ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2004-3446

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 200246.

The Teacher Retirement System of Texas (the "system") received a request for information regarding the recent Request For Proposals ("RFPs") for Pharmacy Benefit Manager, specifically any information comparing Walgreens's proposal with the winning bid. You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, and 552.111 of the Government Code. You also contend that release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, that you notified Caremark, Inc. ("Caremark"), the selected bidder, and Gabriel, Roeder, Smith & Co. ("GRS"), the company that prepared the submitted summary analysis of the proposals for the system, of the request and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (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 Public Information Act in certain circumstances). We received comments from Caremark. We have considered all of the exceptions claimed and reviewed the submitted information.

First, we note that some of the submitted information is not responsive to the request. Thus, this ruling does not address the public nature of the non-responsive information and the system need not release it to the requestor in response to this ruling.

We now address your claim that the submitted responsive information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a contract has been executed. ORD 541.

You inform us that the requested information pertains to a request for proposals issued by the system. You further inform us that "[n]egotiations with Caremark, the respondent initially selected, are still ongoing, and a contract has not yet been finalized or signed." You also state that "in the event [the system] had to reconsider other proposals because negotiations with Caremark did not result in a final contract, [the system's] position would be harmed if Walgreens and the remaining respondents had access to the requested evaluative information." Based on your arguments and our review of the submitted responsive information, we conclude that this information is excepted from disclosure pursuant to section 552.104 until such time the contract negotiations are complete and the contract has been executed. As our ruling is dispositive, we need not address either the system's or Caremark's remaining claimed exceptions.

You also ask this office to issue a previous determination with regard to the type of information that is the subject of this letter ruling. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001). We decline to do so at this time.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 200246

Enc. Submitted documents

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