



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 25, 2004

Ms. Sylvia N. Salazar  
Assistant General Counsel  
Employees Retirement System of Texas  
P. O. Box 13207  
Austin, Texas 78711-3207

OR2004-9080

Dear Ms. Salazar:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211559.

The Employees Retirement System of Texas (the "system") received a request for information concerning the system's pharmacy benefit management services contract with Medco Health Solutions, Inc. ("Medco"). You state that the system will provide the requestor with some of the requested information. You claim that the remaining requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, and 552.110 of the Government Code. You also state that the remaining requested information may implicate the proprietary interests of Medco. Pursuant to section 552.305(d) of the Government Code, the system notified Medco of the request and of Medco's right to submit arguments to this office as to why any portion of the remaining requested information should not be released to the requestor. *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 Public Information Act (the "Act") in certain circumstances). We have considered all arguments and have reviewed the submitted information.

Initially, we note that Medco seeks to withhold information that the system has not submitted to us for review. Accordingly, we conclude that this ruling does not address the arguments submitted to us by Medco pertaining to information that has not been submitted to us by the system for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body seeking

attorney general's opinion under Act must submit copy or representative samples of specific information requested).

Next, we note that we previously addressed the public availability of portions of the submitted information in Open Records Letter No. 2001-4296 (2001). Specifically, we ruled in that decision in part that the system must withhold the information that we marked pursuant to section 552.110. You do not inform us, nor are we aware, of any changes with regard to the law, facts, and circumstances on which that ruling was based. Accordingly, we conclude that the system must continue to follow on our decision in Open Records Letter No. 2001-4296 with respect to the portions of the information submitted in this instance that we ruled in that decision to be withheld pursuant to section 552.110 of the Government Code. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

In addition, we note that portions of the remaining submitted information are currently the subject of a lawsuit pending against the Office of the Attorney General (the "attorney general"). *See Medco Health Care Solutions Inc. v. Greg Abbott*, Cause No. GN103280, 200<sup>th</sup> District Court of Travis County, Texas. We also note that Medco's arguments in the present request for a decision correspond to the arguments concerning the pending litigation of the prior ruling. Accordingly, we are closing our file with regard to these particular portions of the remaining submitted information without issuing a decision and will allow the trial court to determine whether the types of information at issue must be released to the public.

You claim that the remaining submitted information, or portions thereof, is excepted from disclosure pursuant to section 552.101 of the Government Code. Section 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101; *see also* Open Records Decision Nos. 611 at 1 (1992) (relating to common-law privacy), 600 at 4 (1992) (relating to constitutional privacy), 478 at 2 (1987) (relating to statutory confidentiality). We note, however, that you have not asserted any law, and we are not aware of any law, that makes any portion of the remaining submitted information confidential for purposes of section 552.101. Accordingly, we conclude that the system may not withhold any portion of the remaining submitted information under section 552.101 of the Government Code.

Medco claims that the remaining submitted information, or portions thereof, is 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 system 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 system may not withhold any portion of the remaining submitted information pertaining to Medco under section 552.104 of the Government Code.

Medco also claims that the remaining submitted information is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 of the Government Code 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. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 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;

- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). 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. Open Records Decision No. 552 (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) 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Based on our review of Medco’s arguments and the remaining submitted information, we find that Medco has sufficiently demonstrated that portions of this information constitute trade secret information for purposes of section 552.110(a) and we have received no argument that rebuts this claim as a matter of law. Accordingly, we determine that the system must withhold the portions of the remaining submitted information that we have marked pursuant to section 552.110(a) of the Government Code. We also find that Medco has adequately demonstrated that portions of the remaining submitted information constitute commercial and financial information, the release of which would cause Medco substantial competitive harm for purposes of section 552.110(b). Accordingly, we determine that the system must withhold the information that we have marked pursuant to section 552.110(b) of the Government Code. However, we also find that no portion of the remaining submitted information constitutes trade secret information or commercial or financial information, the

release of which would cause Medco substantial competitive harm under section 552.110. Consequently, the system may not withhold any other portion of the remaining submitted information under section 552.110 of the Government Code. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110 and that pricing proposals are entitled to protection only during bid submission process), 184 (1978).

In summary, the system must continue to follow Open Records Letter No. 2001-4296 as a previous determination with respect to the portions of the submitted information that we previously ruled were excepted under section 552.110 of the Government Code. We are closing our file with regard to the portions of the remaining submitted information that are the subject of a lawsuit pending against the attorney general without issuing a decision and will allow the trial court to determine whether the types of information at issue must be released to the public. The system must withhold the marked portions of the remaining submitted information pursuant to section 552.110 of the Government Code. The system must release the remaining submitted information at issue to the requestor.

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,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/RJB/krl

Ref: ID# 211559

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