



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2004

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

OR2004-3594

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID#200804.

The Texas Health and Human Services Commission (the "commission") received a request for information concerning the costs associated with the commission's contract for prior authorization of pharmaceuticals under the commission's CHIPS and Medicaid preferred drug list program. You ask whether the requested information may be excepted from disclosure under section 552.110 of the Government Code. Although you make no arguments pertaining to the applicability of section 552.110, you state and provide documentation showing you have notified one third party, Heritage Information Systems ("Heritage"), of this request and of its right to submit arguments to this office as to why information pertaining to Heritage 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 the Act in certain circumstances). We have received and considered correspondence from legal counsel for Heritage who argues against the disclosure of portions of the information submitted to this office by the commission.

Initially, we must address the commission's obligations under the Act. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not

been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You advise this office that the commission received the request for information on February 12, 2004. You did not request a decision from this office until March 1, 2004. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code. *See* Gov't Code § 552.308(b)(state agency can meet the ten-day requirement if the request is sent by interagency mail and the agency provides evidence sufficient to establish that the request was deposited in interagency mail within that period). Because the request for a decision was not timely submitted, the requested information is presumed to be public information. Gov't Code § 552.302.

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); *see* Open Records Decision No. 630 (1994). The interests of a third party may constitute a compelling reason to withhold the information in this instance. *See* Open Records Decision No. 630 (1994) (presumption of openness can be overcome by a showing that the information is made confidential by another source of law or affects third party interests). Accordingly, we will address the arguments submitted by Heritage.

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 governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also* *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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 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). After reviewing Heritage's arguments, the submitted affidavit of Heritage's Director of Account Management, and the information at issue, we conclude that Heritage has established a *prima facie* case that the majority of the information, including its pricing methodology, for which it has claimed section 552.110(a) is a trade secret. We have received no argument to rebut Heritage's *prima facie* case for exception as a matter of law.

However, the actual pricing information contained in the cost schedule found in Exhibit 1 and the single highlighted bullet point located on the first page of amendment one to the contract, as well as a small amount of other information we have marked, may not be withheld under section 552.110(a). We note that pricing information is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp.*, 314 S.W.2d

¹The 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).

at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Heritage indicates that it is currently using *similar* pricing terms in other contracts with other governmental entities, but does not represent that the pricing terms at issue here are identical to those in other contracts or proposed contracts. Thus, Heritage has not adequately demonstrated that this information, which relates to pricing and to the fixed fee it has or will receive for the first stage of implementing the contract, is excepted from disclosure under section 552.110(a).

Regarding the information that we have determined cannot be withheld under section 552.110(a), we will consider Heritage's arguments that section 552.110(b) is applicable. Heritage generally asserts that release of the information at issue would provide its competitors with a competitive advantage and would result in competitive harm to Heritage. However, Heritage has failed to provide specific factual evidence substantiating its claim. Accordingly, we determine that none of the remaining information at issue is excepted from disclosure under section 552.110(b) of the Government Code. *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), 509 at 5 (1988) (stating that 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 was entirely too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see also* Open Records Decision Nos. 661 (1999), 541 at 8 (1990) (general terms of contract with governmental body are usually not excepted from disclosure); *see generally* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 184 (1978).

Therefore, with the exception of the information we have marked that must be released, the commission must withhold the information for which Heritage has claimed section 552.110(a) under that section. The remaining information must be released.

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 'Cary Grace', with a long horizontal flourish extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/lmt

Ref: ID#200804

Enc. Submitted documents

c: Mr. Greg Novarro
2609 Pasadena Pl.
Flower Mound, Texas 75022
(w/o enclosures)

Mr. Andrew S. "Drew" Miller
Kemp Smith LLP
816 Congress Avenue, Suite 1650
Austin, Texas 78701-2443
(w/o enclosures)