



December 6, 2001

Ms. Carol Longoria
Office of the General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2001-5698

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155706.

The University of Texas System (the "system") received several written requests for the proposals that were submitted to the University of Texas in connection with its managed prescription drug program in 2000. You state that this office has previously ruled that many of the requested proposals are not excepted from required public disclosure and you have released those proposals, or portions thereof, to the requestors in accordance with those rulings.¹ See Open Records Letter Nos. OR2001-1139 (2001), OR2000-4624 (2000). On the other hand, you have submitted to this office the proposals of six companies, for which you now seek a determination from this office as to whether or what extent this information is excepted from required public disclosure. You have requested 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 should be withheld from the public.

In accordance with section 552.305(d), the system was required to notify the six companies of the request and of their right to submit arguments to this office as to why their respective proposals should not be released to the public. See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305

¹You state that the system has released in their entirety the proposals of AmeriPlan USA, Claimspro, PGS Health Systems Eckerd Health Services, MedImpact Healthcare Systems, Inc., MIM Health Plans, Inc., Optimal Health Care, LLC, and RxAmerica based on previous ruling from this office. Additionally, you state that the system has released the portions of the proposal submitted by Advanced Paradigm, Inc. that this office determined to be public in a previous ruling.

permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code* § 552.305(d)(2)(B). This office did not receive responses from Managed Pharmacy Benefits, Inc., PRIME Therapeutics, Unicare, or RESTAT. Accordingly, the system must release these companies' proposals to the requestor, except as we discuss below under Government Code sections 552.136 and 552.137.

On the other hand, this office received arguments from Caremark, Inc. ("Caremark") that portions of its proposal are excepted from required public disclosure pursuant to section 552.110 of the Government Code. 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. Caremark contends that specific portions of its proposal are confidential under both branches of section 552.110.

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 a specific factual or evidentiary showing, not conclusory or generalized allegations, that disclosure would cause substantial competitive injury to the entity from whom the information was obtained. *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).

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).

After reviewing Caremark's brief to this office, we conclude that Caremark has not demonstrated that either branch of section 552.110 applies to most of the information it seeks to withhold. However, we conclude that the system must withhold pursuant to section 552.110 the customer list contained on pages 3 and 4 of Caremark's proposal. The system must release the remaining portions of Caremark's proposal to the requestors, with the following exceptions.

The Caremark proposal, as well as other submitted proposals, contain information that must be withheld from the public pursuant to sections 552.136 and 552.137 of the Government Code. The Seventy-seventh Legislature recently added a new section 552.136 to the Government Code,³ which makes confidential certain account numbers, including bank account numbers. Section 552.136 provides in relevant part:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). We conclude that the department must withhold all bank account numbers contained in the records at issue pursuant to section 552.136 of the Government Code.

³The Legislature also enacted two other bills that add a section 552.136 to chapter 552. One is House Bill 2589, which makes certain e-mail addresses confidential. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The other is Senate Bill 15, which makes information maintained by family violence shelter centers confidential. See Act of May 14, 2001, 77th Leg., R.S., S.B. 15, § 1 (to be codified at Gov't Code § 552.136). In addition, Senate Bill 694 enacted the same language from House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Government Code. See discussion *infra*.

Additionally, the Seventy-seventh Legislature added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.⁴ This section provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Accordingly, section 552.137 of the Government Code requires the system to withhold certain e-mail addresses contained in the records at issue, which we have marked, unless the respective communicant has affirmatively consented to its release.

Finally, we note that the question of whether the proposal submitted to the system by Merck-Medco is subject to required public disclosure is currently pending before the district court in Travis County. *See Merck-Medco Managed Care v. John Cornyn, Attorney General of Texas*, No. GN-003601 (345th Dist. Ct., Travis County, Tex., filed Dec. 18, 2000). Accordingly, we are closing the file as to this aspect of your request without a finding and will allow the trial court to resolve the issue of whether Merck-Medco's proposal must be released to the requestor.

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).

⁴House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

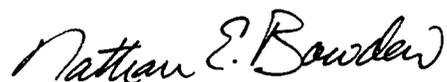
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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); *Tex. Dep't of Pub. 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 Texas Building and Procurement 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/RWP/sdk

Ref: ID# 155706

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