



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 28, 2007

Ms. Marney Collins Sims  
General Counsel  
Cypress-Fairbanks Independent School District  
10300 Jones Road  
Houston, Texas 77065

OR2007-08226

Dear Ms. Sims:

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# 282605.

The Cypress-Fairbanks Independent School District (the "district") received a request for the responses of four third parties to a request for proposals for prescription drug benefit services. You take no position with respect to the public availability of the requested information. You believe, however, that the information in question implicates the interests of PatientChoiceRx ("PTRx"); RxEDO, Inc.; SUNRx; and WMS Prescription Drug Plans ("WMS"). You notified the four interested parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> We received correspondence from PTRx and RxEDO. We have considered all the submitted arguments and have reviewed the information you submitted.

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from either SUNRx or WMS. Therefore, as neither SUNRx nor WMS has demonstrated that any of the information at issue is confidential or proprietary for the

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<sup>1</sup>*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

purposes of the Act, the district may not withhold any of those two parties' information on either of those grounds. *See* Gov't Code §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

We also note that the PTRx's proposal is the subject of Open Records Letter No. 2007-05536 (2007). You do not inform us that there has been any change in the law, facts, and circumstances on which the previous ruling is based. We therefore conclude that the district must dispose of the information contained in PTRx's proposal in accordance with Open Records Letter No. 2007-05536.<sup>2</sup> *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)).

We next note that the district did not fully comply with section 552.301 of the Government Code in requesting this decision. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Subsection 552.301(e) provides that the following materials must be submitted to the attorney general not later than the fifteenth business day after the date of the governmental body's receipt of the request for information: (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information at issue or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ).

In this instance, the district did not submit the information at issue to this office within the fifteen-business-day period prescribed by subsection 552.301(e).<sup>3</sup> Therefore, the submitted information is presumed to be public under section 552.302. This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). In this instance, RxEDO claims exceptions to disclosure under sections 552.104, 552.110, and 552.128 of the

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<sup>2</sup>Accordingly, this decision does not address the arguments that we received from PTRx.

<sup>3</sup>You inform us that the district requested and received clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying request). We note that an appropriate request for clarification under section 552.222(b) merely tolls a governmental body's statutory deadlines under section 552.301 and does not initiate new ten- and fifteen-business-day intervals in which to seek a decision. *See* Open Records Decision No. 663 at 2-5 (1999).

Government Code.<sup>4</sup> We note that section 552.104 protects the interests of governmental bodies, not the proprietary interests of a private party such as RxEDO. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Furthermore, section 552.104 is a discretionary exception to disclosure that a governmental body may waive and does not provide a compelling reason for non-disclosure under section 552.302. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 at 8 (statutory predecessor to Gov't Code § 552.104 subject to waiver). Therefore, the district may not withhold any of the submitted information on the basis of RxEDO's claim under section 552.104 of the Government Code. However, we will address RxEDO's claims under sections 552.110 and 552.128, which can provide compelling reasons for non-disclosure under section 552.302.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret 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.” 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, which holds a “trade secret” to be

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 a single or ephemeral event 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* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts

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<sup>4</sup>Section 552.104 excepts from public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104(a).

the claim as a matter of law.<sup>5</sup> See Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable 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) 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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

RxEDO contends that section 552.110(a) is applicable to specified parts of its proposal. RxEDO also asserts that the information in question is protected by section 552.110(b). Having considered RxEDO's arguments and reviewed the information at issue, we have marked information contained in RxEDO's proposal and in the CD contained in the proposal that the district must withhold under section 552.110(b).<sup>6</sup> We otherwise find that RxEDO has not presented a *prima facie* claim that any of the remaining information at issue qualifies as a trade secret under section 552.110(a). We also find that RxEDO has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause RxEDO substantial competitive harm. We therefore conclude that the district may not withhold any other information contained in RxEDO's proposal under section 552.110. See Open Records Decision Nos. 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 was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

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<sup>5</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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).

<sup>6</sup>For your convenience, we have printed out and marked information contained in the CD that the district must withhold under section 552.110(b). We note that the marked information from Exhibit B, "Claims to be Re-priced," is a sample of the information that must be withheld.

Section 552.128 of the Government Code is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). The district does not indicate that RxEDO submitted its proposal to the district in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

*Id.* § 552.128(c). In this instance, RxEDO submitted the information in its proposal to the district in connection with a proposed contractual relationship with the district. We therefore conclude that the district may not withhold any information contained in RxEDO’s proposal under section 552.128 of the Government Code.

Lastly, we note that some of the information that must be released appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary: (1) the district must dispose of the information contained in PTRx’s proposal in accordance with Open Records Letter No. 2007-05536; and (2) the district must withhold the marked information in RxEDO’s proposal under section 552.110 of the Government Code. The rest of the submitted information must be released. Any information that is 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).

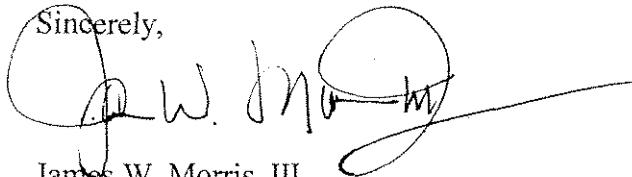
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ma

Ref: ID# 282605

Enc: Submitted documents

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