



March 22, 2001

Ms. Patricia Muniz-Chapa
Public Information Coordinator
University of Texas System
201 West 7th Street
Austin, Texas 78701-2909

OR2001-1139

Dear Ms. Muniz-Chapa:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145240.

The University of Texas System (the “system”) received a written request for “the RFP responses submitted to [the system] for the Prescription Drug Program” by six named pharmacy benefit management firms: Advance Paradigm, PCS Health Systems (“PCS”), Merck-Medco, MedImpact Healthcare Systems Inc., National Prescription Administrators, and Eckerd Health Services. You do not contend that the requested information is excepted from public disclosure, but rather have sought a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information is excepted from public disclosure.

We note at the outset that the question as to whether the records submitted to the system by Merck-Medco must be released to the public is the subject of a pending lawsuit. *Merck-Medco Managed Care, L.L.P. v. John Cornyn, Attorney General of Texas*, No. GN003601 (345th Dist. Ct., Travis County, Tex., filed Dec. 18, 2000). Accordingly, we will not address whether or to what extent the proposal submitted by Merck-Medco is subject to required public disclosure, but rather will allow the trial court to resolve the issue of whether those records are subject to public release.

You note that this office has previously ruled on the proposals submitted by Eckerd Health Services and MedImpact Healthcare Systems. *See* Open Records Letter No. 2000-4624 (2000). Based on your representations that the four criteria for a “previous determination” by this office established in Open Records Decision No. 673 (2001) have been met, we conclude that we need not revisit those proposals here.¹ The system must release or withhold those documents as discussed in Open Records Letter No. 2000-4624. *See* Gov’t Code § 552.301(f); Open Records Decision No. 673 (2001).

You also note that this office has previously ruled on a proposal submitted to the system by PCS Health System and state your assumption that “PCS Health System is also relying on a previous ruling, OR2000-1668, allowing them to withhold proprietary information from the proposal they submitted to U.T. System in 1999.” PCS Health System has not submitted any comments to this office regarding the current request. It is not clear to this office that the proposal submitted to the system in 1999 is precisely the same as that currently being requested. If it is, the system may rely on Open Records Letter No. 2000-1668 (2000) as to whether or to what extent the PCS proposal may be withheld. *See* ORD 673. On the other hand, if the 1999 PCS proposal differs from the proposal currently being requested, we have no basis on which to conclude that the current proposal is excepted from public disclosure and the proposal therefore must be released.

This office did not receive any comments from National Prescription Administrators in response to your notice. Consequently, this office has no basis on which to conclude that any portion of National Prescription Administrators’ proposal is excepted from required public disclosure under the Public Information Act. Accordingly, we conclude that the system must release this company’s proposal to the requestor in its entirety.

On the other hand, AdvancePCS, formerly known as Advance Paradigm, Inc., has submitted comments to our office, and contends that portions of its proposal are excepted from public disclosure. Specifically, AdvancePCS contends that the following portions of its proposal are excepted from public disclosure under section 552.110 of the Government Code: pages 18, 41, 43, 76-79, and the “Standard Performance Guarantees” from Part A, and all of Part B, including the “Formulary booklet.” AdvancePCS contends that these portions of its proposal are excepted from public disclosure pursuant to section 552.110 of the Government Code.

¹The four criteria for this type of “previous determination” are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general’s prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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. AdvancePCS contends that both branches of section 552.110 apply to the cited portions of its proposal.

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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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.² *Id.* This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, 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). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

After reviewing the information at issue and AdvancePCS's arguments, we conclude that AdvancePCS has established the applicability of section 552.110 to most of the information at issue. Accordingly, the system must withhold pursuant to section 552.110 the following information: pages 18, 41, 43, and the "Standard Performance Guarantees" from Part A, and all of Part B, including the "Formulary booklet." AdvancePCS has not, however, established how the information contained in pages 76-79 of Part A comes within either branch of section 552.110; consequently, the system must release these four pages, as well as the remaining portions of the proposal, to the requestor.

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(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 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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 Department of Public 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 General Services Commission 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,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/RWP/seg

Ref: ID# 145240

Encl. Submitted documents

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