



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 11, 2014

Ms. Patricia Guidry  
Director of Risk Management  
Aldine Independent School District  
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Houston, Texas 77032-3099

OR2014-16063

Dear Ms. Guidry:

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# 535842.

The Aldine Independent School District (the "district") received a request for information pertaining to RFP 12-0401, including a copy of (1) the winning proposals, (2) the current ASO agreement or group contract, (3) the most recent utilization report, and (4) the current wellness plan and results. You state the district will release some information to the requestor.<sup>1</sup> Although you take no position with respect to the public availability of the requested information, you state its release may implicate the proprietary interests of certain third parties, namely: Aetna Life Insurance Company ("Aetna"); CaremarkPCS Health, L.L.C. ("Caremark"); and RedBrick Health Corporation ("RedBrick"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to

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<sup>1</sup>You informed this office United Healthcare Specialty Benefits notified the district that it did not object to release of its information.

disclosure under certain circumstances). We have received comments from Aetna, Caremark, and RedBrick. We have considered the submitted arguments and reviewed the submitted information.

Caremark raises section 552.103 of the Government Code, the litigation exception, for its information. We note section 552.103 protects the interests of governmental bodies, as distinguished from exceptions which are intended to protect the interests of third parties. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103), Open Records Decision No. 522 (1989) (discretionary exceptions in general). As the district does not raise section 552.103, we will not consider Caremark's argument under that exception. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76. Therefore, the district may not withhold any of Caremark's information under section 552.103 of the Government Code.

Aetna, Caremark, and RedBrick raise section 552.110 of the Government Code for portions of their respective information. Section 552.110 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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>2</sup> This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. See Open Records Decision No. 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. Open Records Decision No. 402 (1983).

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. *Id.*; see also Open Records Decision No. 661 (1999) at 5-6.

Aetna and Caremark contend portions of their respective information are excepted under section 552.110(b) of the Government Code because release of the information at issue would harm the district’s ability and the ability of other governmental entities to obtain qualified candidates in response to future searches. In advancing this argument, Aetna and Caremark appear to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). See 5 U.S.C. § 552(b)(4) (exempting from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held

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<sup>2</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 Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

*National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only these companies' interests in their respective information.

Aetna, Caremark, and RedBrick contend some of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find RedBrick has established portions of its information constitute trade secrets. Thus, the district must withhold the information we have marked under section 552.110(a) of the Government Code. Additionally, we find Aetna and Caremark each have established a *prima facie* case their customer information constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information Aetna and Caremark seek to withhold is not publicly available on their websites, the district must withhold it under section 552.110(a). However, Aetna, Caremark, and RedBrick each have failed to establish a *prima facie* case the remaining information at issue meets the definition of a trade secret. Moreover, we find Aetna, Caremark, and RedBrick have not demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. *See* ORD 402. Therefore, none of the remaining information at issue may be withheld under section 552.110(a) of the Government Code.

RedBrick further argues portions of its remaining information are commercial or financial information, the release of which would cause substantial competitive harm to the company. Aetna and Caremark argue portions of their remaining information, including any remaining customer information, consist of commercial or financial information, the release of which would cause substantial competitive harm to each. We note the pricing information of a winning bidder is generally not excepted under section 552.110(b), and 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 government is a cost of doing business with government). Upon review, we conclude Aetna and Caremark have established release of portions of their respective information would cause the companies substantial competitive injury. Accordingly, the district must withhold the information we have marked under section 552.110(b) of the Government Code. However, to the extent the customer information Aetna and Caremark seek to withhold is publicly available on their websites, we find Aetna and Caremark have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their customer information would cause the

companies substantial competitive harm. *See* ORD 661. Additionally, we find Aetna, Caremark, and RedBrick have not made the specific factual or evidentiary showing release of the remaining information at issue would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 661, 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), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Thus, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

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 information protected by other statutes. Caremark 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 under section 1839(3). Accordingly, we need not determine whether section 1831 or section 1832 applies, and the district may not withhold any of the remaining responsive information under section 552.101 of the Government Code on those bases.

Additionally, Caremark argues portions of its remaining information fit the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the

Texas Uniform Trade Secrets Act (the "TUTSA") as added by the Eighty-third Texas Legislature. Section 134A.002(6) provides:

(6) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that:

(A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134A.002(6)'s definition of trade secret expressly applies to chapter 134A only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134A.002(6); *see also id.* § 134A.007(d) (TUTSA does not affect disclosure of public information by governmental body under the Act). *See* Open Records Decision Nos. 658 at 4, 478 at 2, 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the district may not withhold Caremark's remaining information under section 552.101 of the Government Code in conjunction with section 134A.002(6) of Texas Civil Practice and Remedies Code.

Section 552.136 of the Government Code states, "[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 an insurance policy number is an access device for the purposes of section 552.136. *See id.* § 552.136(a). Accordingly, we find the district must withhold the bank account, routing, and insurance policy numbers we have marked under section 552.136 of the Government Code.

We note some 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. 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 withhold the information we have marked under section 552.110(a) of the Government Code. Additionally, to the extent the customer information Aetna and Caremark seek to withhold is not publicly available on their websites, the district must withhold it under section 552.110(a) of the Government Code. The district also must withhold portions of Aetna's and Caremark's information, which we have marked, under section 552.110(b) of the Government Code. The district must withhold the bank account, routing, and insurance policy numbers we have marked under section 552.136 of the Government Code. The district must release the remaining information; however, the district may release information protected by copyright only 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lee Seidlits  
Assistant Attorney General  
Open Records Division

CLS/som

Ref: ID# 535842

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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