



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 6, 2003

Ms. Kathleen Finck
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2003-3049

Dear Ms. Finck:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180437.

The City of San Antonio (the "city") received a request for the proposals submitted concerning the city's prescription drug benefit management program. You claim that the requested information is excepted from disclosure under section 552.101, 552.104, and 552.110 of the Government Code. In addition, you have notified nine third parties of the request and of their opportunity to submit comments to this office. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances).

Initially, we note that all but one of the requested proposals are subject to a previous ruling by this office. In Open Records Letter No. 2003-1929 (2003), this office considered arguments by the city and various third parties and concluded that portions of the requested proposals were excepted from disclosure pursuant to sections 552.110 and 552.137 of the Government Code; we also noted that portions of the responsive information were subject to copyright protection. As the facts and circumstances surrounding that ruling do not appear to have changed, you must withhold or release information in those proposals in accordance with our previous ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (criteria of previous determination regarding specific information previously ruled on).¹

¹At issue in our previous ruling were the proposals submitted by WHP Health Initiatives, Incorporated; AdvancePCS; ClaimsPro Management Services, Incorporated; Catalyst Rx; TDI Managed Care Services d/b/a Eckerd Health Services; FBMC/US Script; Express Scripts, Incorporated; RxAmerica; and the current requestor, Systemed, L.L.C.

The only requested proposal not at issue in our previous ruling was the one submitted by Caremark, Incorporated (“Caremark”), and we address that now. Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975). We note that section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991).

The city states that it “has awarded contracts under the RFP for the employee benefits services sought” but contends that the requested information should nevertheless be withheld. The city contends that release of the information “would also allow vendors to gain unfair advantage over others by undercutting the known price structure of their competitors in the future.” The city does not demonstrate how releasing the specifically requested information will cause *the city* harm in this instance. Furthermore, a third party may invoke section 552.110 of the Government Code to prevent a governmental body from releasing any sensitive commercial information that it submits in conjunction with its bid. Under these circumstances, we find that the city has failed to provide sufficient indication that section 552.104 applies. In addition, because section 552.104 is designed to protect the interests of governmental bodies and not third parties, we reject Caremark’s claim that this section protects its information.

We next address whether the submitted information is excepted from disclosure under section 552.110. This section 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.

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). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It

differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² 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).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial 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[.]" Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The city claims that the submitted information is excepted as commercial information, the release of which would harm the person from whom it was obtained. Having reviewed the city's brief, we find that it has not supplied a specific factual or evidentiary showing that substantial competitive injury to Caremark would likely result from releasing that party's information. Accordingly, none of the submitted information may be withheld under section

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).

552.110 on the basis of the city's arguments. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 509 at 5 (1988) (stating because costs, bid specifications, and circumstances will change for future contracts, argument that competitor could obtain unfair advantage on future contracts is entirely too speculative to serve as basis for withholding information).

Having reviewed Caremark's arguments, we conclude the company has failed to make a *prima facie* case that any of the information in its proposal constitutes a trade secret. *See* ORD 552 at 5-6 (to establish that information is trade secret party must establish *prima facie* case that information meets definition of trade secret); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business"). Thus none of the submitted information may be withheld on the basis of section 552.110(a). However, we find that Caremark has established that a portion of its proposal constitutes commercial or financial information the release of which would cause the company harm; we therefore conclude that such information is excepted from disclosure under section 552.110(b). We have marked this information, which the city must withhold. We conclude, however, that Caremark has failed to demonstrate the applicability of section 552.110(b) to the remaining information. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor). Accordingly, pursuant to section 552.110, the city must withhold only those portions of the proposal that we have marked.

We next address the city's arguments concerning section 252.049 of the Local Government Code.³ Section 252.049 provides as follows:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This provision duplicates the protection section 552.110 of the Government Code provides to trade secret and commercial or financial information. As noted above, the city does not demonstrate that any of the requested information qualifies as

³Section 252.049 is incorporated into the Public Information Act by section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

either trade secret or confidential commercial or financial information under section 552.110, and Caremark has not established that the remainder of its proposal is protected under either aspect of section 552.110. We therefore conclude that none of the remaining information may be withheld pursuant to section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.

We note, however, that the submitted information includes e-mail addresses of members of the public. Section 552.137 of the Government Code provides that “[a]n 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 [the Public Information Act].” We note that section 552.137 does not apply to a government employee’s work e-mail address or a business’s general e-mail address or website address. Unless the individual members of the public have affirmatively consented to release of their e-mail addresses, the city must withhold the types of e-mail addresses that we have marked. *See* Gov’t Code § 552.137(b).

Finally, we note that the submitted information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, information in the proposals considered in Open Records Letter No. 2003-1929 (2003) must be withheld or released in accordance with that ruling. With respect to Caremark’s proposal, the city must withhold the information we have marked as being excepted under section 552.110. In addition, we have noted the types of e-mail addresses that must be withheld in accordance with section 552.137. The remainder of Caremark’s proposal must be released in accordance with applicable copyright laws.

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).

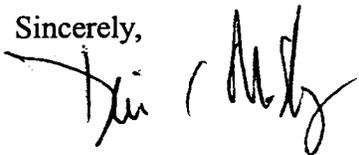
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 180437

Enc. Submitted documents

c: Mr. Kerry O'Brien
Systemed
100 Parson Pond Drvie
Franklin Lakes, New Jersey 07417
(w/o enclosures)

Mr. Richard Nagler
AdvancePCS
1215 N. O'Connor Blvd, Ste. 1600
Irving, TX 75039
(w/o enclosures)

Mr. Thomas M. Farah
HealthExtras, Inc.
2273 Research Blvd
Rockville, MD 20850
(w/o enclosures)

Mr. Richard W. Merrill, Jr.
WHP Health Initiatives, Inc.
1417 Lake Cook Road
Deerfield, IL 60015-5223
(w/o enclosures)

Mr. William J. Stilling
Parsons Behle & Latimer
P.O. Box 45898
Salt Lake City, UT 84145-0898
(w/o enclosures)

Mr. Kevin M. Plunkett
Caremark Rx, Inc.
2211 Sanders Road
Northbrook, IL 60062
(w/o enclosures)

Mr. Eric Singer
ClaimsPro Management Services, Inc.
24370 Northwestern Hwy, Ste 200
Southfield, MI 48075
(w/o enclosures)

Mr. Aman Zahiruddin
J.C. Penney Legal Department
6501 Legacy Dr, MS 1104
Plano, TX 75024-3698
(w/ enclosures)

Mr. Craig Stephens
Express Scripts, Inc.
13900 Riverport Dr.
St. Louis, MO 63043
(w/o enclosures)

Ms. Alyssa Shivers
FBMC/US Script
7170 N. Financial Dr, Ste 124
Fresno, CA 93720
(w/o enclosures)