



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 6, 2003

Mr. Steve Aragon
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2003-0796

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176133.

The Texas Health and Human Services Commission (the "commission") received a request for information relating to the Medicaid/CHIP External Quality Review Organization ("EQRO") Request for Proposal ("RFP") No. 529-02-501, including the business solution proposals that met requirements, the cost proposal submitted by each vendor, and the proposal scoring results for all vendors and evaluator comments. The commission takes no position with regard to whether the requested information is excepted from disclosure. The commission believes, however, that this request for information implicates the proprietary interests of the private parties that submitted proposals. The commission notified the interested parties of the request for information and of their right to submit arguments to this office as to why the information should not be released.¹ We received arguments from Health Services Advisory Group ("HSAG"); the Joint Commission on Accreditation of Health Care Organizations d/b/a Texas Health Quality Alliance ("THQA"); and KePRO, Inc. ("KePRO"). We have considered the submitted arguments and reviewed the requested information.

We first note that most of the requested information relating to RFP #529-02-501 is the subject of Open Records Letter No. 2003-0379 (2003). That decision addresses the commission's scoring sheets and evaluator comments and the business solution and cost proposals of five of the six vendors, namely HSAG, THQA, the Institute for Child Health

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

Policy, MetroHealth Group of America, LLC, and Texas Medical Foundation. The commission does not inform us, and we are not otherwise aware, of any change in the law, facts, or circumstances on which Open Records Letter No. 2003-0379 (2003) is based. Therefore, the commission may continue to rely on Open Records Letter No. 2003-0379 (2003) with regard to the information that is encompassed by that decision. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (delineating circumstances under which attorney general decision constitutes previous determination for purposes of Gov't Code § 552.301). As the prior ruling is dispositive with regard to the requested information that relates to HSAG and THQA, we need not address the arguments that we received from HSAG and THQA.

We next note that the commission did not comply with section 552.301 of the Government Code in submitting KePRO's business solution and cost proposals to this office. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) provides in part that a governmental body that requests an attorney general decision must submit to this office, not later than the fifteenth business day after the date of the governmental body's receipt of the request for information, either a copy of the specific information requested or a representative sample if a voluminous amount of information was requested. *See* Gov't Code § 552.301(e)(1)(D). Section 552.302 of the Government Code states that if a governmental body does not request an attorney general decision as provided by section 552.301, the requested information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information from the public.

The commission did not submit KePRO's business solution and cost proposals within the fifteen business days prescribed by section 552.301(e)(1)(D). To that extent, the commission did not comply with section 552.301 in requesting this decision. Therefore, the information in question is presumed to be public and must be released under section 552.302, unless there is a compelling reason to withhold any of the information from public disclosure. *See also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In this instance, KePRO claims that some of the information in question is excepted from disclosure under section 552.110 of the Government Code. As a claim under section 552.110 can provide a compelling reason for non-disclosure under section 552.302, we will consider KePRO's arguments.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that

disclosure would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) of the Government Code requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

likely result from release of the information at issue. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Under section 552.110, KePRO claims an exception to the disclosure of (1) its entire cost proposal; (2) sections of its business solution proposal that include reference to a "non-disclosure" statement contained in KePRO's business solution and cost proposals; and (3) Appendix 11-C, "Financial Statements," to KePRO's business solution proposal. With respect to KePRO's reliance on the "non-disclosure statement," we note that information is not confidential under chapter 552 of the Government Code simply because the party submitting the information anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of chapter 552. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to chapter 552] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary. Having considered KePRO's other arguments against disclosure, we conclude that KePRO has not demonstrated that any information contained in its cost proposal or business solution proposal is excepted from disclosure under section 552.110.

We note, however, that KePRO's business solution proposal contains the e-mail addresses of private individuals. Section 552.137 of the Government Code provides as follows:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. We have marked the types of e-mail addresses that section 552.137 makes confidential. The commission has not informed us that the individuals to whom these e-mail addresses belong have affirmatively consented to their public disclosure. Accordingly, the commission must withhold the marked e-mail addresses under section 552.137.

We also note that some of the information relating to KePRO is protected by copyright law. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). However, an officer for public information must comply with the copyright law and is not required to furnish copies of information that is copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the commission may continue to rely on Open Records Letter No. 2003-0379 (2003) with regard to the requested information that we addressed in that decision. The commission must withhold the marked e-mail addresses in KePRO's business solution proposal under section 552.137. The commission must release the rest of the information that relates to KePRO, complying with copyright law in doing so.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

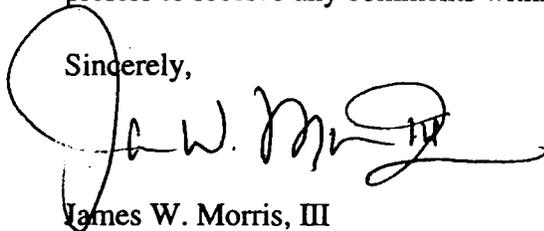
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', with a large circular flourish on the left side.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 176133

Enc: Marked documents

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