ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 26, 2010

Mr. Wm. Clarke Howard
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2010-11132

Dear Mr. Howard:

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# 392918.

The Teacher Retirement System (the "system") received four requests for all proposals submitted in response to request for proposals number 323-PBM-09ML and all materials used to evaluate the proposals. Two of the requestors also seek the contract relating to this request for proposals.[1] You state you do not have portions of the requested information.[2] You claim portions of the submitted information are excepted from disclosure under sections 552.104, 552.111, and 552.136 of the Government Code. You also state release of the requested information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you notified Caremark, LLC ("Caremark"), Express Scripts, Inc. ("Express"), Prime Therapeutics, LLC. ("Prime"), Humana, Inc. ("Humana"), and Medco Health Solutions, Inc. ("Medco") of the requests and of their right to submit arguments to this office as to why their 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 Act in certain circumstances). We have received comments from Caremark, Express, Prime,

[1]We note the system sought and received clarification of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request).

[2]We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

and Humana. We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge these requests for information were ruled upon in Open Records Letter No. 2010-08904 (2010). In that ruling we determined the system may withhold some information under sections 552.104 and 552.111 of the Government Code, and the system must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy, and sections 552.110 and section 552.136 of the Government Code. You now submit additional responsive information pertaining to Prime. You acknowledge the system failed to meet the deadline prescribed by section 552.301(e) of the Government Code in requesting an open records decision from this office with respect to the newly submitted information. *See* Gov't Code § 552.301(e). Pursuant to section 552.302 of the Government Code, 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; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Because third-party interests are at stake, we will address Prime's arguments against the disclosure of the newly submitted information. However, you must continue to follow Open Records Letter No. 2010-08904 with respect to the remaining requested information.

Prime raises section 552.110 of the Government Code for portions of its proposal. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. 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." Gov't Code § 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 No. 552 at 5 (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.[3] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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). We note that 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 the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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 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).

After reviewing the arguments submitted by Prime and the information at issue, we conclude Prime has demonstrated its client information constitutes a trade secret for purposes of section 552.110(a). Accordingly, the system must withhold the information we have marked under section 552.110(a). However, Prime has not demonstrated its remaining information at issue consists of trade secrets. Thus, the system may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

Next, Prime claims release of specific portions of its remaining information would cause the company specific harm. Upon review, we find Prime has established release of some of its

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[3]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).

remaining information would cause the company substantial competitive harm. Accordingly, the system must withhold the information we have marked in the remaining information under section 552.110(b). However, we find Prime has failed to provide specific factual evidence demonstrating that release of any of the 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), 509 at 5 (1988) (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 is too speculative), 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). Accordingly, the system may not withhold any of the remaining information at issue pursuant to section 552.110(b) of the Government Code.

We note the remaining information contains information protected by common-law 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."[4] Gov't Code § 552.101. This section encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), rev'd on other grounds, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Upon review, we find portions of the remaining information are highly intimate and not of legitimate public interest. Accordingly, the system must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

In summary, except for the newly submitted information pertaining to Prime, the system must continue to follow our ruling in Open Records Letter No. 2010-08904. With respect to the submitted information, the system must withhold the information we have marked

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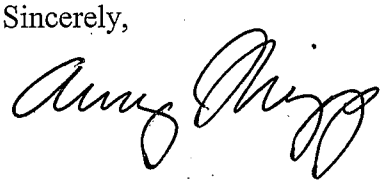
[4]The Office of the Attorney General will raise a mandatory exception like section 552.101 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

under section 552.110 of the Government Code and the information we have marked under section 552.101 in conjunction with common-law privacy. The remaining submitted 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,



Amy L.S. Shipp
Assistant Attorney General
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ALS/eeg

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Enc. Submitted documents

c: Requestor
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