



September 25, 2001

Ms. Paula A. Jones  
General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR2001-4296

Dear Ms. Jones:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152312.

The Employees Retirement System of Texas (the "system") received a request for several categories of information "concerning the relationship between the State of Texas and the prescription drug plan available to state employees from years 1995 to present[.]" You indicate that the system is making most of the responsive information available to the requestor. You state that, to the extent any information regarding pricing agreements between PBM and pharmacy networks and drug manufacturers exists, "such information belongs to and is solely in the possession of Merck and/or BCBSTX." You further state that the system believes that some of the requested information may be excepted from disclosure under section 552.110 of the Government Code. You have notified Merck-Medco Managed Care, L.L.C. ("Merck") and BlueCross BlueShield of Texas ("BCBSTX") of the request for information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

You state that "BCBSTX has instructed [the system] to release the information in [the system's] possession without exception." Therefore, we assume that you have released all responsive information regarding BCBSTX to the requestor. On the other hand, Merck has submitted a brief to this office requesting that certain portions of its responsive information be withheld from disclosure.

We must next address the system's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e)(1) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). The system failed to submit certain portions of responsive information that Merck seeks to withhold from its proposal. Specifically, the system did not submit Merck's responses to Questions 4, 7, 9, 16, and 17 of Part A, General Information from Part X: Interrogatories, and the Preferred Prescriptions Formulary booklet exhibit.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301(e) results in the legal presumption that the requested information is public and must be released unless the governmental body or a third party demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Because you have not submitted Merck's responses to Questions 4, 7, 9, 16, and 17 of Part A, General Information from Part X: Interrogatories, and the Preferred Prescriptions Formulary booklet exhibit, we have no basis for determining whether a compelling reason exists for withholding that information. Thus, we have no choice but to order Merck's responses to Questions 4, 7, 9, 16, and 17 of Part A, General Information from Part X: Interrogatories, and the Preferred Prescriptions Formulary booklet<sup>1</sup> released pursuant to section 552.302. If you believe this information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

We now address the applicability of the claimed exception to the submitted information. Section 552.110 of the Government Code 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. Merck contends that both branches of section 552.110 apply to portions of its proposal and to certain exhibits to its April 22, 1999 agreement with the system.

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<sup>1</sup>We note that the system did submit an exhibit titled Formulary Pocket Guide, which we have ruled on. The Preferred Prescriptions Formulary booklet must be released only to the extent that it differs from the submitted Formulary Pocket Guide.

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.<sup>2</sup> *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 Merck's arguments and the information at issue, we conclude that Merck has established the applicability of section 552.110(b) to most of the information at issue. Accordingly, the system must withhold the information we have marked pursuant to section 552.110(b).

We note, however, that although Merck states that disclosure of portions of its proposal and certain exhibits to its agreement with the system would permit its competitors to "understand and predict [Merck's] pricing," we do not believe that pricing information is excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 509 at 5 (1988) (stating that 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 was entirely too speculative); *see also* Gov't Code § 552.022(a)(3) (information in an account, voucher, or contract relating to the receipt or expenditure of public funds by a governmental body is public information); Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors) We also note that in applying the predecessor statute to section 552.110, this office has held that information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing ordinarily may not be withheld under section 552.110. Open Records Decision No. 319 (1982). Furthermore, we conclude

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<sup>2</sup>The 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).

that Merck has not established how the remaining unmarked information comes within either branch of section 552.110. Therefore, the system may not withhold the remaining information under section 552.110.

To summarize, we conclude that: (1) the system must withhold the information we have marked in the submitted documents under section 552.110 of the Government Code; and (2) the remaining responsive information must be released.

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,



Karen A. Eckerle  
Assistant Attorney General  
Open Records Division

KAE/sdk

Ref: ID# 152312

Enc: Submitted documents

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