ATTORNEY GENERAL OF TEXAS
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May 1, 2013

Mr. J. Scott Wilson
In-House Counsel
TML Intergovernmental Employee Benefits Pool
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OR2013-07208

Dear Mr. Wilson:

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# 487118.

The Public Employee Benefits Alliance ("PEBA") received a request for scoring and evaluation information relating to its award of a specified contract, excluding any information pertaining to CVS Caremark. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Additionally, you state release of the submitted information may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, that PEBA notified Restat, OptumRx, Inc. (formerly Prescription Solutions) ("Optum"), PTRx, Catamaran (formerly InformedRx), LDI Integrated Pharmacy Services, Inc. ("LDI"), WelldyneRx, Inc. ("Welldyne"), and Navitus Health Solutions ("Navitus") of the request for information and of their right to submit arguments stating why their information should not be released. *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 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). We have received comments from Restat, Catamaran, and Welldyne, as well as representatives of Optum. We have considered the submitted arguments and reviewed the submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received correspondence from PTRx, LDI, or Navitus.

Therefore, we have no basis to conclude that these third parties have protected proprietary interests in the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, PEBA may not withhold any portion of the submitted information based upon the proprietary interests of PTRx, LDI, or Navitus.

Next, we note Welldyne objects to the disclosure of the names and titles of certain personnel which are not contained in the documents PEBA has submitted to this office for review. This ruling does not address information that was not submitted by PEBA and is limited to the information submitted as responsive by PEBA. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

We first address the submitted arguments under section 552.110 of the Government Code. Although PEBA raises section 552.110 of the Government Code, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address PEBA's arguments under section 552.110 of the Government Code.

Restat, Optum, Catamaran, and Welldyne argue portions of their submitted information are confidential under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

> may consist of 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 single or ephemeral events in the conduct of the business, as, for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
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> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (4) the value of the information to [the company] and to [its] competitors;
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> (5) the amount of effort or money expended by [the company] in developing the information; and
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> (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* ORD 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 2. However, we cannot conclude 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) protects "[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 information at issue. *Id.* § 552.110(b); ORD 661 at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Restat, Optum, Catamaran, and Welldyne claim portions of their information contain trade secrets that should be protected by section 552.110(a) of the Government Code. We note

pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Having reviewed their arguments, we find Restat, Optum, Catamaran, and Welldyne failed to demonstrate how any of their information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Thus, PEBA may not withhold any of the submitted information under section 552.110(a).

Restat, Optum, Catamaran, and Welldyne assert portions of their information are confidential under section 552.110(b). Upon review, we find Restat, Optum, Catamaran, and Welldyne have demonstrated portions of their respective information at issue, including their pricing, rate, operational, management, and performance guarantee information, constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, PEBA must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we note Welldyne has published some of the remaining information it seeks to withhold, including information on the size of its network, on its website, making this information publically available. Because Welldyne has published this information, it has failed to demonstrate how release of this information would cause it substantial competitive injury. We find Restat, Optum, Catamaran, and Welldyne have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *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), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience).

Optum claims its information is excepted 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." Gov't Code § 552.104. Section 552.104, however, 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). As PEBA does not argue section 552.104 is applicable in this instance, we conclude none of Optum's information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Optum further claims its information is excepted under section 552.111 of the Government Code. Section 552.111 encompasses the deliberative process privilege, which excepts from disclosure "[a]n interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. Section 552.111 is a discretionary exception to public disclosure that protects a governmental body's interests, not those of a third party, and may be waived. *See id.* § 552.007; Open Records Decision No. 663 at 5 (1999) (governmental body may waive section 552.111). Therefore, because PEBA does not raise section 552.111 for the information at issue, this information may not be withheld under the deliberative process privilege.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Restat argues portions of its remaining information fit the definition of a trade secret found in section 1839(3) of title 18 of the United States Code, and indicates this information is therefore confidential under sections 1831 and 1832 of title 18 of the United States Code. *See* 18 U.S.C. §§ 1831, 1832, 1839(3). Section 1839(3) provides in relevant part:

> (3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes . . . if-
>
> > (A) the owner thereof has taken reasonable measures to keep such information secret; and
> >
> > (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public[.]

Id. § 1839(3). Section 1831 provides criminal penalties for the unauthorized disclosure of trade secrets to foreign governments, instrumentalities, or agents. *Id.* § 1831. Section 1832 provides criminal penalties for the unauthorized appropriation of trade secrets related to products produced for or placed in interstate or foreign commerce. *Id.* § 1832. We find Restat has not demonstrated any of their remaining information at issue is a trade secret under section 1839(3). Accordingly, we need not determine whether section 1831 or section 1832 applies, and PEBA may not withhold any of the remaining information under section 552.101 on those bases.

PEBA generally asserts that the submitted information is excepted under section 552.101 of the Government Code. However, you have not directed our attention to, and we are not aware of, any law under which any of the remaining information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1

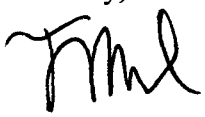
(1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, we conclude that PEBA may not withhold any of the remaining information under section 552.101.

In summary, PEBA must withhold the marked information under section 552.110 of the Government Code. The remaining information must be released.

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, 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, toll free at (888) 672-6787.

Sincerely,



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TN/dls

Ref: ID# 487118

Enc. Submitted documents

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