



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2003

Ms. Carol Longoria
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2003-8881

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 192423.

The University of Texas at Austin (the "university") received a request for "all responses made to RFP #041603." You state that the requested information may be confidential under sections 552.101, 552.110, 552.113 and 552.131 of the Government Code, but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office and provide documentation showing that you have notified all of the twelve interested third parties, whose proprietary interests may be implicated by the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). As of the date of this ruling, we received arguments from representatives for Neoscribe, HealthScribe, Advanced Professional Medical Services ("APMS"), and Diversified Information Technologies ("DIT"). We have reviewed the information you submitted and considered all of the submitted third party arguments.

We note that section 552.305 of the Government Code allows an interested third party ten business days from the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't

Code § 552.305(d)(2)(B). However, as of the date of this letter, we have not received arguments for withholding the requested information from eight of the interested third parties, Cbay Systems, Axolotl Corporation, eTransPlus, Total eMed, Celtic Transcripts, CyMed, Northeast Transcription, and EDIX Corporation. Therefore, we have no basis to conclude that the release of any of the submitted information would harm the proprietary interests of these eight interested third parties. *See* Gov't Code § 551.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Thus, the university must release their proposals.

APMS, Neoscribe, HealthScribe, and Diversified all contend that portions of the requested information are excepted from disclosure under section 552.110 of the Government Code. APMS also asserts that portions of its proposal are excepted from disclosure under sections 552.104, 552.131, and 552.136. HealthScribe also contends that portions of its proposal are excepted from disclosure under sections 552.101 and 552.104. Diversified contends that its proposal is excepted from disclosure under section 552.104 as well. However, Diversified's main argument is that its proposal is not a public record subject to the Public Information Act. We will address this claim first.

Section 552.002(a) of the Government Code defines "public information" as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002(a). Thus, under this provision, information is generally "public information" within the scope of the Act when it relates to the official business of a governmental body or is maintained by a public official or employee in the performance of official duties, even though it may be in the possession of one person. *See* Open Records Decision No. 635 at 4 (1995). Although you argue that your proposal is not a "public record" within the meaning of the statute, your proposal is in the hands of a governmental body as defined by section 552.003. In this instance, the proposal is "public information" subject to the Public Information Act (the "Act") because the proposal was collected, assembled, or maintained in connection with the transaction of official business by a governmental body. Because the Act applies to "governmental bodies" as that term is defined in section 552.003(1)(A) of the Government Code, we are applying the Act to the

information held by the university. We find that your proposal in the hands of the university public information subject to Act under section 552.002. Therefore, your proposal may only be withheld if one of the exceptions to disclosure under the Act applies. Furthermore, Diversified asserts it is not subject to the Act under section 552.003. Although Diversified is not a governmental body subject to the Act, the university is.

Because all the third parties claim section 552.110, we will now address this exception. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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 single or ephemeral events 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. Restatement of Torts § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the

¹ The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others 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).

application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial 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." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. Cf. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974). An interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of requested information. See Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

First, after reviewing APMS's arguments and the submitted information, we conclude that Section 3.1; Section 4, Attachment 7.1; and Section 4 (9) are excepted from disclosure under section 552.110(a). We have marked this information accordingly. APMS has not demonstrated that the remaining information constitutes trade secrets under section 552.110(a) and have failed to show that the release of the remaining portion of their information would cause them substantial competitive harm for purposes of section 552.110(b). Thus, only the information we have marked may be excepted from disclosure under section 552.110. Because Neoscribe, HealthScribe and Diversified have failed to make a *prima facie* case that any of their information at issue constitutes trade secrets under section 552.110(a) and have failed to show that the release of any portion of their information would cause them substantial competitive harm for purposes of section 552.110(b), we also conclude that the university may not withhold any portion of Neoscribe's, HealthScribe's, or Diversified's information under section 552.110 of the Government Code.

APMS, HealthScribe, and Diversified also contend that their proposals are excepted from disclosure pursuant to section 552.104. We note, however, that section 552.104 only protects the interests of governmental bodies, not those of private parties such as APMS, HealthScribe, and Diversified. See Open Records Decision Nos. 592 at 8 (1991) (governmental body may waive section 552.104). Therefore, APMS's, HealthScribe's and Diversified's proposals are not excepted under section 552.104 of the Government Code.

APMS also claims that portions of their proposal are excepted from disclosure under section 552.131 of the Government Code. Section 552.131(a) excepts from public disclosure a business prospect's trade secret or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. Gov't Code § 552.131(a). APMS has failed to demonstrate that their remaining information constitutes trade secrets under section 552.131(a)(1) and has failed to show that the release of their commercial or financial information would cause them substantial competitive harm under section 552.131(a)(2). Therefore, the university may not withhold the remaining portions of APMS's proposal under section 552.131.

In addition, APMS argues that their Employer Identification Number ("EIN") is excepted from disclosure under section 552.136. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We note however that the EIN is not an "access device number" for the purposes of section 552.136. The EIN is merely an employer tax identification number. Therefore, you may not withhold the EIN under section 552.136 of the Government Code.

HealthScribe also argues that their proposal is excepted from disclosure under section 552.101. Section 552.101 of the Government Code excepts from disclosure "information made confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information another statute makes confidential. However, HealthScribe has failed to assert what law, either constitutional, statutory, or judicial, would make its information confidential. Likewise, it has failed to demonstrate what information constitutes confidential information that must be protected under

section 552.101. Therefore, we have no basis for determining the applicability of section 552.101 with regards to their proposal.

We note, however, that all of the submitted proposals includes social security numbers, which may be excepted from disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We have no basis for concluding that the social security numbers are confidential under section 405(c)(2)(C)(viii)(I) and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security numbers, the university should ensure that such numbers are not obtained or maintained pursuant to any provision of law enacted on or after October 1, 1990.

In summary, the university may withhold Section 3.1; Section 4, Attachment 7.1; and Section 4 (9) of APMS's proposal under section 552.110. Social security numbers must also be withheld if obtained or maintained pursuant to a law enacted on or after October 1, 1990. The remaining information must be released to the requestor.

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

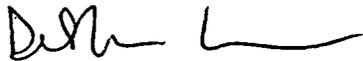
governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The 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,



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Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 192423

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