



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



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GREG ABBOTT

August 26, 2008

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

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

OR2008-11771

Dear Ms. Salazar:

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# 320117.

The Employees Retirement System of Texas (the "system") received requests for the submitted responses to the Pharmacy Benefits Management proposal, the evaluations, and the executed contract between the system and Caremark, L.L.C. ("Caremark"). The system states it will provide some information to the requestors. The system claims the submitted proposals are excepted from disclosure under section 552.110 of the Government Code.<sup>1</sup> In addition, you believe the request for information may implicate the privacy or proprietary interests of Catalyst Rx ("Catalyst"), Prime Therapeutics LLC ("Prime"), Medco Health Solutions, Inc. ("Medco"), and Caremark. The system states and provides documentation showing, that it has notified the third parties of the requests for information and of their right to submit arguments to this office as to why the requested information should not be released. *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 received arguments from Catalyst, Prime, Medco, and Caremark. We have considered these arguments and reviewed the submitted sample of information.<sup>2</sup>

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<sup>1</sup>Although you also raise section 552.101 of the Government Code, you have provided no argument explaining how this exception is applicable to the submitted information. Therefore, the system may not withhold the information under this exception. *See* Gov't Code §§ 552.301, .302.

<sup>2</sup>We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

First, Catalyst claims its proposal is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure information that, if released, would give an advantage to a competitor or bidder. Gov't Code § 552.104. Section 552.104 is a discretionary exception that protects only the interests of a governmental body as distinguished from exceptions which 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 submitted information to the government), 522 (1989) (discretionary exceptions in general). Because the system did not assert section 552.104, the system may not withhold Catalyst's information pursuant to section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

The system, Catalyst, Prime, Medco, and Caremark claim the information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: 1) trade secrets and 2) commercial or financial information the release of which would cause a third party substantial competitive harm. Gov't Code § 552.110.

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* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

Upon review, we determine that Catalyst, Prime, and Medco have demonstrated, based on a specific factual or evidentiary showing, that release of the information we marked would likely result in substantial competitive harm. However, we determine these companies failed to make such a showing for the remaining information. In addition, Caremark seeks to withhold its pricing, rebates, and guarantees under section 552.110(b). Because Caremark is the winning bidder, its pricing and cost information, which are incorporated into the contract, are not excepted from disclosure under section 552.110(b). The pricing information of a winning bidder is generally not excepted under section 552.110(b) because we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 319 at 3 (1982) (information relating to pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* 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).

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.” *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.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.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person’s claim for exception as valid under that branch if that person establishes a *prima facie* case for exception, and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition

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<sup>3</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.

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).

of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

After review of the remaining information, we conclude the companies have not established a prima facie case that the remaining information they seek to withhold is excepted under section 552.110(a) as trade secrets. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

We note a portion of the submitted information contains insurance policy numbers. Section 552.136 of the Government Code 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. Accordingly, the system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, some of the submitted information is copyrighted. 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 system must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The system must release the remainder; however, in releasing the information that is copyrighted, the system must comply with applicable copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/mcf

Ref: ID# 320117

Enc. Marked documents

c: Mr. Paul Blissenbach  
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CAUSE NO. D-1-GN-08-003359

CAREMARK, L.L.C.,  
*Plaintiff,*

v.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS,  
*Defendant.*

§ IN THE DISTRICT COURT  
§  
§  
§ 345th JUDICIAL DISTRICT  
§  
§  
§ TRAVIS COUNTY, TEXAS

Filed in The District Court  
For Travis County, Texas

JL JUL 07 2013  
At 2:23 P.M.  
Angela Rodriguez-Mendoza, Clerk

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff

Caremark, L.L.C., (Caremark) and Defendant Greg Abbott, Attorney General of Texas, (Attorney General) appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff Caremark to challenge Letter Ruling OR2008-11771 (the "Ruling"). The Employees Retirement System of Texas (ERS) received separate requests from Prime Therapeutics, LLC, Medco, Raymond James & Associates, Casey Cabalquinto of Change to Win, Onvia, Inc., Catalyst Rx, Market Analytics International, and Wellpoint NextRx (the "Requestors") for information pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain documents submitted to ERS by Caremark. These documents contain information designated by Caremark as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA (Caremark Information). ERS requested a ruling from the Open Records Division of the Office of the Attorney General (ORD). ORD subsequently issued the Ruling, ordering the release of the Caremark Information. ERS holds the information that has been ordered to be disclosed.

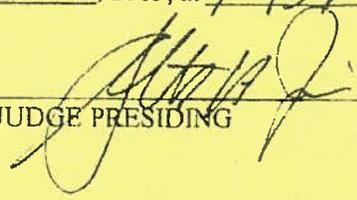
The parties represented to the Court that: (1) pursuant to Tex. Gov't Code §

552.327(2) the Attorney General has determined and represents to the Court that all Requestors have in writing voluntarily withdrawn their requests for information (in the case of Market Analytics International, only to the extent any Caremark-related information was sought by its request), (2) in light of these withdrawals the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

**IT IS THEREFORE ORDERED** that:

1. Because the request was withdrawn to the extent they seek the Caremark Information, no Caremark information should be released in reliance on Letter Ruling OR2008-11771. Letter Ruling OR2008-11771 should not be cited for any purpose as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the signing of this Final Judgment, the Office of the Attorney General shall notify ERS in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct ERS that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2008-11771 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any Caremark information in reliance on said Ruling, and if ERS receives any future requests for the same or similar Caremark Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2008-11771.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on July 2, 2013, at 1:43 P m.

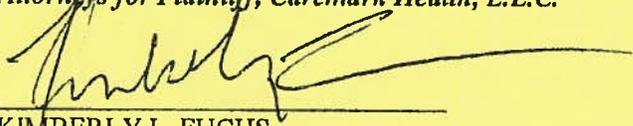
  
\_\_\_\_\_  
JUDGE PRESIDING

AGREED:



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*Attorneys for Plaintiff, Caremark Health, L.L.C.*



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*Attorney for Defendant, Greg Abbott*