



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.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 17, 2010

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

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

OR2010-08904

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# 381802.

The Teacher Retirement System (the "system") received three 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 submitted 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

¹We 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).

²We 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 dismissed); Open Records Decision No. 452 at 3 (1986).

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

The system and Caremark both argue portions of the submitted information are excepted under section 552.104 of the Government Code. Section 552.104 only protects the interests of a governmental body and does not protect the interests of third parties; therefore, we will not consider Caremark's claim under section 552.104. *See* Open Records Decision No. 592 at 9 (1991). However, we will address the system's claim under section 552.104 for the information it has marked. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* ORD 592. Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated that the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates that public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

You state the system serves as trustee for two health benefits plans and routinely issues requests for proposals for pharmacy benefit manager services. You acknowledge a contract has been executed for the pharmacy benefit manager proposals at issue. You explain the contracts for these two health benefit plans are two year contracts that are renewable annually for an additional four years. You note, however, the contracts at issue may not be renewed, and the system would have to issue a request for proposals within the next year for pharmacy benefit manager services. You explain the information at issue includes fees, rates, pharmaceutical provider discounts, and other unit pricing information. You state release of this information will provide competing vendors with amounts the system is willing accept. You also state the competing vendors could use the information you have marked to undercut future bidding processes. Based on your representations and our review of the information

at issue, we agree the system may withhold the information you have marked under section 552.104 of the Government Code.³

You assert the remaining information in Exhibits 2 through 4 is excepted under section 552.111 of the Government Code, which excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body’s policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body’s policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Section 552.111 can also encompass communications between a governmental body and a third-party, including a consultant or other party with a privity of interest. *See* Open Records Decision No. 561 at 9 (1990) (section 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process). For section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable

³As ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See id.*

You assert the remaining information in Exhibits 2 through 4 relates to the evaluation of the proposals. You state Exhibits 2 and 4 were created by the personnel and agents of the system in a deliberative process aimed at providing advice, opinion, and recommendations on a policymaking decision. You also assert Exhibit 3 contains opinions and recommendations and "should be withheld as constituting inextricably intertwined factual information relating to the evaluation materials" in Exhibits 2 and 4. After review of your arguments and the documents at issue, we agree the system may withhold the information we have marked under section 552.111 of the Government Code. However, we find you have not established that the remaining information at issue consists of advice, opinions, and recommendations of the system. Therefore, the system may not withhold the remaining information at issue under section 552.111.

You state the submitted information contains insurance policy numbers that are excepted under section 552.136 of the Government Code. Section 552.136(b) provides "[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). Accordingly, the system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.⁴

Next, 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 any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, Medco has not submitted to this office any reasons explaining why its requested information should not be released. We thus have no basis for concluding that any portion of Medco's information constitutes proprietary information, and the system may not withhold any portion of the information at issue on that basis. *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), *552 at 5 (1990)* (party must establish *prima facie* case that information is trade secret), *542 at 3*.

Prime seeks to withhold from public disclosure portions of its proposal that were not submitted to this office. This ruling does not address information that was not submitted by

⁴We 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 insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

the system and is limited to the information submitted as responsive by the system. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Therefore, we do not address Prime's argument against disclosure of this information.

Caremark, Express, Prime, and Humana raise section 552.110 of the Government Code for portions of their proposals. 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." *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 ORD 552 at 2. 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.⁵ 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)

⁵The 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).

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

After reviewing the arguments submitted by Caremark, Express, Prime, and Humana and the information at issue, we conclude Caremark, Express, and Humana have demonstrated their respective 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, Caremark, Express, Prime, and Humana have not demonstrated their 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.

Caremark, Express, Prime, and Humana each claim release of specific portions of their remaining information would cause each company specific harm. Upon review, we find each company has established release of some of their remaining information would cause each 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 each company 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 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, qualifications, and pricing 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 Caremark, 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). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); ORD 541 at 8 (public has interest in knowing terms of contract with state agency). Accordingly, the system may not withhold any of the remaining information at issue pursuant to section 552.110(b) of the Government Code.

Caremark also argues portions of its remaining information fit the definition of a trade secret found in section 1839(3) of title 18 of the United States Code, and indicates this information is therefore confidential under sections 1831 and 1832 of title 18 of the United States Code. *See* 18 U.S.C. §§ 1831, 1832, 1839(3). Section 1839(3) provides in relevant part:

(3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes... if-

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public[.]

Id. § 1839(3). Section 1831 provides criminal penalties for the unauthorized disclosure of trade secrets to foreign governments, instrumentalities, or agents. *Id.* § 1831. Section 1832 provides criminal penalties for the unauthorized appropriation of trade secrets related to products produced for or placed in interstate or foreign commerce. *Id.* § 1832. We find Caremark has not demonstrated the information at issue is a trade secret for purposes of section 1839(3). Accordingly, we need not determine whether release of information at issue in this instance would be a violation of section 1831 or section 1832 of title 18 of the United States Code.

We note portions of 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." 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 information under section 552.101 in conjunction with common-law privacy.

We note that portions of the remaining information may 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. *See Attorney General Opinion JM-672 (1987)*. A governmental body must allow inspection of materials that are subject to copyright protection 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)*.

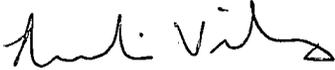
In summary, the system may withhold the information it has marked under section 552.104 of the Government Code and the information we have marked under section 552.111 of the Government Code. The system must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The system also must withhold the information we have marked under section 552.110 of the Government Code. The system must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. The remaining information must be released, but any copyrighted information 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, 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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/sdk

Ref: ID# 381802

Enc. Submitted documents

c: 4 Requestors
(w/o enclosure)

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OCT 20 2014

At 3:46 P. M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-10-002136

CAREMARKPCS HEALTH, L.L.C.,
Plaintiff,

§ IN THE DISTRICT COURT

§

§

v.

§ 419th JUDICIAL DISTRICT

§

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,

§

§

Defendant.

§ TRAVIS COUNTY, TEXAS

§

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff CaremarkPCS Health, L.L.C. ("Caremark") and Defendant Greg Abbott, Attorney General of Texas, 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 Caremark to challenge Letter Ruling OR2010-08904 (the "Ruling"). The Teacher Retirement System of Texas ("TRS") received requests from Medco Health Solutions, Inc., Express Scripts, Inc., Prime Therapeutics, LLC, and Onvia, Inc. (the "Requestors") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for, among other things, certain documents reflecting a proposal submitted by Caremark to TRS and a resulting contract between Caremark and TRS. These documents include commercial and financial information that Caremark contends is confidential, proprietary, and trade secret ("Caremark Information"). Caremark asserted that the Caremark Information was exempt from disclosure under the PIA. TRS 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. TRS holds the information that has been ordered to be disclosed.

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

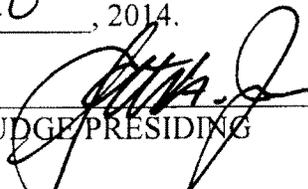


552.327(2) the Attorney General has determined and represents to the Court that the Requestors have in writing voluntarily withdrawn their requests for information, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

IT IS THEREFORE ORDERED that:

1. Because the requests have been withdrawn, no Caremark Information should be released in reliance on Letter Ruling OR2010-08904. Letter Ruling OR2010-08904 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 Court signing this Final Judgment, the Office of the Attorney General shall notify TRS 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 TRS that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2010-08904 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 TRS 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 OR2010-08904.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on October 20, 2014.



JUDGE PRESIDING

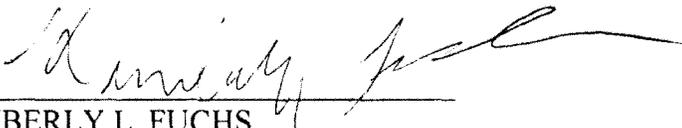
AGREED:



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