



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.



February 24, 2015

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701

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

OR2015-03624

Dear Mr. Junell:

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# 554563.

The Teacher Retirement System of Texas (the "system") received a request for information pertaining to RFP No. 323-PBM-13JD. The system states it will redact account numbers in accordance with section 552.136(c) of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of CaremarkPCS Health ("Caremark"), L.L.C., Catamaran LLC ("Catamaran"), and Express Scripts, Inc ("ESI"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information 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); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party

¹Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from all notified third parties. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the submitted information is not responsive to the instant request. The system need not release non-responsive information in response to this request, and this ruling will not address that information.

Next, you state some of the responsive information pertaining to ESI was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-00323 (2015). In that ruling, we held (1) to the extent the client information is not publicly available on its website, the system must withhold the customer information of ESI under section 552.110(a) of the Government Code; (2) the system must withhold the marked pricing information under section 552.110(b) of the Government Code; and (3) the system must release the remaining information at issue in accordance with copyright law. You state the law, facts, and circumstances upon which the prior ruling was based have not changed. Thus, the system must continue to rely on Open Records Letter No. 2015-00323 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). You state some of the information at issue was not previously ruled upon. Thus, we will address the submitted arguments for the submitted information not subject to Open Records Letter No. 2015-00323.

Caremark, Catamaran, and ESI 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.² 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.

Caremark contends portions of its information are excepted under section 552.110(b) of the Government Code because release of the information at issue would harm the system’s ability and the ability of other governmental entities to obtain qualified candidates in response to future searches. In advancing this argument, Caremark appears 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

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 ; *see* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 *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 Caremark’s interests in its information.

Caremark, Catamaran, and ESI contend some of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Caremark, Catamaran, and ESI 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 Caremark, Catamaran, and ESI seek to withhold is not publicly available on their websites, the system must withhold it under section 552.110(a). However, Caremark, Catamaran, and ESI each have failed to establish a *prima facie* case the remaining information at issue meets the definition of a trade secret. Moreover, we find Caremark, Catamaran, and ESI 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.

Caremark, Catamaran, and ESI 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. However, we note some of ESI’s pricing information pertains to prices charged to the system under a prior contract with the system and Caremark was the winning bidder with respect to the current contract at issue. 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 Catamaran and ESI have established release of portions of their respective information would cause the companies substantial competitive injury. Accordingly, the system must withhold the information we have marked under section 552.110(b) of the Government Code. However, to the extent the customer information the companies seek to withhold is publicly

available on their websites, we find Caremark, Catamaran, and ESI 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 Caremark, Catamaran, and ESI 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 system may not withhold any of the remaining responsive 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 system 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 system 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.

We note some of the remaining responsive information may be excepted from disclosure under section 552.117(a)(1) of the Government Code.³ Section 552.117 excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987).

body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). We also note section 552.117 does not apply to an individual's work telephone number. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Therefore, if the individuals whose information is at issue made timely elections under section 552.024, the system must withhold the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former system officials or employees under section 552.117(a)(1) of the Government Code, including personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. The system may not withhold the information at issue under section 552.117 if the individuals did not make timely elections under section 552.024 or if the cellular telephone service is paid for by a governmental body.

We note some of the remaining responsive 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 system must continue to rely on Open Records Letter No. 2015-00323 as a previous determination and withhold or release the identical information at issue in accordance with that ruling. To the extent the customer information Caremark, Catamaran, and ESI seek to withhold is not publicly available on their websites, the system must withhold it under section 552.110(a) of the Government Code. The system also must withhold portions of Catamaran's and ESI's information, which we have marked, under section 552.110(b) of the Government Code. If the individuals whose information is at issue made timely elections under section 552.024, the system must withhold the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former system officials or employees under section 552.117(a)(1) of the Government Code, including personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. The system must release the remaining responsive information; however, the system 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, 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 554563

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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JUN 23 2016

At 8:40 A.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-15-000871

CAREMARKPCS HEALTH, L.L.C.
Plaintiff,

v.

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§ 98th JUDICIAL DISTRICT
§
§
§ OF TEXAS,
§ 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 Ken Paxton, 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 Plaintiff Caremark to challenge Letter Ruling OR2015-03624 (the "Ruling"). The Teacher Retirement System of Texas ("TRS") received a request from Melanie Mann (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain proposal documents submitted to TRS. 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"). 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 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 in writing voluntarily withdrawn her request, (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 request has been withdrawn, no Caremark Information should be released in reliance on Letter Ruling OR2015-03624. Letter Ruling OR2015-03624 should not be cited for any purpose related to the Caremark Information 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 OR2015-03624 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 OR2015-03624.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on June 23, 2016.

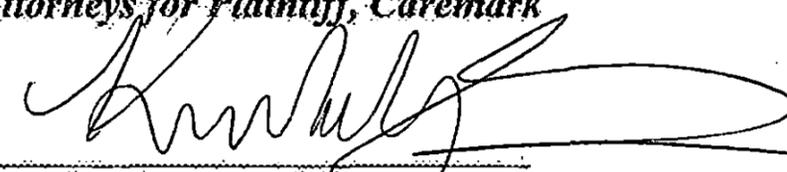

JUDGE PRESIDING
Hon. Gus J. Strauss

AGREED:



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Attorney for Defendant, Ken Paxton

AUG 01 2016

At 2:03 PM
Velva L. Price, District Clerk

Cause No. D-1-GN-15-000894

EXPRESS SCRIPTS, INC.,
Plaintiff,

v.

KEN PAXTON,
ATTORNEY GENERAL OF TEXAS,
Defendant.

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§

IN THE DISTRICT COURT OF

53rd JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Express Scripts, Inc. ("Express"), and Defendant Ken Paxton, 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 Plaintiff Express to challenge Letter Ruling OR2015-03624 (the "Ruling"). The Teacher Retirement System of Texas ("TRS") received a request from Melanie Mann (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain proposal documents submitted to TRS. These documents contain information designated by Express as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA ("Express Information"). 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 Express Information. TRS 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 in writing voluntarily withdrawn her request, (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 request has been withdrawn, no Express Information should be released in reliance on Letter Ruling OR2015-03624. Letter Ruling OR2015-03624 should not be cited for any purpose related to the Express Information as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. 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 OR2015-03624 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any Express Information in reliance on said Ruling, and if TRS receives any future requests for the same or similar Express Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2015-03624.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on August 1st, 2016.

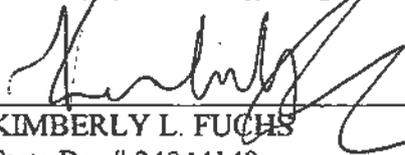

JUDGE PRESIDING

AGREED:



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