



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2011

Ms. Winifred H. Dominguez
Counsel for Ysleta Independent School District
Walsh, Anderson, Brown, Gallegos and Green, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2010-17200A

Dear Ms. Dominguez:

This office issued Open Records Letter No. 2010-17200 (2010) on November 15, 2010. We have examined this ruling and determined that we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on November 15, 2010. Your request was assigned ID# 408805.

The Ysleta Independent School District (the "district"), which you represent, received a request for information pertaining to the district's request for proposals for Employee Health Benefits Plan Services. You state the submitted information may be excepted from disclosure under section 552.110 of the Government Code but make no arguments in support of this exception. You also state the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified the following third parties: Aetna Life Insurance Company ("Aetna"); Assured Benefits Administrators ("Assured"); Blue Cross and Blue Shield of Texas ("BCBS"); CBCA Administrators, Inc. ("CBCA"); HealthScope Benefits ("HealthScope"); HealthSmart; and Medco Health Solutions, Inc. ("Medco") of the request and of each company's right to submit arguments to this office as to why its 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 Aetna, BCBS, HealthScope, HealthSmart, and Medco. We have also received and considered arguments submitted by Express Scripts, Inc. ("Express").¹ *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us some of the submitted information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2010-09617 (2010). In that ruling, we determined the district must withhold the portions of Aetna's, Assured's, BCBS's, and CBCA's information we marked under section 552.110 of the Government Code and withhold the information we marked under section 552.136 of the Government Code but must release the remaining information in accordance with copyright law. We note that in subsequent litigation involving Open Records Letter No. 2010-09617, *Health Care Service Corporation v. Greg Abbott*, No. D-1-GN-10-002441 (98th Dist. Ct., Travis County, Tex.), the court issued an Agreed Final Judgment pertaining to BCBS's information. Thus, the district must continue to rely on the Agreed Final Judgment to release or withhold the information pertaining to BCBS. We further note the portion of CBCA's information pertaining to Caremark, L.L.C. ("Caremark"), is currently the subject of a lawsuit pending against the Attorney General: *Caremark, L.L.C. v. Greg Abbott*, No. D-1-GN-10-002388 (261st Dist. Ct., Travis County, Tex.). We will not address whether the information at issue in this lawsuit is excepted from required public disclosure under the Act, but will instead allow the trial court to determine whether this information must be withheld from the public. Further, except for the information pertaining to BCBS, Caremark, and Express, as we have no indication that there has been any change in the law, facts, or circumstances on which this previous ruling was based, the district must continue to rely on Open Records Letter No. 2010-09617 with respect to the remaining information at issue in this prior ruling. However, we will consider Medco's information, as this information was not previously ruled upon, as well as Express' arguments.²

Medco and Express raise section 552.110 of the Government Code for portions of their submitted information. 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

¹Express informs us it submitted a proposal to the district through its third-party administrator, HealthScope, and was awarded the resulting contract.

²We note Medco was the requestor in Open Records Letter No. 2010-09617, and another third party, Serve You Custom Prescription Management, is the requestor in the present request.

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 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.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).

³The 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).

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).

Upon review, we conclude Express has established a *prima facie* case that its client references and pricing methodology constitute trade secret information, and the district must withhold the information we have marked under section 552.110(a) of the Government Code. However, we conclude Medco and Express have failed to establish that any of the remaining information at issue meets the definition of a trade secret, nor have Medco and Express demonstrated the necessary factors to establish a trade secret claim for the information at issue. We note pricing information pertaining to a particular proposal or 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Thus, the district may not withhold any portion of the remaining information under 552.110(a) of the Government Code.

Upon review, we also conclude Medco has established that release of its pricing information would cause the company substantial competitive harm. Accordingly, the district must withhold the information we have marked under section 552.110(b). However, we find Medco and Express have failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to the companies. *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, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder, such as Express, 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). Accordingly, the district may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

We note the remaining submitted information contains an insurance policy number that is excepted from disclosure under section 552.136 of the Government Code.⁴ Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). This office has determined that insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Accordingly, the district must withhold the insurance policy number we have marked under section 552.136 of the Government Code.⁵

Finally, we note some of the materials at issue are 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the district must continue to rely on the Agreed Final Judgment to release or withhold the information pertaining to BCBS. We will not address whether the information at issue in the lawsuit pending against this office is excepted from required public disclosure under the Act, but will instead allow the trial court to determine whether this information must be released to the public. Except for the information pertaining to BCBS, Caremark, and Express, the district must continue to rely on Open Records Letter No. 2010-09617 with respect to the remaining information at issue in this prior ruling. The district must withhold Express’ information we have marked under section 552.110(a) of the Government Code and Medco’s information we have marked pursuant to section 552.110(b) of the Government Code. The district also must withhold the insurance policy number we have marked pursuant to section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁵We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 400069

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Rodney Napier
CBCA Administrators, Inc.
250 Civic Center Drive, Suite 350
Columbus, Ohio 43215
(w/o enclosures)

Mr. Chuck Stevens
Medco Health Solutions, Inc.
100 Parsons Pond Drive
Franklin Lakes, New Jersey 07417
(w/o enclosures)

Ms. Melissa J. Copeland
Schmidt & Copland LLC
for Healthscope Benefits
P.O. Box 11547
Columbia, South Carolina 29211
(w/o enclosures)

Ms. Brook A. Spence
GreenbergTraurig
for Blue Cross Blue Shield of Texas
1000 Louisiana Street, Suite 1700
Houston, Texas 77002
(w/o enclosures)

Mr. Mark Chulick
Aetna Life Insurance Company
2777 Stemmons Freeway
Dallas, Texas 75207
(w/o enclosures)

Mr. Joseph R. Halow
Assured Benefits Administrators
4100 Rio Brave, Suite 211
El Paso, Texas 79902
(w/o enclosures)

Ms. Sarah A. Brown
Healthsmart
222 West Las Colinas Boulevard, Suite 600N
Irving, Texas 75039
(w/o enclosures)