



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 11, 2002

Ms. Belinda R. Perkins
Texas Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2002-7055

Dear Ms. Perkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173463.

The Teacher Retirement System (the "system") received a written request for all proposals submitted to the system in connection with an RFP for the selection of a pharmacy benefit manager for the TRS-ActiveCare Program. You inform us that five companies submitted responsive proposals to the system: Aetna, Inc. ("Aetna"), AdvancePCS, Express Scripts, Merck-Medco Managed Care, L.L.C. ("Merck-Medco"), and Prescription Solutions.¹ You do not contend that any of the requested information is excepted from public disclosure, but rather 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 five interested parties of the records request and of their right to submit arguments to this office as to why portions of their 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 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).

¹The requestor amended his records request to specifically include the proposal submitted by Aetna.

This office did not receive a response from AdvancePCS, Express Scripts, or Prescription Solutions indicating that they wished to have any portion of their respective proposals withheld from the public. This office therefore has no basis for concluding that these three companies have a privacy or property interest in this information. Consequently, the system must release these companies' proposals to the requestor, except as discussed below.

We now address the extent to which the remaining two requested proposals are excepted from public disclosure. Both Aetna and Merck-Medco contend that portions of their proposals constitute both "trade secret" information under section 552.110(a) and "commercial or financial" information under section 552.110(b) of the Government Code. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See 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 *See id.* This office has held that we must accept a 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. *See* 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); Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

After reviewing the information at issue and the arguments submitted by Aetna and Merck-Medco, we conclude that both of those companies have established that portions of their respective proposals are excepted from public disclosure pursuant to section 552.110. Specifically, we conclude that Aetna has demonstrated that the following portions of its proposal come under the protection of section 552.110: information pertaining to pharmacy benefit administrative fees; fee and performance guarantees; TRS's projected pharmacy claim costs and estimated potential savings under the Aetna pharmacy benefit plan; charges

² 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).

for management reporting and other support services; network retail and mail order pharmacy contract reimbursement rates; drug pricing; generic utilization rates; Aetna pharmacy benefit plan statistical information, including number of prescriptions filled; drug manufacturer rebate arrangements and Aetna's drug manufacturer rebate program for eligible customers; Aetna pharmacy utilization reports; Aetna's Maximum Allowable Cost list; the portions of Aetna's pharmacy provider newsletter that contains certain reimbursement rate information; and a formulary drug exhibit which includes drug pricing information. The system must also withhold from Aetna's proposal all information pertaining to Aetna's pharmacy network management; drug utilization review/disease management; pharmacy benefit management reporting claims administration and eligibility; customer service and provider relations; mail order drug quality control; and specific case installation services, systems, and materials. The remaining portions of Aetna's proposal must be released, except as discussed below.

We further conclude that Merck-Medco has demonstrated that the following portions of its proposal come under the protection of section 552.110: Executive Summary; sections 9.1.1 - 9.1.5; sections 9.2.1 - 9.2.4; sections 9.3.1 - 9.3.4; sections 9.4.1 - 9.4.15; sections 9.5.1 - 9.5.7; sections 9.6.1 - 9.6.8; sections 9.7.1 and 9.7.3 - 9.7.4; sections 9.8.1 and 9.8.2; sections 9.9.1 and 9.9.2; section 9.10.1; Sample Master Agreement; section 11.0 (marked portions only); sections 11.1 - 11.5; sections 2.18, 6.6.1, and 6.10 of the Addendum; information pertaining to Aetna's HUB Participation Program, Supplier Diversity Program, Mail Service Refill Order Form, Sample Drug Information leaflet, Home Delivery Pharmacy Service Advantage Brochure, CSR Reason/Action/Disposition Code List, and Eligibility Record Layout. The remaining portions of Merck-Medco's proposal must be released to the requestor, except as discussed below.

We note, however, that all of the proposals you submitted to this office contain information that is copyright protected. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials where no exception to required public disclosure otherwise applies. Attorney General Opinion JM-672 at 2-3 (1987). Also, the requestor may make copies of copyrighted materials unassisted by the system. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2. Consequently, the system must allow the requestor to view the copyrighted information that is not otherwise excepted from required public disclosure and also allow him to reproduce the material without the system's assistance. It will be the requestor's responsibility to adhere to the federal copyright law.

We also note that some of the submitted proposals contain certain e-mail addresses that the system is required to withhold from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential and 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. [Emphasis added.]

Some of the documents at issue contain private e-mail addresses. Accordingly, section 552.137 of the Government Code requires the system to withhold the e-mail addresses of private individuals unless the system receives an affirmative consent to release from the person to whom the e-mail address belongs. Please note, however, that section 552.137 does not make confidential a company's website or a public employee's governmental e-mail address.

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 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Cindy M. Nettles
Assistant Attorney General
Open Records Division

CMN/RWP/lmt

Ref: ID# 173463

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