



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 5, 2009

Mr. Steve Aragon  
Chief Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2009-01540

Dear Mr. Aragon:

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# 332813.

The Texas Health and Human Services Commission (the "commission") received a request for any information regarding any commission contracts, proposals, and correspondence relating to McKesson Health Solutions L.L.C. ("McKesson"), including five specific categories of information. You state you have released some of the responsive information to the requestor. Although you take no position on the public availability of the submitted information, you indicate that the request may implicate the proprietary interests of a third party. You state that you have notified McKesson of the request and of its opportunity to submit comments to this office as to why this information should not be released. *See Gov't Code § 552.305(d)*; Open Records Decision No. 542 (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). An attorney representing McKesson has submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.

Initially, you assert that a portion of the request responsive to the category of requested e-mails has been withdrawn by operation of law because the requestor has failed to respond to an itemized cost estimate for copies of the responsive documents. *See Gov't Code § 552.2615*. Under section 552.2615, a governmental body is required to provide a requestor with an estimate of charges when a request to inspect a paper record will result in the imposition of a charge that will exceed forty dollars. *See id.* The relevant portion of section 552.2615 provides:

(a) [T]he governmental body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

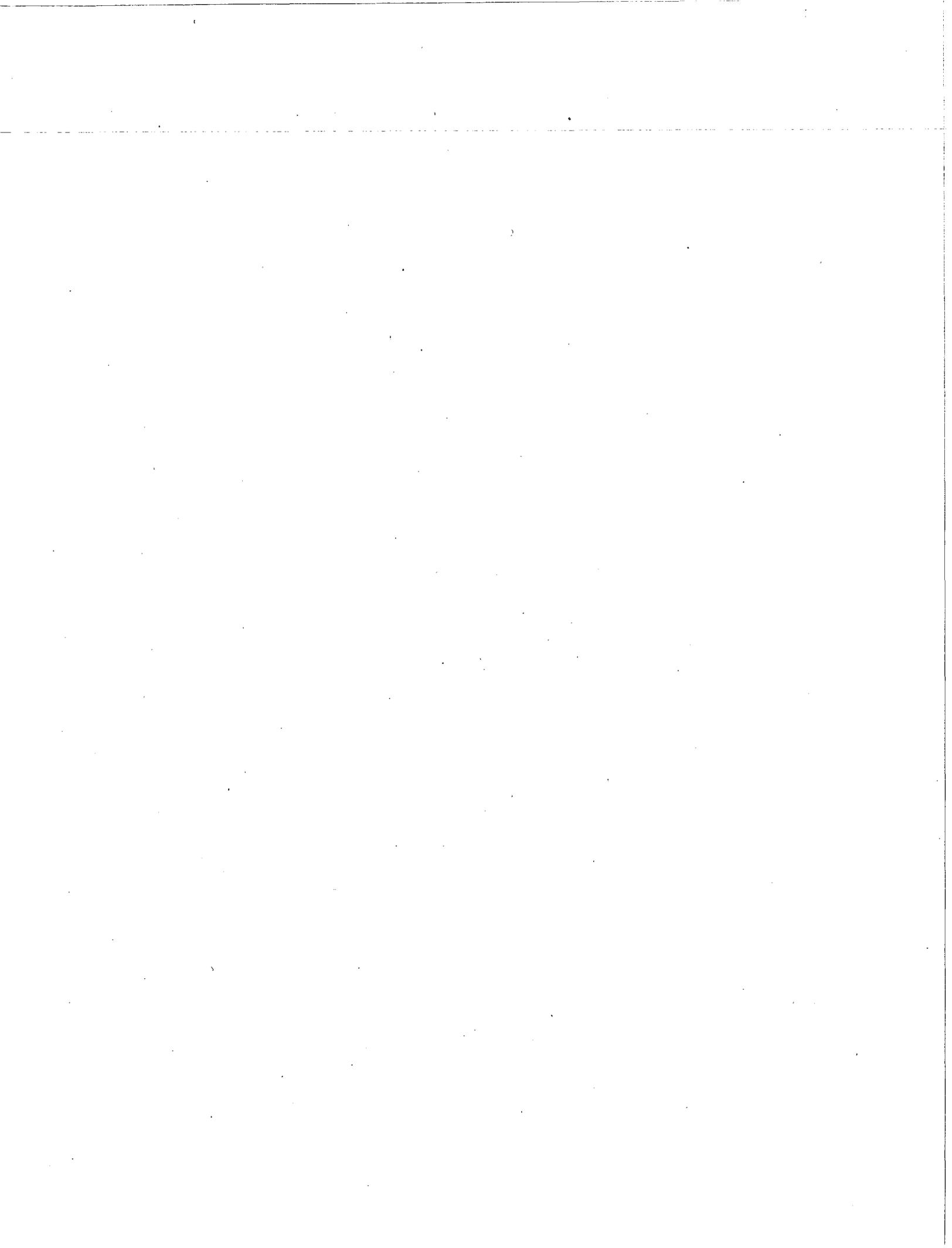
(b) A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 days after the date the statement is sent to the requestor that

(1) the requestor will accept the estimated charge;

(2) the requestor is modifying the request in response to the itemized statement; or

(3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of public information.

*Id.* § 552.2615(a), (b). You state, and provide supporting documentation, that you provided the requestor with an itemized cost estimate for information responsive to the category of requested e-mails. Upon review, we agree that the cost estimate complies with the requirements of section 552.2615. Further, you state that the requestor did not respond to the issued estimate in accordance with section 552.2615. Accordingly, we agree that section 552.2615(b) is applicable as to this category of requested information, and the commission need not provide the requestor with this information.



You acknowledge, and we agree, that the commission did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). A governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). A compelling interest exists when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). In this instance, because third-party interests can provide a compelling reason to withhold information, we will address whether the submitted information is excepted from disclosure under the Act:

Next, we address McKesson's arguments against release of the submitted information. McKesson raises section 552.110 of the Government Code for portions of the submitted information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information, the release of which would cause a third party substantial competitive harm. Gov't Code. § 552.110(a)-(b). Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." *Id.* § 552.110(a). 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 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 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 Huffines*, 314 S.W.2d at 776. 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.<sup>1</sup> This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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. *See* 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). 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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

McKesson claims section 552.110(a) for portions of its submitted information. Having considered McKesson’s arguments, we conclude it has established a *prima facie* case that the majority of its “Disease Management Claims Reporting,” which we have marked, constitutes a trade secret. Therefore, the commission must withhold the portions of the documents we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that McKesson has published details concerning its disease management and nurse triage programs on its website. Thus, McKesson has not demonstrated it considers the information published on its website confidential. Further, McKesson has not shown how any portion of the remaining information it seeks to withhold, which consists of general company information, status reports and updates, and other information particular to its work for Texas, constitutes a trade secret. *See* 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, we find McKesson has failed to demonstrate how any portion of the remaining information it seeks to withhold constitutes a trade secret. Therefore, we determine that no portion of the remaining information is excepted from disclosure under section 552.110(a).

McKesson also argues section 552.110(b) for portions of its remaining information. Upon review, we find McKesson has established that release of portions of its “Care Enhance

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<sup>1</sup>The following are the six factors that the Restatement gives 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 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).

Disease Management Program Description” would cause it substantial competitive harm. Therefore, the commission must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find McKesson has failed to provide specific factual evidence demonstrating that release of any of its remaining information at issue would result in substantial competitive harm to the company. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We also note that the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We therefore conclude that the commission must only withhold the information we have marked under section 552.110(b) of the Government Code.

In summary, the commission must withhold the information we have marked under section 552.110. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/cc

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Ref: ID# 332813

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)