



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2007

Ms. Leah Curtis Morris
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P.O. Box 1256
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OR2007-09938

Dear Ms. Morris:

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# 285776.

The Hunt Memorial Hospital District (the "district"), which you represent, received two requests from the same requestor for the following: 1) the district's bylaws, 2) the membership list of the district's credentials committee, 3) the membership list of the district's executive committee, 4) the district's policy governing physician credentialing, 5) documents reflecting the date on which a named physician became a member of the district's medical staff, 6) "[i]ncome guarantees, loans, forgiven loans, and any other form of remunerations provided" by the district to the named physician between January 1, 2001 and the date of the request, 7) minutes of district board meetings over the same period, 8) the most recent budget of the district, 9) the most recent independent and internal audits of the district, 10) the IRS Form 990 for the Foundation for Good Health for calendar years 2005 and 2006, 11) the current agreement or contract between the district and Presbyterian Healthcare System, 12) the current agreement or contract between the district and Texas Health Resources ("THR"), 13) statistical report on surgical infection rates of the district between January 1, 2001 and the date of the request, 14) the original credential application of a named physician, 15) information or communications provided to or exchanged with the district regarding the named physician, 16) communications between the named physician and the district, 17) communications between the Texas Medical Board and the district concerning the named physician between January 1, 2000 and the date of the request, and 18) records provided to the district for consideration and approval of staff privileges for the

named physician. You state that the district does not maintain information responsive to items 6, 10, 11, and 17.¹ You also state that, upon receipt of payment, the district will release some information responsive to items 1, 4, 5, 6, 7, 8, 9, 15, and 16. You claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. In addition, you note release of information responsive to item 12 may implicate the protected proprietary interests of THR. Accordingly, you notified THR of the request and its right to submit arguments to this office explaining why this information should not be released. *See* Gov't Code § 552.305 (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 in certain circumstances). We received correspondence from an attorney for THR. We have considered all submitted arguments and reviewed the submitted information.² We have also considered comments submitted on behalf of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the arguments submitted by THR against the disclosure of its agreement with the district. THR asserts that the agreement “is protected as confidential as set forth and contemplated within the [a]greement itself” and claims that “[b]oth parties agreed that the [c]ontents of the [a]greement were to be kept confidential.” Information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987). Consequently, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

THR also claims that the agreement at issue is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

²We note that the district has marked portions of the submitted information that are not responsive to the present requests. Information that is not responsive to the requests need not be released. Moreover, we do not address such information in this ruling.

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 the claim as a matter of law.³ *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).

³The 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).

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).

Having considered THR's arguments and reviewed the information at issue, we find that THR has not presented a *prima facie* claim that any of the information at issue qualifies as a trade secret under section 552.110(a). We also find that THR 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 THR substantial competitive harm. We therefore conclude that the district may not withhold any information contained in the submitted agreement under section 552.110 of the Government Code.

THR also asserts that the agreement between the district and THR is excepted from disclosure under 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." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1994) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). THR has not directed our attention to any law under which any portion of the agreement is considered to be confidential for purposes of section 552.101. Therefore, the district may not withhold the agreement under section 552.101 on the basis of THR's claim.

We next address the district's arguments under section 552.101. The district claims that portions of the submitted information are made confidential by section 160.007 of the Occupations Code. Section 160.007 of the Occupations Code provides that, "[e]xcept as otherwise provided by this subtitle, each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged." Occ. Code § 160.007. Medical peer review is defined by the Medical Practice Act ("MPA"), subtitle B of title 3 of the Occupations Code, to mean "the evaluation of medical and health care services, including evaluation of the qualifications of professional health care practitioners and of patient care rendered by those practitioners." *Id.* § 151.002(a)(7). A medical peer review committee is "a committee of a health care entity . . . or the medical staff of a health care entity, that operates under written bylaws approved by the policy-making body or the governing board of the health care entity and is authorized to evaluate the quality of medical and health care services[.]" *Id.* § 151.002(a)(8).

You indicate that portions of the submitted information consist of records of medical peer review committees concerning "patient and employee safety issues" and credentialing. Based on your representations and our review, we agree that portions of the information at issue are confidential pursuant to section 160.007 of the Occupations Code. *See St. Luke's*

Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 505 (Tex. 1997); *Memorial Hosp.-the Woodlands v. McCown*, 927 S.W.2d 1, 5 (Tex. 1996) (finding that review by medical staff committee of application for staff privileges qualifies as medical peer review because it necessarily involves review of physician's qualifications, competence, and ethics). We note, however, that the membership lists of the district's credentials and executive committees are not made confidential by section 160.007, and they may not be withheld under section 552.101 on this basis. See *In re Liberty-Dayton Hosp.*, 144 S.W.3d 642, 646 (Tex. App.-Beaumont 2004, writ granted) (holding that committee membership lists are not confidential under chapter 160 of the Occupations Code). Therefore, the district must withhold the remaining information responsive to items 5, 13, 14, 15, 16, and 18 under section 552.101 of the Government Code in conjunction with section 160.007 of the Occupations Code.⁴ As you claim no other exceptions to disclosure, the remaining information must be released to the requestor.

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).

⁴As our ruling on this issue is dispositive, we need not address your remaining argument for the information responsive to item 13 of the request.

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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Assistant Attorney General
Open Records Division

LJJ/eeg

Ref: ID# 285776

Enc. Submitted documents

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