



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

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Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division Mail Code 110-1A
Texas Department of Insurance
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OR2005-9332

Dear Ms. Villarreal-Reyna:

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# 234271.

The Texas Department of Insurance (the "department") received a request for documents concerning two specified independent review organizations ("IROs"). You state some of the requested information will be released, but claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, and 552.137 of the Government Code. You also claim that some of the requested information may implicate the proprietary interests of both Professional Associates, Inc. ("Associates") and Parker Healthcare Management Organizations, Inc. ("Parker"). Accordingly, the department has notified Associates and Parker of the department's receipt of the request for information and of their right to submit arguments to this office as to why information pertaining to them 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 in certain circumstances). We have reviewed the submitted information and considered all of the submitted arguments. We have also considered correspondence submitted by the requestor's company. *See* Gov't Code § 552.304 (providing that individual may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code

§ 552.101. This section encompasses information protected by other statutes. Section 2(h) of article 21.58C of the Texas Insurance Code provides as follows:

Information that reveals the identity of a physician or individual health care provider who makes a review determination for an [IRO] is confidential.

Ins. Code Ann. art. 21.58C, § 2(h). The department indicates that Associates and Parker are IROs and that they both provided information to the department that identifies physicians who make review determinations. Based on these representations, we conclude that the information revealing the identities of these physicians is confidential under section 2(h) of article 21.58C, and that the department must withhold this information under section 552.101 of the Government Code.

Section 552.101 also encompasses article 21.58A of the Insurance Code. Section 4 of article 21.58A provides as follows:

Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, dentists, and other health care providers. . . . [I]nformation obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.

Ins. Code Ann. art. 21.58A, § 4(i). You inform us that the submitted information contains “screening criteria and review procedures [that] are part of the utilization review plan[.]” Based on this representation, we agree that the information pertaining to the screening criteria and review procedures is confidential under section 4(i) of article 21.58A, and that the department must withhold this information under section 552.101.

Section 552.101 also encompasses section 59.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code. Occ. Code § 59.001.¹ The submitted

¹This section was renumbered from Occ. Code § 58.001 by the Act of May 25, 2005, 79th Leg., R.S., H.B. 2018, § 23.001(68).

biographical affidavits contain the social security numbers of officers of the applicant companies. You inform us that the submitted biographical affidavits were required to be filed with the department by the IRO applicants. Based on this representation, we agree that the social security numbers you have marked in the submitted information are confidential under section 59.001 of the Occupations Code and thus must be withheld from disclosure under section 552.101 of the Government Code.

Next, you claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common law privacy. The common law right of privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (citing *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)); personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical disabilities). You have submitted biographical affidavits that include questions regarding personal financial information. Because this information, which you have marked, does not relate to a financial transaction between an individual and a governmental body, we conclude that it must be withheld under section 552.101 in conjunction with common law privacy.

You also assert that some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex.

App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. However, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state that the information at issue consists of communications that address the handling of regulatory matters, recommended actions, and opinions and analyses of regulatory matters, as well as opinions as to possible compliance with legal requirements for licensure. We understand you to assert that the initiation and resolution of a regulatory matter is a matter of policy. Having reviewed the information you have marked, we conclude that the department may withhold this information under section 552.111.

You assert that the e-mail addresses you have marked are excepted pursuant to section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any of the e-mail addresses at issue. Thus, we agree that the e-mail addresses you have marked are excepted from disclosure under section 552.137 of the Government Code.

We now turn to Associates’ arguments for its proprietary information. Associates argues that its information is excepted under section 552.110 of the Government Code, which protects the proprietary interests of private parties 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is the following:

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. *Id.*² 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).

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are the following: (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).

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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *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).

After reviewing the arguments and the information at issue, we conclude that Associates has failed to establish a *prima facie* case that the information at issue constitutes a trade secret under the definition adopted by the Texas Supreme Court. *See Huffines*, 314 S.W.2d at 776; *see also* Open Records Decision No. 552 at 5-6 (1990); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939). Additionally, we find that Associates has made only conclusory allegations that release of the information it seeks to withhold would cause substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations for purposes of section 552.110(b). *See* Open Records Decision Nos. 661 (1999) (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (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), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the department may not withhold any of the remaining information on the basis of any proprietary interest that Associates may have in the information under section 552.110.

Finally, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Parker explaining how the release of the submitted information will affect its proprietary interests. Thus, Parker has not demonstrated that any of the submitted information is proprietary for purposes of chapter 552 of the Government Code. *See* Gov’t Code § 552.110; *see also, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the department may not withhold any of the requested information on the basis of any proprietary interest that Parker may have in the information.

In summary, the department must withhold the information marked under section 552.101 in conjunction section 59.001 of the Occupations Code, article 21.58C of the Insurance Code, article 21.58A of the Insurance Code, and common law privacy. The department must withhold the information it has marked under section 552.137 of the Government Code. The department may withhold the information it has marked under section 552.111 of the Government Code. The remaining submitted 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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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Open Records Division

CMD/krl

Ref: ID# 234271

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