



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 24, 2006

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2006-05478

Dear Mr. Smith:

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# 249819.

The Texas Health and Human Services Commission (the "commission") received a request for information related to specified HMO Financial-Statistical Reports (FSRs) for the CHIP and STAR Medicaid Program. You claim that the documents related to the FSRs are excepted from disclosure under section 552.116 of the Government Code. You further contend that the requested information may constitute proprietary information subject to exception under the Act. Pursuant to section 552.305(d) of the Government Code, you have notified Superior Health Plan, Inc. ("Superior"), whose information is at issue in this request, of its opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 received correspondence from an attorney representing Superior. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988) 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Superior has informed our office that information responsive to this request was previously the subject of Open Records Letter No. 2004-7833 (2004). In that ruling, we held that the commission must withhold Superior's FSRs for the CHIP and STAR Medicaid Program because Superior established a prima facie case that its FSRs constituted a trade secret under section 552.110(a) of the Government Code. Assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the commission must continue to rely on our decision in Open Records Letter No. 2004-7833 with respect to the information requested in this instance that was previously ruled upon in that decision.² See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001).

Next, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from us and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. See Gov't Code § 552.301(b). You inform us that the commission received the initial written request for information from the requestor on February 28, 2006. You further state that the commission asked the requestor to clarify her request on March 7, 2006. See Gov't Code § 552.222; see also Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Thus, the ten business day time period to request a decision from us under section 552.301(b) was tolled on the date that the commission sought clarification of the request from the requestor. See Gov't Code § 552.301(b); see also Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). You state that the commission received the requestor's clarification on March 10, 2006. Accordingly, we conclude that the tenth business day for requesting a decision from our office was March 17, 2006. However, your submitted request bears a postmark of March 20, 2006. See Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find that the commission failed to comply with the procedural requirements of section 552.301 in requesting this decision.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption

²The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Section 552.116 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). The commission's claim under section 552.116 is not a compelling reason for non-disclosure under section 552.302, and none of the submitted information may be withheld on this basis. *See* Open Records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 586 at 2-3 (1991). However, because third party interests may provide a compelling reason to withhold information from public disclosure, we will address Superior's arguments.

Superior 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). Superior generally asserts that the requested information is excepted from disclosure under section 552.101. However, Superior 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, Superior has not demonstrated that any of the submitted information is excepted from disclosure under section 552.101 of the Government Code. *See* Gov't Code § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested).

Superior claims that the remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.); *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.³ *Id.* 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 the 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 can not 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 exempts 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 information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial

³The 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).

competitive harm); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Upon review of Superior's arguments and the submitted information, we find that Superior has failed to demonstrate that any portion of the remaining information meets the definition of a trade secret under section 552.110(a). Furthermore, Superior has failed to establish by specific factual evidence that any of the remaining information constitutes commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"); *see also, e.g.*, Open Records Decision No. 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). Accordingly, no portion of the remaining information may be withheld under section 552.110 of the Government Code.

We note, however, that the remaining information contains a social security number. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act.⁴ Therefore, the commission must withhold the social security number we have marked under section 552.147 of the Government Code.⁵

In summary, the commission must continue to withhold Superior's FSRs under section 552.110(a) of the Government Code as set forth in Open Records Letter No. 2004-7833. In addition, the commission must withhold the social security number we have marked under section 552.147 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

⁴We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

⁵The Office of the Attorney General will raise a mandatory exception like section 552.147 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/sdk

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Enc. Submitted documents

c: Ms. Kimberly A. Frost
Vinson & Elkins, L.L.P.
The Terrace 7
2801 Via Fortuna, Suite 100
Austin, Texas 78746-7568
(w/o enclosures)

Ms. Suzanne F. Spradley
Akin Gump Strauss Hauer & Feld
300 West 6th Street, Suite 2100
Austin, Texas 78701-2916
(w/o enclosures)