



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 31, 2006

Ms. Lisa Ayers
Paralegal, Legal Affairs
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2006-05691

Dear Ms. Ayers:

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# 250445.

The Parkland Health & Hospital System (the "system") received a request for contracts and other documents pertaining to Novation, L.L.C. ("Novation") and University HealthSystem Consortium ("UHSC"). You state that you have released some of the responsive information. While you raise no exceptions to disclosure on behalf of the system regarding the remaining requested information, you state that its release may implicate the proprietary interests of Novation and UHSC. You notified Novation and UHSC of the request and of their right to submit arguments to this office as to why the information at issue 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.¹

¹To the extent any remaining information responsive to this request existed on the date that the system received the instant request, we assume that the system has released it to the requestor. If the system has not released any such information, the system must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Initially, we must address the system's obligations under the Act. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). In order for us to determine the statutory deadlines, a governmental body is required to submit to this office within fifteen business days of receiving an open records request a signed statement or other evidence showing the date the governmental body received the request. *See* Gov't Code § 552.301(e)(1)(C). You do not inform us when the system received this request for information. Because you do not inform us when the request was received, we must assume that the system received the request on the day it was dated, which is March 9, 2006. Accordingly, the deadline for the system to request a ruling from this office was March 23, 2006. We received your request on March 27, 2006. It appears the system sent its request for a decision to this office via interagency mail. As there is no postmark, we are unable to determine the date that the system actually mailed its request for a decision. *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 system failed to request a decision within the ten day business period as mandated by section 552.301(b) of the Government Code.

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 that the requested information is public and must be released unless a compelling reason exists 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). Generally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Therefore, we will address whether the submitted information must be withheld to protect the interests of the third parties.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code 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 decision UHSC has not submitted comments to this office explaining why any portion of the submitted information should not be released to the requestors. Thus, this third party has not provided any basis to conclude that the release of any portion of the submitted information would implicate its proprietary interests. *See* Gov't Code § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade

secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the system may not withhold any portion of the submitted information based on the proprietary interests of UHSC.

Novation contends that releasing the information that “identifies people who assist Novation in selecting suppliers to provide products and services to its participants” would violate these individual’s First Amendment rights to freedom of association, and that this information is therefore excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” The First Amendment guarantees the freedom of association for the purpose of advancing ideas and airing grievances. U.S. Const. amend. I; *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). The party asserting the right of association bears the initial burden of making a prima facie showing of harm to its First Amendment right. *In re Bay Area Citizens Against Lawsuit Abuse*, 932 S.W.2d 371, 376 (Tex. 1998). Such a burden is a light one. *Id.*

In support of its argument, Novation cites to *Buckley v. Valeo*, 424 U.S. 1, 74 (1976), which held that the party “need show only a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” Such proof includes “specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself.” *Id.* We note that the information at issue in this instance does not consist of a party’s contributors’ names, but rather the identifying information of Novation’s business associates. Further, although Novation argues that “if these peoples’ identities were made public, they would be confronted with a barrage of solicitations and offers from the would-be suppliers trying to convince the representatives to recommend their products,” Norton has failed to present any specific evidence of past or present harassment of these people. Accordingly, we conclude that none of the information at issue may be withheld under the right of association.

Novation contends that portions of its information are 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(a), (b).

The Texas Supreme Court has adopted the definition of a 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).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 will 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. *See* 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) 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). 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. *See id.*; *see also* Open Records Decision No. 661 (1999).

²The 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).

After reviewing the information at issue and the submitted arguments, we conclude that Novation has demonstrated that release of certain information would result in substantial competitive harm to it for purposes of section 552.110(b). We have marked the information that must be withheld on this basis. However, we find that Novation has made only conclusory allegations that release of the remaining information at issue would result in substantial competitive harm and has not provided a specific factual or evidentiary showing to support these allegations. *See* Open Records Decision No. 509 at 5 (1938) (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).

Upon review, we find that Novation has not shown that any of the remaining information at issue meets the definition of a trade secret, nor demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Thus, none of the remaining information may be withheld under section 552.110(a). *See* ORD 402.

Finally, we note that some of the submitted information may be 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 copyrighted. 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 copyrighted materials, 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, the system must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining submitted information must be released, but any information protected by copyright must be released in accordance 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).

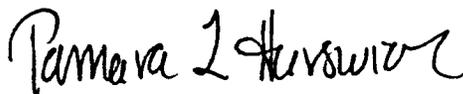
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Tamara L. Harswick
Assistant Attorney General
Open Records Division

TLH/eb

Ref: ID# 250412

Enc. Submitted documents

c: Mr. Pablo Lastra
Fort Worth Weekley
1204-B W. Seventh St., Suite 201
Forth Worth, Texas 76102
(w/o enclosures)

Ms. Loren Sobel
Senior Counsel, Legal Department
Novation, L.L.C.
125 East John Carpenter Frwy.
Irving, Texas 75062
(w/o enclosures)

Ms. Karin Lindgren
General Counsel
University HealthSystem Consortium
2001 Spring Road, Suite 700
Oak Brook, Illinois 60523
(w/o enclosures)