



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 21, 2007

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

OR2007-02097

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# 271695.

The Texas Health and Human Services Commission (the "commission") received a request for ten categories of information related to the commission's State of Texas Access Reform program ("STAR") and Children's Health Insurance Program ("CHIP"). You state that you will make most of the requested information available to the requestor. You claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. You also assert that the release of the requested information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, that you notified Community Health Choice ("CHC"), AMERIGROUP, Inc. ("Amerigroup"), UTMB HCS ("UTMB"), and Texas Children's Health Plan ("TCHP"), of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 representative sample and arguments.¹ We

¹ We 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.

have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments explaining why requested information should or should not be released).

The commission asserts that Exhibit C is excepted from disclosure under section 552.101 of the Government Code. 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. Section 552.101 encompasses information made confidential by statutes such as sections 12.003 and 21.012 of the Human Resources Code which you state excepts Exhibit C. Section 12.003 provides in relevant part:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information* concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). In Open Records Decision No. 584 (1991), this office concluded that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the department's clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." *Id.* at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See* Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs); Open Records Decision No. 166 (1977).

You inform this office that the information at issue relates to individual recipients of commission benefits. You also inform us that in this instance the release of the information in question would not be for a purpose directly connected with the administration of the programs to which the information pertains. Based on your representations and our review of the information at issue, we conclude that Exhibit C is confidential under section 12.003 of the Human Resources Code and must be withheld under section 552.101.

Next, the commission claims that Exhibits D-1 and D-2 are excepted from disclosure under section 552.111. Section 552.111 of the Government Code excepts from public 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, and opinions reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. Section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See id.* 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). This office also has concluded that a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

In this instance, you state that the information in Exhibit D-1 constitutes the draft of a commission memorandum the final copy of which has been provided to the requestor. Thus, based upon your representations, and our review, we determine that you may withhold Exhibit D-1 under section 552.111. Next, you assert that Exhibit D-2 consists of two memoranda that consist of advice, opinions, and recommendations of commission staff regarding commission policy issues. Upon review, we have marked the information in Exhibit D-2 that consists of advice, opinions, and recommendations that may be withheld under section 552.111 of the Government Code. However, the commission has failed to demonstrate that the remaining information is not factual or written observations of factual information and events. Thus, the remaining information is not excepted under section 552.111.

Next, we address the proprietary interests of the third parties at issue. 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, we have only received correspondence from CHC, Amerigroup, and UTMB. TCHP has not submitted comments to this office in response to the section 552.305 notice. Because TCHP has failed to submit any arguments to this office, we have no basis to conclude that the responsive information is excepted from disclosure based on their proprietary interest. *See, e.g.,* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces

competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Accordingly, the commission may not withhold any of the submitted information on the basis of any proprietary interest that TCHP may have in the information.

The arguments submitted by CHC, Amerigroup, and UTMB assert that Exhibit E consists of proprietary information under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Gov't Code § 552.110. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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

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); *see also Huffines*, 314 S.W.2d at 776. 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). The 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. *Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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).

CHC, Amerigroup, and UTMB assert that the submitted information consists of financial information related to the ongoing business practices of CHC, Amerigroup, and UTMB. After reviewing the information at issue and the submitted arguments, we conclude that CHC, Amerigroup, UTMB have established a *prima facie* case that the records pertaining to them in Exhibit E constitute trade secrets. Therefore, the commission must withhold the marked records in Exhibit E under section 552.110(a).

In summary, the commission must withhold Exhibit C under section 552.101 in conjunction with section 12.003 of the Human Resources Code. The commission may withhold Exhibit D-1 and the marked portions of Exhibit D-2 under section 552.111. Finally, the marked portions of Exhibit E must be withheld under section 552.110(a). 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).

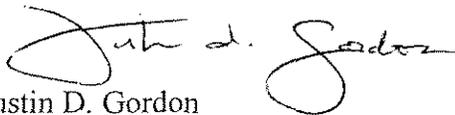
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/sdk

Ref: ID# 271695

Enc. Submitted documents

c: Ms. Susan Feigin Harris
Baker Hostetler
1000 Louisiana, Suite 2000
Houston, Texas 77002-5009
(w/o enclosures)

Ms. Susan Erickson Martin
Counsel to UTMB HCS
1810 Cresthaven Drive
Austin, Texas 78704
(w/o enclosures)

Mr. Christopher Born
President
Texas Children's Health Plan
1919 Braeswood
Houston, Texas 77230
(w/o enclosures)

Ms. Melba Stiefel
Compliance Officer
UTMB HCS
301 University Boulevard, Rte. 0985
Galveston, Texas 77555-0985

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

Ms. Nancy Wingstrom
Counsel to Community Health Choice
Harris County Attorney's Office
2525 Holly Hall, Suite 190
Houston, Texas 77054
(w/o enclosures)