



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 27, 2004

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

OR2004-0592

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# 194970.

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for certain information concerning Medistar Corporation ("Medistar") and a building planned for the 6700 block of Main Street. The request specifically includes, but is not limited to information regarding: (1) Medistar's response to the university's request for proposal to construct a Class A space; (2) letters of intent and other agreements with Medistar relating to the design, development, construction or operation of the building project; (3) any agreements among Medistar, the university, and third parties relating to the formation of any joint venture or strategic relationship relating to the building project; (4) any leases relating to the building project; (5) any operating agreements relating to the building project; and (6) any financing documents relating to the building project. We addressed the public availability of the majority of the requested information relating to Medistar in Open Records Letter No. 2003-8748, issued December 5, 2003. The university must continue to follow Open Records Letter No. 2003-8748 with respect to the portions of the requested information at issue in that ruling. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). However, to the extent that our prior ruling does not encompass the submitted information in this request, we address the university's claim that the release of the submitted information in Exhibit 5 may implicate the proprietary interests of Medistar. You notified Medistar of this request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *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 to disclosure under Public Information Act (the "Act") in certain circumstances). We received arguments from representatives for Medistar. We have reviewed Medistar's comments and the submitted information.

First, Medistar asserts that the requested information is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Thus, section 552.101 protects information that is deemed to be confidential under other law. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Medistar generally asserts that the requested information is excepted from disclosure under section 552.101. However, Medistar has not directed our attention to any law, nor is this office aware of any law, under which any of the submitted information is deemed to be confidential by law for purposes of section 552.101. Therefore, Medistar has not demonstrated that any of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

We also understand Medistar to assert that the information is excepted from disclosure pursuant to section 552.105 of the Government Code. We note, however, that section 552.105 only protects the interests of governmental bodies, not those of private parties such as Medistar. *See* Open Records Decision Nos. 564 at 2 (1990) (governmental body may waive statutory predecessor to section 552.105), 522 (1989) (discretionary exceptions in general). Because the university has not raised this exception, none of Medistar's information may be withheld on this basis.

We now address Medistar's assertions under section 552.110 of the Government Code. 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. *See* Gov't Code § 552.110.

The Texas Supreme Court has adopted the definition of 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 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), cert. denied, 358 U.S. 898 (1958). 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 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) 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. *See* 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). 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 id.*

Upon review, we find that Medistar has failed to adequately demonstrate that any portion of its information constitutes confidential trade secrets under section 552.110(a) and has failed to show that the release of any portion of its information would cause the company substantial competitive harm for purposes of section 552.110(b). Thus, the submitted information may not be withheld under section 552.110 of the Government Code.

Medistar also states that the requested information is protected under section 552.113 of the Government Code. Section 552.113 protects certain "geological or geophysical information or data." Gov't Code § 552.113. However, because the submitted information does not constitute or contain geological or geophysical information or data, no portion of it may be withheld on the basis of section 552.113.

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).

Finally, Medistar claims that the requested information is 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). Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body "[u]nless and until an agreement is made with the business prospect." Upon review, we find that Medistar has failed to show that the submitted 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). Medistar has also failed to demonstrate how any of the submitted information relates to a financial or other incentive that is being offered to Medistar by the university under section 552.131(b). Therefore, the university may not withhold Medistar's information under section 552.131. Because none of Medistar's claimed exceptions apply and the information at issue is not otherwise confidential by law, the submitted 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 194970

Enc. Submitted documents

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