



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 1, 2010

Ms. Laura Garza Jimenez  
Nueces County Attorney  
901 Leopard, Room 207  
Corpus Christi, Texas 78401-3680

OR2010-04626

Dear Ms. Jimenez:

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# 374514.

The Nueces County Hospital District (the "district") received a request for information pertaining to a specified request for proposals, including all bid responses. You state you will release some of the requested information to the requestor. Although you take no position with respect to the remaining information, you state release of the information may implicate the proprietary interests of several third parties. Accordingly, you state, and provide documentation showing, you notified the interested third parties of the district's receipt of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the requestors.<sup>1</sup> See Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted information and considered the submitted arguments.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if

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<sup>1</sup>The interested third parties are: PBM Plus, Inc. ("PBM"); Walgreens Health Initiatives, Inc. ("Walgreens"); Script Care, Ltd. ("Script Care"); Ramsell Public Health Rx, MedImpact Healthcare Systems, Inc.; and Serve You Custom Prescription Management, Inc.

any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only PBM, Walgreens, and Script Care have submitted to this office reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude they have protected proprietary interests in the submitted information. Accordingly, the district may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in this information. *See* 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), 542 at 3.

We understand Script Care to assert that its employees' information is excepted from disclosure under constitutional privacy. 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. Section 552.101 encompasses constitutional privacy, which consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. *See Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find Script Care has not demonstrated how any of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the district may not withhold any of Script Care's information under section 552.101 on the basis of constitutional privacy.

Walgreens argues that its information is excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note that section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 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 the district does not raise section 552.104, this section is not applicable to any portion of the submitted information. *See* ORD 592 (section 552.104 may

be waived by governmental body). Therefore, the district may not withhold any of Walgreens's information under section 552.104 of the Government Code.

Walgreens and Script Care both argue, and we understand PBM to assert, that portions of their information are excepted from disclosure 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. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets 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. 1957); *see also* Open Records Decision No. 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 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); *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>2</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a

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<sup>2</sup>The 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.

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. 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.*; *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

In asserting that its information should be excepted from disclosure, Walgreens relies on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 770. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, in making our determinations under section 552.110, we will consider only Walgreens’s interest in its information.

Upon review, we find that PBM, Walgreens, and Script Care have established a *prima facie* case that their customer information constitutes trade secrets. We also find that Script Care has demonstrated that additional portions of its proposal constitute protected trade secrets. Thus, the district must withhold the information we have marked in PBM’s, Walgreens’s,

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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).

and Script Care's proposals under section 552.110(a). We note, however, that Walgreens has made some of the customer information it seeks to withhold publicly available on its website. Because Walgreens has published this information, it has failed to demonstrate that this information is a trade secret and none of this information may be withheld under section 552.110(a). Additionally, we find PBM, Walgreens, and Script Care have failed to establish how any of their remaining information constitutes trade secrets under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"). Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Upon review, we find PBM and Walgreens have established that their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, the district must withhold the information we have marked in PBM's and Walgreens's proposals under section 552.110(b) of the Government Code. Although Script Care also specifically argues against disclosure of its pricing information, we note Script Care was the winning bidder in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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). Furthermore, we find PBM, Walgreens, and Script Care have made conclusory or generalized allegations or failed to provide specific factual evidence demonstrating that release of any of the remaining information at issue would result in substantial competitive harm to their interests. *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 (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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, we determine that no portion of the remaining information at issue is excepted from disclosure under section 552.110(b) of the Government Code.

We note that some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In

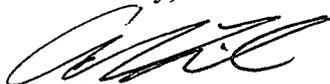
making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the district must withhold the information we have marked under subsections 552.110(a) and 552.110(b) of the Government Code. The remaining information must be released to the requestor, but any information that is protected by copyright may only be released in accordance with copyright law.

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

Sincerely,



Adam Leiber  
Assistant Attorney General  
Open Records Division

ACL/rl

Ref: ID# 374514

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

cc: Mr. Klaus Hieber, President  
PBM Plus, Inc.  
300 TechneCenter Drive, Suite B  
Milford, Ohio 45150  
(w/o enclosures)

Mr. Ken Daniel  
Vice President, Sales  
Walgreens  
11000 Corporate Center Drive, Suite 100  
Houston, Texas 77041  
(w/o enclosures)

Ms. Sophia Byndloss  
President  
Ramsell Public Health Rx  
200 Webster Street, Suite 200  
Oakland, California 94607  
(w/o enclosures)

Mr. Kevin J. Brown  
Vice President, Sales & Marketing  
Script Care, Ltd.  
6380 Folsom Drive  
Beaumont, Texas 77706  
(w/o enclosures)

Mr. Mark Dunlap  
Regional Sales Executive  
MedImpact Healthcare Systems, Inc.  
17061 Westridge Oaks Drive  
Grover, Missouri 63040  
(w/o enclosures)

Ms. Charmane Walden  
Sales Executive  
Serve You Custom Prescription Management, Inc.  
773 Rockdale Drive  
Dallas, Texas 75220  
(w/o enclosures)