ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2003

Ms. Deborah C. Hiser
Hilgers & Watkins
98 San Jacinto Boulevard, Suite 1300
Austin, Texas 78701

OR2003-8405

Dear Ms. Hiser:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191570.

The El Paso Community Mental Health Mental Retardation Center (the "center"), which you represent, received a request for a copy of all responses submitted in response to a particular request for proposals. Although you take no position on the release of the information, you have submitted correspondence indicating that you have notified the third parties whose information is at issue in the current request 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). Three of the third parties, Express Scripts, Inc. ("ESI"), National Extended Care Networks, L.L.C. ("NEC"), and The Inteq Group, Inc. ("Inteq"), have responded to the notice, asserting that portions of the requested information are excepted from disclosure by sections 552.104 and 552.110 of the Government Code. We have considered all of the submitted arguments and reviewed the submitted information.

Initially, we note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Advant-Edge Pharmacy, Inc. ("Advant-Edge"); Alameda Thrifty Pharmacy, Inc.; National Medical Health Card Systems, Inc. ("NMHC"); RxSolutions, Inc.; RESTAT; RxProvider Services, L.L.C.; RxWest, Inc.; ScripSolutions, Inc. ("ScripSolutions"); US Script, Inc.; and Walgreens Health

Initiatives ("Walgreens") have not submitted to this office their reasons explaining why the requested information should not be released. Consequently, these third parties have provided this office with no basis to conclude that their responsive information is excepted from disclosure. *See* Gov't Code § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the center may not withhold any portion of the submitted information relating to Advant-Edge; Alameda Thrifty Pharmacy, Inc.; NMHC; RxSolutions, Inc.; RESTAT; RxProvider Services, L.L.C.; RxWest, Inc.; ScripSolutions; US Script, Inc.; and Walgreens on the basis of any third party proprietary interest.

We next note that ESI argues that its information has been designated as confidential. However, information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We next note that ESI claims that all or portions of the submitted information relating to ESI are excepted from disclosure pursuant to section 552.104 of the Government Code. We note, however, that section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). We note that the center has not argued that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Accordingly, we conclude that the center may not withhold any portion of ESI's information under section 552.104 of the Government Code.

We next note that ESI, NEC, and Inteq claim that all or portions of the submitted information relating to each company are excepted from disclosure pursuant to section 552.110 of the Government Code. The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

> 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 a single or ephemeral event 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.[1] *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) 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). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial

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[1] The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

> (1) the extent to which the information is known outside of [the company];
> (2) the extent to which it is known by employees and other 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).

competitive injury would likely result from disclosure of the requested information. *See* 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).

Based on each company's arguments and our review of the submitted information relating to each company, we find that NEC and ESI have sufficiently demonstrated that portions of the submitted information relating to each company's proposal constitute commercial and financial information, the release of which would cause each company substantial competitive harm. Accordingly, we conclude that, pursuant to section 552.110(b) of the Government Code, the center must withhold the information that we have marked within each of NEC's and ESI's proposals. However, we find that neither company has established that the remainder of its proposal constitutes trade secret information or commercial or financial information, the release of which would cause each company substantial competitive harm under section 552.110. Accordingly, we also conclude that the center may not withhold any portion of the remaining submitted information from either of these companies' proposals under section 552.110 of the Government Code. Furthermore, we conclude that Inteq has not established a *prima facie* case that any portion of its proposal falls within the definition of trade secret as contemplated by the Texas Supreme Court and the Restatement of Torts. Neither has Inteq raised more than a conclusory allegation that release of its information would result in substantial competitive harm. Therefore, Inteq's proposal is not excepted from required public disclosure by section 552.110 of the Government Code.

We note that we have marked information in the Advant-Edge proposal that may be confidential under section 552.130 of the Government Code. Section 552.130 provides in relevant part:

> (a) Information is excepted from the requirement of Section 552.021 if the information relates to:
>
> . . . .
>
> (2) a motor vehicle title or registration issued by an agency of this state[.]

To the extent the motor vehicle information we have marked was issued by the State of Texas, it must be withheld under section 552.130.

Finally, we note that the proposals submitted by NEC, ESI, Inteq, NMHC, Rx Solutions, RESTAT, ScripSolutions, and Walgreens contain information that 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, the center must withhold the information that we have marked within NEC's and ESI's proposals pursuant to section 552.110 of the Government Code. To the extent the motor vehicle information we have marked in the Advant-Edge proposal was issued by the State of Texas, it must be withheld under section 552.130 of the Government Code. The remainder of the submitted information must be released in accordance with copyright law to the extent it is applicable.

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).

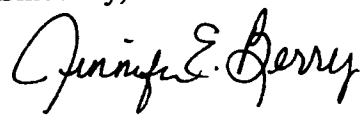
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

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,



Jennifer E. Berry
Assistant Attorney General
Open Records Division

JEB/sdk

Ref: ID# 191570

Enc: Submitted documents

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