



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2006

Mr. Dan Junnell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2006-10313

Dear Mr. Junnell:

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# 257065.

The Teacher Retirement System of Texas (the "system") received a request for a copy of the contract between the system and its pharmacy benefit manager ("PBM"). The requestor subsequently clarified his request to include the PBM contracts for both the system's retiree plan with Caremark, Inc. ("Caremark"), and its active member plan with Medco Health Solutions, Inc. ("Medco"). You state that the system has released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.104 and 552.107 of the Government Code. You also contend that release of some of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, that you notified Caremark and Medco of the request and of their right to submit arguments to this office as to why the information 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 under the Act in certain circumstances). We have received correspondence from attorneys for both Caremark and Medco. We have considered all of the exceptions claimed and reviewed the submitted information, consisting of the system's contract with Caremark, a Caremark contract amendment, the system's contract with Medco, and a Medco contract amendment.

As a preliminary matter, we note that this office previously issued Open Records Letter No. 2002-2450 (2002) in response to a request for a decision concerning some of the same information at issue in the current request. In Open Records Letter No. 2002-2450, we concluded that some of the information in the Medco contract was excepted from disclosure under section 552.110 of the Government Code, and some of the information was required to be released. You have submitted the Medco contract as Exhibits A1 and A2. You have provided documentation showing that in subsequent litigation involving Open Records Letter No. 2002-2450, in cause number GN 201655 the 261st Judicial District Court of Travis County, Texas, the court issued an agreed order pertaining to the information that was required to be released by Open Records Letter No. 2002-2450. The agreed order states, "if either [the system] or [Medco] timely provides the Attorney General with a copy of this order, the Attorney General will not view OR2002-2450 as a prior determination under Tex. Gov't Code § 552.301(f) as to the information at issue in this lawsuit." As both the system and Medco have timely provided our office with copies of the court order, we will not view Open Records Letter No. 2002-2450 as a previous

determination with respect to the information that was at issue in the lawsuit.⁽¹⁾ However, as you state that the remaining law, facts, and circumstances on which the prior ruling was based have not changed, you may continue to rely on Open Records Letter No. 2002-2450 as a previous determination to the extent that the submitted information in Exhibits A1 and A2 is not subject to the agreed order.

Next, we address the system's assertion that portions of the Medco contract, which it has highlighted in Exhibit A2, are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(2) excepts information from public disclosure if "a court by order has prohibited disclosure of the information." Gov't Code § 552.107(2). You state that the information the system has highlighted in Exhibit A2 reflects the information that our office ordered the system to release in Open Records Letter No. 2002-2450 and that was the subject of the agreed order in cause number GN 201655. You claim that this information is excepted from disclosure under section 552.107(2). We note, however, that the agreed order provides, among other things, that if the system provides our office with a copy of the agreed order, our office "will not view OR2002-2450 as a prior determination under Tex. Gov't Code § 552.301(f) as to the information at issue in this lawsuit." The agreed order does not prohibit disclosure of this information, but instead requires only that our office reevaluate the information, rather than releasing it pursuant to our previous determination in Open Records Letter No. 2002-2450. Having reviewed the agreed order and considered the system's arguments, we find that the order does not "prohibit[] disclosure of . . . information" for the purposes of section 552.107(2). Gov't Code § 552.107(2). We therefore conclude that the system may not withhold any of the information in Exhibits A1 and A2 on the basis of the agreed order under section 552.107(2).

Next, we address the system's claim that portions of the submitted Caremark contract in Exhibits B1 and B2 and the amendment in Exhibit B3 are excepted from 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." 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). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded and executed. Open Records Decision Nos. 541 (1990). However, this office has determined that in some circumstances, section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5.

You inform this office that the system, "as trustee, is responsible for the implementation and administration of the statewide healthcare benefits plan which involves contracting for group health coverage, including contracting with a pharmacy benefits manager." *See* Ins. Code § 1575.106(a) (contract to be awarded only through competitive bidding), (b) (trustee must submit each contract for competitive bidding at least every six years). You assert that release of the information at issue could "give a future prospective bidder an unfair competitive advantage if the system decides to issue a new RFP for pharmacy benefit services in less than one year." We acknowledge that this office has previously ruled that some of the information at issue was excepted from disclosure under section 552.104. However, upon careful reexamination of this information and the submitted arguments, we find that you have failed to demonstrate that public release of the information at issue would cause specific harm to the system's interests in a particular competitive bidding situation. Accordingly, we find that the system has failed to demonstrate the applicability of section 552.104 to the information at issue. Therefore, the system may not withhold the any of the information in Exhibits B1, B2, or B3 from required public disclosure under section 552.104.

Next, we address Medco's assertion that the remaining information in Exhibits A1, A2, and A3 is confidential pursuant to section 10 of the Medco contract, in which "the parties designated the contract, its terms, and the information contained therein as confidential, and each party agreed not to disclose

the information." We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. 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. *See Attorney General Opinion JM-672* (1987). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement or statement specifying otherwise. *See Gov't Code* § 552.302.

Both Caremark and Medco claim that portions of the remaining information are excepted from disclosure under section 552.110 of the Government Code. Caremark claims section 552.110 for the contract amendment in Exhibit B3, and Medco claims section 552.110 for the remaining information in the Medco contract and contract amendment, which consists of the remaining information in Exhibits A1, A2, and A3. Section 552.110 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. *Gov't Code* § 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is the following:

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. *Id.* ⁽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). 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). In this instance, Caremark asserts that portions of the information in Exhibit B3 constitutes trade secret information related to pricing.

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." 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). Medco asserts that the Medco contract and contract amendment contain "detailed descriptions of the design, operation, and specifications of Medco's proprietary programs for claims data management and for interfacing with customers, pharmacies and physicians." Medco also states that "if this information were disclosed, Medco's

competitors would be able to compete unfairly with Medco in a number of ways." Upon review of the information at issue and the submitted arguments, we find that Caremark has established that the information it seeks to withhold in Exhibit B3 constitutes trade secret information. Further, we conclude that Medco has established that some of the information in the contract amendment in Exhibit A3, which we have marked, consists of trade secrets or the release of the information would result in substantial competitive injury. However, Medco has failed to establish that any of the remaining information in Exhibits A1, A2, or A3 is excepted from disclosure under section 552.110. Therefore, the system must withhold the information we have marked in Exhibits B3 and A3 under section 552.110.

In summary, the system may continue to rely on Open Records Letter No. 2002-2450 as a previous determination to the extent that the in Exhibits A1 and A2 is not subject to the agreed order in cause number GN 201655. The system must withhold the information we have marked in the Caremark and Medco contract amendments in Exhibits B3 and A3 under section 552.110 of the Government Code. The remaining submitted information must be released.

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,

Shelli Egger
Assistant Attorney General

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Footnotes

1. The agreed order states:

The information at issue in this action consists of the following parts of the contract between [Medco] and the [system] . . . to provide certain pharmaceutical benefit management services for the [system]:

- a. §§ 6.1.2 - 6.1.12 and §§ 6.2, 6.2.1, 6.3, and 6.4;
- b. § 9.1.1;
- c. §§ 10.3 and 10.4;
- d. certain portions of § 11.1;
- e. §§ 13.1 - 13.5;
- f. §§ 16.7, 16.24, 16.25, and 16.26; and
- g. Schedule A, §§ 1.2, 1.A, 2.3, 3, and 3.3.

2. The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are the following: (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).

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