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**TEXAS ADMINISTRATIVE LAW
ADDRESSING PROTECTION OF TRADE SECRETS**

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In Texas, most state administrative agencies and many local governmental bodies are subject to the state's open records statute, the Public Information Act ("PIA").² Under that law, information prepared by or supplied to government is public unless an exception applies. The PIA states: "it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees."³ Similarly, in agency contested case proceedings, information that meets relevance and other standards for discovery or evidence is typically subject to disclosure absent a privilege.

The PIA, Texas law on privileges, and other law relevant to Texas governmental bodies, however, contain express protections from public disclosure for trade secrets and similar confidential business information. If the standard for such protections is met, the information is not released in response to a PIA request, and in a contested case may be withheld or, if necessary for purposes of the proceeding, provided under a protective order that limits disclosure and use of the information.

Those asserting harm if information were disclosed could include the entity that provided the confidential business information to the government, or the entity's supplier, customer or consultant that would be damaged by disclosure of their confidential business information to which the entity has access. Because those affected might not be the same as those entitled to notice of the overall proceeding (if any) in which the confidentiality issue arose, affording due process and avoiding delay might require timely notice to affected third parties of a proposed disclosure.

¹ Any opinions expressed in this paper are solely my own and may change depending on specific circumstances and applicable law. The paper is a summary that omits some issues and details and is not legal advice or rendition of legal services. I appreciate the contributions of Humberto Aguilera and Edie Heuss, who assisted in updating and broadening research for the 2009 version of this paper, as well as the work by State Office of Administrative Hearings ("SOAH") intern Carlos Castañeda in updating the research and this paper in preparation for this seminar.

² TEX. GOV'T CODE §§ 552.001-552.353.

³ See PIA § 552.003.

I. WHY IS THIS IMPORTANT? CONSEQUENCES OF INCORRECTLY WITHHOLDING OR DISCLOSING TRADE SECRET-TYPE INFORMATION PROVIDED TO GOVERNMENT⁴

The main reason to identify and to handle correctly confidential business information provided to government is to safeguard the public's right of access to information that is not legally protected and businesses' right to confidentiality of business information that is legally protected. In addition, Texas law provides significant consequences for failure to comply with such legal requirements.

For example, under PIA § 552.353, a public information officer or agent thereof commits an offense if, with criminal negligence, he or she *fails or refuses to give access to information that is public under the PIA*. Affirmative defenses include those relating to having a pending request for Attorney General ruling, and reasonable reliance on an Attorney General or judicial ruling that indicates the information can be withheld.

On the other hand, under PIA § 552.352, *distributing information confidential under the PIA*, such as trade secrets, is a misdemeanor punishable by a fine up to \$1,000 and imprisonment in county jail for up to six months and is also official misconduct.

The PIA thus seemingly puts governmental bodies between a rock and a hard place, imposing significant sanctions for either incorrectly withholding or incorrectly disclosing information. The PIA, however, also provides governmental bodies a way out: seeking an Attorney General decision. Judicial review is also available. In addition, PIA § 552.011 states: "The attorney general shall maintain uniformity in the application, operation, and interpretation of this chapter. To perform this duty, the attorney general may prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on this chapter."

Possible sanctions for disclosing trade secrets are not limited to those under the PIA. Under TEX. PENAL CODE § 31.05, a person commits a third degree felony if, without the owner's effective consent, he knowingly steals, copies, communicates or transmits a trade secret. For purposes of that provision, "trade secret" is defined as the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes. Texas also recognizes civil suits for misappropriation of trade secrets.⁵

In addition to the above consequences, many agencies can impose or seek in court remedies, such as injunctive relief and monetary and criminal penalties, for violation of their statutes, rules or orders, including those regarding confidential business information.

⁴ Arguments such as any sovereign immunity defense that might apply are beyond the scope of this paper.

⁵ See, e.g., TEX. CIV. PRAC. & REM. CODE § 16.010.

II. LEGAL PROTECTIONS FOR CONFIDENTIAL BUSINESS INFORMATION

The law has long protected trade secrets from destruction through disclosure. Roman law afforded relief against a person who induced another's employee to divulge secrets relating to the master's commercial affairs.⁶ The first reported case in the United States is *Vickery v. Welch*, 36 MASS. (19 Pick.) 523 (1837), which upheld a contract for the sale of rights in a secret process against claims that the contract was void as a restraint of trade.⁷ *Peabody v. Norfolk*, 98 Mass. 452, 461 (1868) held that confidential disclosures do not destroy the secrecy necessary for protection as a trade secret.⁸

In 1939, the American Law Institute ("ALI") adopted RESTATEMENT (FIRST) OF THE LAW OF TORTS ("Torts Restatement"). Torts Restatement § 757, which addresses claims such as for misappropriation of a trade secret, was soon widely accepted nationally⁹ and in Texas.¹⁰ In large measure, the trade secret definition, criteria and factors quoted in Texas legal authorities have come from Torts Restatement § 757.

The growth of trade secret law led ALI in 1979 to remove § 757 from the Torts Restatement, due to trade secret law having evolved into a separate field.¹¹ Trade secrets are now addressed in RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39. This Restatement updates the analysis of what qualifies for protection. For example, computer programs are now expressly listed as information that may constitute a trade secret.

The trade secret privilege exists to protect the interests of the holder of the trade secret.¹² Courts have held that this private interest also serves the public interest, by eliminating disincentives to invest in innovation.¹³

⁶ Patricia A. Meier, "Looking Back and Forth: The Restatement (Third) of Unfair Competition and Potential Impact on Texas Trade Secret Law," 4 TEX. INTELLECTUAL PROPERTY LAW J. 415, 416 (Spring 1996), citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 cmt. a (1993) ("Unfair Competition Restatement").

⁷ *Id.* at 417.

⁸ *Id.*

⁹ *Id.*

¹⁰ *See, e.g., Hyde Corp. v. Huffines*, 158 Tex. 566, 314 S.W.2d 763 (Tex. 1958).

¹¹ *Meier* at 415-416.

¹² *See, e.g., Tex. Att'y. Gen. ORD-669* at 2 (2000) (the exception of trade secrets from public disclosure requirements is to protect "the property interests of those supplying information to governmental bodies.").

¹³ *See J.E.M. AG Supply, Inc. dba Farm Advantage, Inc.*, 534 U.S. 124, 144, 122 S.Ct. 593, 605, 151 L.Ed.2d 508, 526 (2001), describing trade secret protection as an incentive to invention.