



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 2, 2004

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

OR2004-1538A

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# 197006A.

The Texas Health and Human Services Commission (the "commission") received a request for information concerning two Requests for Proposals Issued by the commission, for the commission's Preferred Drug List, and for Prior Authorization Services. This office issued Open Records Letter No. 2004-1538 (2004) on March 1, 2004, in response to the commission's request for a decision. It has come to our attention that our ruling in Open Records Letter No. 2004-1538 was in error with respect to the portion of the request pertaining to Provider Synergies. We have re-examined our ruling and determined that Open Records Letter No. 2004-1538 should be withdrawn. The present decision shall substitute for the ruling issued as Open Records Letter No. 2004-1538.

The request at issue seeks proposals submitted to the commission by Provider Synergies, L.L.C. and Heritage Information Systems, Inc., as well as the resulting contracts with those companies, in connection with the Request for Proposals for Preferred Drug List and Prior Authorization Services. The commission informs us that Heritage Information Systems submitted proposals for both aspects of the RFP, while Provider Synergies submitted a proposal only in connection with the Preferred Drug List and Supplemental Rebate Services aspect of the RFP. While you do not raise any exceptions to disclosure on behalf of the commission, you state that release of the information at issue may implicate the proprietary interests of the companies. Accordingly you state, and provide documentation showing, that you notified Provider Synergies and Heritage Information Systems of the request and of their right to submit arguments to this office as to why the 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 in certain circumstances). We have reviewed the submitted information.

Heritage Information Systems and Provider Synergies have submitted comments to this office in which the companies argue that portions of the information at issue are excepted from disclosure. As a threshold issue, we first note that Provider Synergies seeks to withhold some information that the commission has not submitted to this office for review. Specifically, Provider Synergies contends that “HHSC-approved Project Plans,” to be found in Exhibit A to the submitted Preferred Drug List and Supplemental Rebate Services Agreement (the “agreement”), are excepted from disclosure. We note that, in the documents the commission submitted for our review, Exhibit A to the agreement does not include the information Provider Synergies describes in its comments. The present ruling does not reach the company’s claims pertaining to information that has not been submitted for our review by the commission. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body seeking attorney general’s opinion under the Public Information Act must submit a copy or representative samples of the specific information requested).

Next, as a second threshold issue, Provider Synergies contends that its records are excepted from public disclosure because the records are subject to a confidentiality agreement with the State of Texas. We note that information is not confidential under the Public Information Act simply because the party that submitted the information to a governmental body anticipates or requests that it be kept confidential. *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 a contract, overrule or repeal provisions of the Public Information Act. Attorney General Opinion JM-672 (1987). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any contract between Provider Synergies and another party specifying otherwise.

We now address the applicability of the exceptions under the Public Information Act raised by Heritage Information Systems and Provider Synergies. Provider Synergies first contends that the information it seeks to withhold is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 552.101 encompasses information that other law makes confidential. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). While Provider Synergies makes reference to section 1396r-8 of the federal Social Security Act, article 2.44 of the Texas Business Corporation Act, an Ohio statute, and copyright law in its comments to this office, we find the company has not adequately explained how any of these sources of law make the information at issue confidential for purposes of section 552.101 of the Government Code. *See* 42 U.S.C. § 1396r-8(a)(1) (pertaining to confidentiality of certain pricing information collected by Secretary of United States Department of Health and Human

Services); Tex. Bus. Corp. Act Ann. art. 2.44 (pertaining to examination of books and records of Texas corporation by officers and shareholders of corporation); Ohio Rev. Code Ann. § 1705.22 (pertaining to right of member of Ohio limited liability company to obtain information about the company); Attorney General Opinion JM-672 (1987) (governmental body must allow inspection of materials protected by copyright unless an exception applies to the information); *see also* Open Records Decision No 478 (1987) (statutory confidentiality requires express language making certain information confidential); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); Open Records Decision No. 620 (1993) (financial information of corporation not protected by privacy). Consequently, we determine that the commission may not withhold any of the submitted information pertaining to Provider Synergies under section 552.101 as information made confidential by law.

Provider Synergies also contends that staffing information contained in the submitted documents is excepted from disclosure under section 552.102 of the Government Code, which excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). This section applies to information in the personnel file of an employee of a governmental body. The information that Provider Synergies seeks to withhold under section 552.102 is not information in the personnel file of an employee of a governmental body. Thus, we determine that section 552.102 does not apply to any portion of the submitted information.

Next, Provider Synergies contends that portions of the information at issue are excepted from disclosure under section 552.104 of the Government Code. Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the commission does not raise section 552.104, this section is not applicable to the information at issue in the present request. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the commission may not withhold any of the information at issue under section 552.104.

Heritage Information Systems and Provider Synergies also contend that portions of the information at issue are excepted from disclosure under section 552.110 of the Government Code. We note that Heritage Information Systems only seeks to withhold information relating to the company’s proposal for the Prior Authorization Services aspect of the RFP under section 552.110. Section 552.110 of the Government Code protects trade secrets, and commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private

parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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). This exception to disclosure 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the arguments submitted by Heritage Information Systems and the information at issue, we find that the company has made a *prima facie* case that portions of the company’s proposal for Prior Authorization Services are protected as trade secrets. Moreover, we have received no arguments that would rebut this claim as a matter of law. We therefore determine that the commission must withhold the information we have marked in the submitted documents pursuant to section 552.110(a) of the Government Code. We also find, however, that the remaining information that Heritage Information Systems seeks to withhold under section 552.110(a) does not meet the definition of a trade secret, nor has Heritage Information Systems demonstrated the necessary factors to establish a trade secret claim for this information. Furthermore, upon review of the arguments submitted by Provider Synergies, we find that Provider Synergies has failed to establish that any of the information at issue pertaining to Provider Synergies meets the definition of a trade secret, and has failed to demonstrate the necessary factors to establish a trade secret claim for the information. *See* Open Records Decision No. 541 (1990) (general terms of contract with governmental body are not excepted from disclosure under statutory predecessor to section 552.110). We therefore determine that the commission may not withhold any portion of the information pertaining to Provider Synergies, nor the remaining information pertaining to Heritage Information Systems, under section 552.110(a).

With respect to the claims of Heritage Information Systems and Provider Synergies under section 552.110(b) of the Government Code, we find that the companies have generally asserted that disclosure of the information the companies seek to withhold would result in substantial competitive harm. We determine that Heritage Information Systems and Provider Synergies have not sufficiently demonstrated the specific harm that would result from the release of the information at issue. *See* Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of

section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 541 (1990), 509 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). We therefore determine that the commission may not withhold any portion of the information pertaining to Provider Synergies or Heritage Information Systems under section 552.110(b) of the Government Code.

We note that the submitted information contains social security numbers that may be excepted from disclosure under 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," and encompasses information made confidential by other statutes. A social security number may be confidential in some circumstances under the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained or 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 id.* We have no basis for concluding that the social security numbers at issue 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 Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

Finally, we note that some of the information at issue is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person 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 (1990).

In summary, we have marked the portions of the proposal submitted by Heritage Information Systems in connection with the Prior Authorization Services aspect of the RFP at issue that the commission must withhold pursuant to section 552.110(a) of the Government Code. Social security numbers may be excepted from disclosure under section 552.101 of the Government Code in conjunction with federal law. The remainder of the submitted information must be released to the requestor. Information protected by copyright must be released in compliance with copyright law.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 197006A

Enc: Submitted documents

c: Mr. Paul C. Parkinson
203 Hayes Court
Colleyville, Texas 76034
(w/o enclosures)

Mr. William S. Thomas, Jr.
Heritage Information Systems, Inc.
18441 NW 2nd Avenue, Suite 108
Miami, Florida 33169
(w/o enclosures)

Mr. Daniel E. Kincaid
Provider Synergies, L.L.C.
6279 Tri-Ridge Boulevard, Suite 209
Loveland, Ohio 45140
(w/o enclosures)