



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2010

Ms. Gay Dodson
Executive Director/Secretary
Texas State Board of Pharmacy
333 Guadalupe Street, Suite 3-600
Austin, Texas 78701-3943

OR2010-03215

Dear Ms. Dodson:

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# 371803.

The Texas State Board of Pharmacy (the "board") received a request for the approved evaluator list prepared by Professional Recovery Network ("PRN") and information that indicates changes in the list over a specified time period. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. In addition, you inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the board has notified PRN of the request and of its right to submit arguments to this office explaining why its 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 have received comments from PRN. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note you have not submitted information responsive to the portion of the request seeking information that indicates changes in the list over a specified time period. To the extent any information responsive to this portion of the request existed on the date the board received the request, we assume the board has released it. If the board has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we address your comment that the submitted information may not be responsive to the request because it "was compiled by [board] staff from information obtained from PRN [and] created as a reference for [board] staff." A governmental body is required to make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at 8 (1990) (construing statutory predecessor). The submitted information appears to relate to the request for a provider list. Thus, based on our review, we find the board has made a good-faith effort to relate the request for information to the submitted information; accordingly, we will address your arguments against disclosure of this information.

Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information made confidential by other statutes. Section 564.001 of the Occupations Code provides that "[a] person, including a pharmaceutical peer review committee, who has knowledge relating to an action or omission of a pharmacist in this state or a pharmacy student . . . that might provide grounds for disciplinary action under Section 565.001(a)(4) or (7) may report relevant facts to the board," and that a "committee of a professional society composed primarily of pharmacists, the staff of the committee, or a district or local intervenor participating in a program established to aid pharmacists . . . impaired by chemical abuse or mental or physical illness may report in writing to the board the name of an impaired pharmacist . . . and the relevant information relating to the impairment." Occ. Code § 564.001(a), (b). Section 564.002 of the Occupations Code provides that "[t]he records and proceedings of the board . . . in connection with a report under Section 564.001(a) or (b), are confidential and are not considered public information for purposes of [the Act]." Occ. Code § 564.002.

The request is for information pertaining to the board's approved provider list, not for information relating to any report made to the board in accordance with section 564.001. You argue that the current statute is ambiguous and incorrect, and, thus, "the predecessor statute should be looked to for clarification on the scope of confidentiality." You further state that this ambiguity was caused by incorrect recodification in the seventy-sixth legislative session. In addition, you argue that the legislative intent related to the recodification was to make "confidential all records and proceedings of the board and an impaired pharmacist program." However, we must apply the law as currently written. *See Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999) (where codified statute is unambiguous, plain meaning rule applies even if codification is inconsistent with

its statutory predecessor). Thus, we find the board has failed to demonstrate how the information at issue consists of records and proceedings of the board in connection with a report of an impaired pharmacist in accordance with section 564.001. Therefore, the board may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 564.002 of the Occupations Code.

Next, we address PRN's arguments under section 552.101 and section 552.110 of the Government Code. Section 552.101 of the Government Code also encompasses section 564.103 of the Occupations Code. PRN claims that the requested information was created by a pharmacy peer review committee and is therefore confidential under the Pharmacy Act, which provides that "all proceedings and records of a pharmacy peer review committee are confidential and all communications made to a pharmacy peer review committee are privileged." Occ. Code § 564.103(a). A "pharmacy peer review committee" is defined as a committee "established to evaluate the quality of pharmacy services or the competence of pharmacists and suggest improvements in pharmacy systems to enhance patient care." *Id.* § 564.102(a). However, you state that the submitted provider list was "compiled by [board] staff . . . as a reference for [board] staff when communicating with a mental health or chemical dependency evaluator." Thus, we find that PRN has failed to prove how the submitted provider list is a proceeding or record of a pharmacy peer review committee. The submitted information may not be withheld under section 552.101 of the Government Code on this basis.

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. 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that 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).

Section 552.110(b) of the Government Code excepts 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." 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 requested information. *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).

The submitted document consists of a provider list. Having considered PRN's arguments and reviewed the information at issue, we find that PRN has not shown that any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. We also find PRN has made only conclusory allegations that release of the information at issue would cause it substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, the submitted provider list may not be withheld pursuant to section 552.110. As neither the board nor PRN raise any additional exceptions to disclosure, the submitted information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

¹The following are the six factors that the Restatement gives 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).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 371803

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. C. Dean Davis
Davis, Fuller, Jackson & Keene
Suite A-425
11044 Research Boulevard
Austin, Texas 78759
(w/o enclosures)