



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2006

Mr. Rashaad V. Gambrell
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City of Houston - Legal Department
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OR2006-05573

Dear Mr. Gambrell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 250046.

The City of Houston (the "city") received two requests for copies of all of the proposals submitted for the Pharmacy Benefit Management request for proposals released in August 2005 and returned on October 3, 2005. While you raise no exceptions on behalf of the city regarding the requested information, you state that it may contain proprietary information excepted from disclosure under the Act. Accordingly, you state and provide documentation showing that you have notified interested third parties Blue Cross Blue Shield ("Blue Cross"), Caremark, Inc. ("Caremark"), Catalyst Rx ("Catalyst"), Express Scripts, Inc. ("ESI"), Medco Health Solutions, Inc. ("Medco"), PharmaCare, and Walgreens Health Initiatives, Inc. ("Walgreens") of the city's receipt of the requests for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See Gov't Code § 552.305(d); see also 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).* We have reviewed the submitted information. We have also received and considered arguments submitted by each of the third parties involved.

Initially, we note that Catalyst seeks to withhold its BAFO, which was not submitted to this office by the city. Additionally, Walgreens seeks to withhold portions of information

contained on a CD that was not submitted by the city. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the city. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Blue Cross, Caremark, Catalyst, PharmaCare, and Walgreens each claim an exception to disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). In this instance, the city does not assert that the release of the requested information would harm its competitive interests. Thus, we conclude that none of the information at issue may be withheld under section 552.104.

Catalyst also asserts that its proposal is confidential under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Catalyst raises section 552.101 in conjunction with section 252.049 of the Local Government Code, which 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 merely duplicates the protection section 552.110 of the Government Code provides to trade secret and commercial or financial information. Therefore we will address Catalyst's arguments with respect to section 252.049 of the Local Government Code under its claims regarding section 552.110.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret 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.” See Gov’t Code § 552.110(a)-(b).

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 [one] 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). 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.¹ *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). However, we cannot conclude that section 552.110(a) applies 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. See Open Records Decision No. 402 (1983).

¹The 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).

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). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Blue Cross asserts that portions of its proposal, including the executive summary, the financial proposal, the medical questionnaires, the provider and network worksheets, repricing scenarios, and ethnicity/ gender provider reports are excepted from disclosure under subsections 552.110(a) and 552.110(b). Upon review of Blue Cross’ arguments and its proposal, we find that Blue Cross has made a *prima facie* case that a portion of the information it seeks to withhold, which includes the underwriting comments and assumptions, and performance guarantees, are trade secrets for purposes of section 552.110(a). We have received no arguments to rebut this claim. Therefore, the city must withhold this information, which we have marked pursuant to section 552.110(a). However, Blue Cross has not demonstrated that any portion of the remaining information it seeks to withhold meets the definition of a trade secret. We therefore determine that no remaining portion of the proposal is excepted from disclosure under section 552.110(a). We also find that Blue Cross has made a specific factual showing that release of portions of its financial proposal, which includes its fully insured and self-insured rate quotes, other fees, and specific pricing information, would cause substantial competitive injury. Therefore, the city must withhold this information, which we have marked, under section 552.110(b). As to the remaining information Blue Cross seeks to withhold under section 552.110(b), we find that Blue Cross has not demonstrated that substantial competitive injury would likely result from the release of this information. Therefore, no portion of the remaining information Blue Cross seeks to withhold may be withheld under section 552.110(b).

Caremark asserts that its pricing and rebate information, other financial proposals, the specifics of its quality assurance programs, its formulary information, fees, and other performance guarantees are excepted from disclosure under section 552.110(a). Further, Caremark asserts that any of this information that is not excepted as a trade secret under section 552.110(a) should be excepted under section 552.110(b). Upon review of Caremark’s arguments and its proposal, we find that Caremark has established that portions of the information it seeks to withhold, which include its business methodologies, its performance guarantee, clinical programs, reimbursement rates, and information regarding its mail order facility capacities, constitute trade secrets for purposes of section 552.110(a). We thus determine that Caremark has made a *prima facie* case under section 552.110(a) for that information and we have received no arguments to rebut that claim. Therefore, the city must withhold the information we have marked under section 552.110(a). However, Caremark has not demonstrated that any portion of the remaining information it seeks to

withhold meets the definition of a trade secret. We therefore determine that no remaining portion of the proposal is excepted from disclosure under section 552.110(a). Caremark has made a specific factual showing that release of savings and costs of specific clinical programs, along with its formulary rebates and information pertaining to rebate programs with manufacturers would cause substantial competitive harm to Caremark and that such information, which we have marked, is excepted from disclosure under section 552.110(b). However, Caremark has only made general assertions that the release of the remaining information it seeks to withhold would cause the company substantial competitive injury. Therefore, no portion of the remaining information that Caremark seeks to withhold is excepted under section 552.110(b). *See* Gov't Code §552.110(b); ORD 319 at 3.

Catalyst asserts that its entire proposal is excepted from disclosure under subsections 552.110(a) and 552.110(b). In the alternative, Catalyst specifically asserts that its business methodologies, sample reports, clinical programs, financial proposal, and personnel description are protected as trade secrets under section 552.110(a). Having considered the submitted arguments and reviewed the information at issue, we find that Catalyst has made a *prima facie* case that some of the information it seeks to withhold, which includes its business methodologies, sample reports, and clinical program information, is protected as trade secret information. Catalyst has also demonstrated that its client lists are a trade secret for purposes of section 552.110(a). We have received no arguments to rebut these claims. We have marked the information in Catalysts' proposal that the city must withhold pursuant to section 552.110(a) of the Government Code. However, we determine that Catalyst has failed to demonstrate that any remaining portion of its proposal meets the definition of a trade secret. We therefore determine that the remaining portions of the proposal are not excepted from disclosure under section 552.110(a). *See* Gov't Code § 552.110(b); Open Records Decision No. 319 at 3 (1982) (information relating to organization, personnel, market studies, qualifications, and experience not excepted under statutory predecessor to section 552.110). Catalyst also asserts alternatively that its pricing methodology and formulas, and its "pass through" pricing proposal, including negotiated pharmaceutical rebates and discounts, should be excepted from disclosure under section 552.110(b). Upon review, we find that Catalyst has made a specific factual showing that release of its retail and mail pricing programs and guarantees, along with portions of its "pass through" pricing proposals would cause substantial competitive harm to Catalyst. Therefore, this information, which we have marked, is excepted from disclosure under section 552.110(b). However, Catalyst has made only conclusory allegations that release of the remaining information in its proposal would cause Catalyst substantial competitive injury. Therefore, the remaining portions of the proposal are not excepted under section 552.110(b). *See* Gov't Code § 552.110(b); ORD 319 at 3.

ESI asserts that designated pricing and financial information, including fees, discounts, and rebates, as well as client-reference information and its performance guarantee are excepted from disclosure under subsections 552.110(a) and 552.110(b). Upon review of ESI's arguments and its proposal, we find that ESI has established a *prima facie* case that its client

list and performance guarantee constitute a trade secret for purposes of section 552.110(a). We have received no arguments to rebut this claim. Therefore, the city must withhold the information we have marked under section 552.110(a). We also find that ESI has made a specific factual showing that release of its formulary rebate information, the specific pricing of prescription drugs, retail and mail services, and its pricing guarantees would cause ESI substantial competitive injury. Thus, the information we have marked must be withheld under section 552.110(b). However, the remaining information ESI seeks to withhold under section 552.110(b) is only general financial information, and ESI has only made conclusory assertions that the release of this information would cause substantial competitive injury. Therefore, no remaining portion of the proposal may be withheld under section 552.110(b).

Medco asserts that portions of its proposal, including its organization and personnel information, certain business methodologies regarding pricing, controlling costs, approving drugs, and evaluating claims, information related to its software programs, its implementation schedule, and specific pricing information are excepted from disclosure under subsections 552.110(a) and 552.110(b). Upon review of Medco's arguments and its proposal, we find that Medco has made a *prima facie* case that most of the information it seeks to withhold, including various business methods, details of performance reports, information pertaining to its disease management program, its financial proposal, a portion of its installation plan, and client and reference lists, are trade secrets for purposes of section 552.110(a). We have received no arguments to rebut these claims. Therefore, we find that the city must withhold this information, which we have marked under section 552.110(a). However, Medco has not demonstrated that any portion of the remaining information it seeks to withhold meets the definition of a trade secret. We therefore determine that none of the remaining information in the proposal is excepted from disclosure under section 552.110(a). Medco has made a specific factual showing that release of a portion of its pricing information, including formulary rebates, guarantees, rebate programs with drug manufacturers, and pricing terms would cause substantial competitive harm to Medco and that such information, which we have marked, is excepted from disclosure under section 552.110(b). However, Medco has only made general assertions that the release of the remaining information it seeks to withhold would cause the company substantial competitive injury. Therefore, no portion of the remaining information at issue may be withheld under section 552.110(b). *See* ORD 319 at 3.

PharmaCare asserts that its executive summary, memorandum of insurance, client list, cost sheet and financial proposal, questionnaire, information regarding its organization, and sample agreements are excepted from disclosure under subsections 552.110(a) and 552.110(b). Upon review of PharmaCare's arguments and its proposal, we find that PharmaCare has established a *prima facie* case that some of the information it seeks to withhold, which includes its executive summary, client list, sample agreements, and business methodologies, constitute trade secrets for purposes of section 552.110(a). We have received no arguments to rebut these claims. Therefore, the city must withhold the information we have marked under section 552.110(a). However, PharmaCare has not demonstrated that any

portion of the remaining information it seeks to withhold meets the definition of a trade secret. We therefore determine that no remaining portion of the proposal is excepted from disclosure under section 552.110(a). We also find that PharmaCare has made a specific factual showing that release of portions of its financial proposal would cause substantial competitive injury. Therefore, the city must withhold this information, which we have marked, under section 552.110(b). The remaining information, including information pertaining to PharmaCare's personnel and internal organization, is not excepted under section 552.110. *See* ORD 319 at 3.

Walgreens asserts that portions of its proposal, including personnel information, the executive summary, its client and subcontractor lists, the RFP questionnaire, performance guarantees and pricing information, cost information, sample contracts and reports, member surveys, information on clinical management programs, its formulary, and information on its disease management programs are excepted from disclosure under section 552.110(a). Upon review of Walgreens' arguments and its proposal, we find that Walgreens has established a *prima facie* case that its client list, the executive summary, the performance guarantee, the sample contract, and information pertaining to its clinical and disease management programs are trade secrets for purposes of section 552.110(a). We have received no arguments to rebut these claims. Therefore, the city must withhold this information, which we have marked, under section 552.110(a). However, we find that Walgreens has not demonstrated that any of the remaining information it seeks to withhold meets the definition of a trade secret. We therefore determine that no remaining portion of the proposal is excepted from disclosure under section 552.110(a).

We note that proposals submitted by Catalyst, ESI, Medco, PharmaCare, and Walgreens include insurance policy numbers. Section 552.136 of the Government Code provides that "[n]otwithstanding 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." Gov't Code § 552.136.² Accordingly, the city must withhold the policy numbers we have marked in the submitted proposals pursuant to section 552.136.

Lastly, we note that some of the information contained in the proposals is subject to copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

compliance with the copyright law and the risk of a copyright infringement suit. *See Open Records Decision No. 550 at 8-9 (1990).*

In summary, the city must withhold the information we have marked in each of the submitted proposals under subsections 552.110(a) and 552.110(b) of the Government Code. The city must also withhold the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code. The remaining information must be released to the requestor. However, in releasing the remaining information, the city must comply with copyright law.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Candice M. De La Garza
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Open Records Division

CMD/vh2

Ref: ID# 250046

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