



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 26, 2014

Ms. Laura Garza Jimenez  
County Attorney  
County of Nueces  
901 Leopard, Room 207  
Corpus Christi, Texas 78401-3680

OR2014-21522

Dear Ms. Jimenez:

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# 545202.

The Nueces County Purchasing Department (the "county") received a request for the responses and addenda submitted by Discovery Benefits ("Discovery") and HealthSmart Benefit Solutions, Inc. ("HealthSmart") in response to a specified request for proposals. Although you take no position with respect to the public availability of the submitted information, you state its release may implicate the proprietary interests of Discovery and HealthSmart. Accordingly, you state, and provide documentation demonstrating, you have notified these third parties of the request for information and of their right to submit arguments to this office as to why the requested 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) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments from Discovery and HealthSmart. We have considered the submitted arguments and reviewed the submitted information.

We note HealthSmart's information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-20930 (2014). In that ruling, we found, in relevant part, the county must withhold the portions of HealthSmart's information we marked under sections 552.110(b) of the Government Code, and release the remaining information in accordance with copyright law. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the county must continue to rely on Open Records Letter No. 2014-20930 as a previous determination and withhold or release the identical information at issue in

accordance with the prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Discovery raises section 552.110 of the Government Code for portions of its information. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.<sup>1</sup> This office must accept a claim that

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<sup>1</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 other 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Discovery contends some of its information constitutes trade secrets under section 552.110(a) of the Government Code. We note Discovery has published some of the information at issue on its website. Thus, Discovery has failed to establish the information it published on its website is a trade secret. Further, we find Discovery has failed to establish a *prima facie* case any portion of its remaining information meets the definition of a trade secret, nor has Discovery demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, none of the information at issue may be withheld under section 552.110(a).

Discovery further argues portions of its information consist of commercial information, the release of which would cause Discovery substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Discovery has demonstrated its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the county must withhold the information we have marked under section 552.110(b) of the Government Code. However, as noted above, Discovery has published some of the information at issue on its website, making this information publicly available. Thus, Discovery has failed to demonstrate release of the information it published on its website would cause the company substantial competitive harm. Further, we find Discovery has made only conclusory allegations the release of any of its remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence substantial competitive injury would result from release of particular information at issue), 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 is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

In summary, the county must continue to rely on Open Records Letter No. 2014-20930 as a previous determination and withhold or release the identical information in accordance with the prior ruling. The county must withhold the information we have marked under section 552.110(b) of the Government Code. The county must release the remaining information.

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.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lee Seidlits  
Assistant Attorney General  
Open Records Division

CLS/som

Ref: ID# 545202

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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