



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 5, 2003

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

OR2003-3857

Dear Mr. Aragón:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182349.

The Texas Health and Human Services Commission (the "commission") received a request for information relating to dental providers that have been paid more than \$100,000.00 under the Children's Health Insurance Programs ("CHIP"), including amounts paid from January 1, 1998. You believe that some of the requested information may be excepted from disclosure under section 552.101 of the Government Code. You also believe that this request for information implicates the interests of a private party, United Concordia Insurance Company ("Concordia"). You notified Concordia of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.¹ You also submitted the responsive information, along with arguments against disclosure of that information that Concordia provided to the commission. Concordia also submitted arguments to this office in which it claims exceptions to disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered all of the submitted arguments and have reviewed the submitted information.²

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 chapter 552 in certain circumstances).

²We note that Concordia has informed the commission that although the present request is for information for the time period beginning January 1, 1998, the submitted information dates from June 1, 2000, when Concordia began performance of the CHIP contract. This letter ruling is applicable only to the information that the commission has submitted to this office. This ruling assumes, however, that the submitted information is representative of the requested information as a whole. This ruling neither reaches nor authorizes the commission to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We begin by noting that the commission has not complied with section 552.301 of the Government Code in requesting this decision. 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(b) provides that “[t]he governmental body must ask for the attorney general’s decision and state the exceptions that apply . . . not later than the tenth business day after the date of receiving the written request [for information].” Section 552.302 provides that “[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.”

You inform us that the commission received the present request for information on January 9, 2003. You requested this decision on April 3, 2003. Thus, the commission did not request this decision within the ten-business-day period prescribed by section 552.301(b). Therefore, the submitted information 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 the public. *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 when the information is confidential by law or third-party interests are at stake. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982)*. Sections 552.101 and 552.110 of the Government Code can provide compelling reasons for non-disclosure under section 552.302. Therefore, we will consider the claims of the commission and Concordia under these exceptions. We note that Concordia also invokes section 552.104, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” However, section 552.104 protects the interests of governmental bodies, not those of private parties such as Concordia. *See Open Records Decision No. 592 at 8 (1991)* (discussing statutory predecessor). Therefore, Concordia may not raise section 552.104 to protect its own interests. *See also Open Records Decision Nos. 630 at 3 (1994)* (compelling reason for non-disclosure exists where information is made confidential by law or implicates third-party interests), *592 at 8 (1991)* (governmental body may waive Gov’t Code § 552.104). Therefore, none of the submitted information may be withheld from disclosure under section 552.104.

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.³ *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 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).

Concordia states that the submitted information constitutes a customer list. Concordia asserts that the information is excepted from disclosure under both aspects of section 552.110. Having considered the company's arguments, we conclude that Concordia has

³The 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).

demonstrated that the submitted information qualifies as a trade secret under section 552.110(a). We have received no arguments that rebut Concordia's trade secret claim as a matter of law. We therefore conclude that the submitted information is excepted from disclosure under section 552.110(a) of the Government Code. *See also* Open Records Decision No. 552 (addressing customer list under statutory predecessor). As our conclusion under section 552.110 is dispositive, we need not address section 552.101.

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).

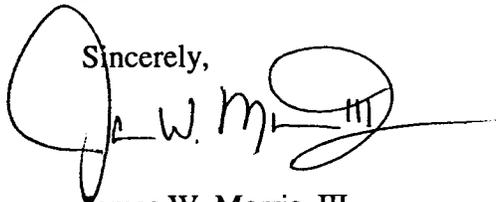
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

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

JWM/sdk

Ref: ID# 182349

Enc: Submitted documents

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