



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

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

March 20, 2012

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

Mr. R. Brooks Moore
Managing Counsel, Governance
The Texas A&M University System
301 Tarrow Street, Floor 6
College Station, Texas 77840-7896

OR2012-04083

Dear Mr. Moore:

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# 448108 (SO-11-142).

Texas A&M University (the "university") received a request for (1) executed contracts and amendments in relation to RFP01 RSK-09-003; (2) all proposals submitted in response to the RFP; (3) copies of Best and Final Offers in response to the RFP; and (4) notes, score sheets, presentations, reports, and recommendation packets produced during the review process of the proposals at issue. Although the university takes no position as to whether the requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you notified Blue Cross Blue Shield of Texas ("BCBSTX"); CaremarkPCS Health, L.L.C. ("Caremark"); Cigna; Envision Pharmaceutical Services, Inc. ("Envision"); Express Scripts, Inc. ("ESI"); Medco Health Solutions, Inc. ("Medco"); MedImpact; OptumRx, Inc. d/b/a Prescription Solutions ("OptumRx"); Scott & White Prescription Solutions ("Scott & White"); and Walgreens Health Initiatives ("Walgreens") of the request 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 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 BCBSTX, Medco, and OptumRx. We have considered the submitted arguments and reviewed the submitted information.

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 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, we have not received comments from Caremark, Cigna, Envision, EST, MedImpact, Scott & White, or Walgreens explaining why their information should not be released. Therefore, we have no basis to conclude these companies have a protected proprietary interest in the submitted information. *See id.* § 552.110; 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. Accordingly, the university may not withhold any of the information at issue on the basis of any proprietary interest Caremark, Cigna, Envision, EST, MedImpact, Scott & White, or Walgreens may have in it.

OptumRx argues its information was submitted with the expectation it would be treated as confidential and would not be divulged to competitors or to the public. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

OptumRx claims its information is excepted under section 552.104 of the Government Code.¹ Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 submitting information to the government), 522 (1989) (discretionary exceptions in general). As the university does not argue section 552.104 is applicable in this instance, we conclude none of OptumRx's information may be withheld under

¹Although OptumRx also raises section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code, this office has concluded section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2000), 575 at 2 (1990).

section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

BCBSTX, Medco, and OptumRx argue portions of their information are protected under section 552.110 of the Government Code, which 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the

²The 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).

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 section 552.110(a) is applicable unless it has been shown 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).

Section 552.110(b) of the Government Code 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).

Upon review of the submitted arguments under section 552.110(b), we find BCBSTX, Medco, and OptumRx have established some of their information constitutes commercial or financial information, the release of which would cause each company substantial competitive injury. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code.³ However, we note Medco has published some of the remaining information it seeks to withhold, including the identity of one of its customers, on its website, making this information publically available. Because Medco has published this information, it has failed to demonstrate how release of this information would cause it substantial competitive injury. Further, we find BCBSTX, Medco, and OptumRx 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 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). We note Medco was the winning bidder with respect to the request for proposal at issue, and the pricing information of a winning bidder 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* Dep’t of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged

³As our ruling is dispositive for this information, we need not address BCBSTX’s remaining argument against the release of some of its information.

government is a cost of doing business with government). Thus, the university may not withhold any of the remaining information under section 552.110(b).

In addition, we find BCBSTX, Medco, and OptumRx have failed to demonstrate any of the remaining information at issue meets the definition of a trade secret. As noted above, Medco has published some of the remaining information it seeks to withhold under section 552.110(a) on its website, making this information publically available. Because Medco has published this information, it has failed to demonstrate this information is a trade secret, and none of it may be withheld under section 552.110(a). We note 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 business,” rather than “a process or device for continuous use in the operation of the business.” *See* RESTATEMENT OF TORTS § 757 cmt. b; *Huffines*, 314 S.W.2d at 776; ORD 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). Thus, none of the remaining information may be withheld under section 552.110(a).

We note some of the remaining information is subject to section 552.136 of the Government Code.⁴ Section 552.136 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. Accordingly, we find the university must withhold the insurance policy numbers we have marked under section 552.136.

Medco asserts its information is subject to copyright. We note some of the submitted information is 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 university must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright 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. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 443108

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Patricia Fuller McCandless
Greenberg Traurig
For Blue Cross Blue Shield of Texas
300 West 6th Street, Suite 2050
Austin, TX 78701
(w/o enclosures)

Mr. Richard L. Josephson
Baker Botts LLP
For Medco Health Solutions, Inc.
One Shell Plaza
910 Louisiana
Houston, TX 77002-4995
(w/o enclosures)

Mr. John K. Edwards
Jackson Walker LLP
For OptumRx, Inc.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Mr. Barry Rosenthal
Express Scripts, Inc.
6625 West 78th Street, BL-425
Bloomington, Minnesota 55439
(w/o enclosures)

Ms. Iloha Smith
CVS Caremark
9207 Bigbury
San Antonio, Texas 78254
(w/o enclosures)

Mr. Glen Jasper
Envision Pharmaceutical Services
1901 Split Mountain
Canyon Lake, Texas 78133
(w/o enclosures)

Mr. Ric Bailey
Walgreens Health Initiatives
607 Timber Circle
Houston, Texas 77079
(w/o enclosures)

Mr. Julio Iturriaga
Cigna
7600 North Capital of Texas Highway
Lakewood on the Park, Bldg. B, Suite 335
Austin, Texas 78731
(w/o enclosures)

Mr. Dale Brown
MedImpact
10680 Treena Street
San Diego, California 92131
(w/o enclosures)

Ms. Esther Webb
Scott & White Prescription Solutions
P.O. Box 174401
Arlington, Texas 76003
(w/o enclosures)

AUG 31 2016

At 3:00 P.M.
Velva L. Price, District Clerk

No. D-1-GN-12-000951

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

v.

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS,
Defendant.

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IN THE DISTRICT COURT

261st JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

The parties, CaremarkPCS Health, L.L.C. (“CaremarkPCS”) and Defendant Ken Paxton, Attorney General of Texas, agree that all matters in controversy between them have been fully and finally resolved.

This is an action brought by Plaintiff CaremarkPCS to challenge Letter Ruling OR2012-04083. The Texas A&M University System (“Texas A&M”) received a request from Ms. Jeannet Maldonado on behalf of Catalyst Rx pursuant to the Public Information Act (the “PIA”), Tex. Gov’t Code ch. 552, for a copy of documents related to a request for proposals. These requested documents contain information CaremarkPCS claims is confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA (“Requested Information”). Texas A&M requested a ruling from the Open Records Division of the Office of the Attorney General (“ORD”). ORD subsequently issued Letter Ruling OR2012-04083, ordering the release of the Requested Information. Texas A&M holds the information that has been ordered to be disclosed.

The parties represent 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



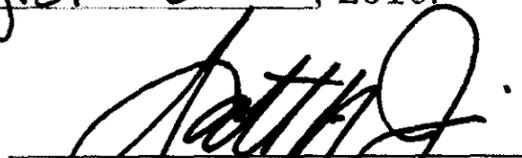
the requestor has abandoned the request, (2) in light of this abandoned request the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

IT IS THEREFORE ORDERED that:

1. Because the request has been abandoned, none of the Requested Information should be released in reliance on Letter Ruling OR2012-04083. The ruling should not be cited for any purpose related to the Requested Information as a previous 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 Agreed Final Judgment, the Office of the Attorney General shall notify Texas A&M in writing of this Agreed Final Judgment and shall attach a copy of this Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct Texas A&M that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2012-04083 as a previous determination under Tex. Gov't Code § 552.301(f) nor shall it release any Requested Information in reliance on said ruling, and if Texas A&M receives any future requests for the same or similar Requested Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2012-04083.
3. All costs of court and attorney fees are taxed against the parties incurring same.
4. All other requested relief not expressly granted herein is denied.

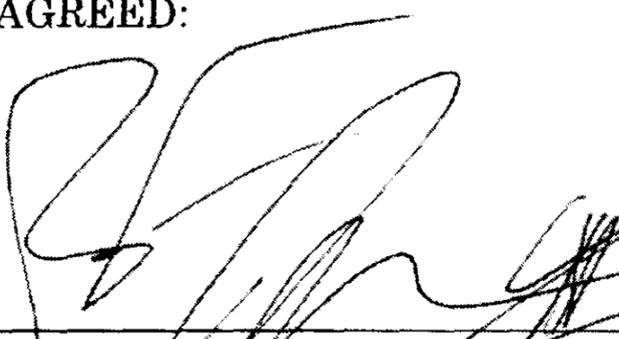
5. This cause is hereby DISMISSED without prejudice.
6. This order disposes of all the parties and all the claims and is final.

SIGNED on August 31, 2016.



JUDGE PRESIDING
Scott H. Jenkins

AGREED:



ROBERT F. JOHNSON III
State Bar No. 10786400
Gardere Wynne Sewell LLP
600 Congress Avenue, Suite 3000
Austin, Texas 78701-2978
Telephone: (512) 542-7127
Facsimile: (512) 542-7327
rjohnson@gardere.com

*Attorney for Plaintiff,
CaremarkPCS Health, L.L.C.*



ROSALIND L. HUNT
State Bar No. 24067108
Assistant Attorney General
Administrative Law Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4166
Facsimile: (512) 457-4677
Rosalind.Hunt@texasattorneygeneral.gov

*Attorney for Defendant,
Attorney General of Texas*