



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 11, 2005

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

OR2005-01293

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# 218038.

The Teacher Retirement System of Texas (the "system") received a request for the "prescription service contract with Caremark . . . and all related documents and correspondence." You state that some responsive information, including a copy of the final executed contract, has been provided to the requestor. You claim that some of the requested information is excepted from disclosure under sections 552.104 and 552.107 of the Government Code.¹ You also contend that release of some 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 Act in certain circumstances). We received comments from Caremark. We have considered all of the

¹As you did not submit to this office written comments stating the reasons why section 552.111 would allow the information to be withheld, we find that you have waived this exception. *See* Gov't Code §§ 552.301, .302.

exceptions claimed and reviewed the submitted information, portions of which consist of representative samples.²

We first note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, GRS has not submitted comments to us explaining why any portion of the submitted information relating to it should not be released. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to GRS would implicate that entity's proprietary interests. *See, e.g.*, Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the system may not withhold any portion of the submitted information pertaining to GRS on the basis of any proprietary interest that GRS may have in the information.

We next note that Caremark seeks to have certain information withheld from the requestor that was not submitted to us for review by the system. Accordingly, this ruling does not address information related to Caremark beyond that which was submitted to us for review by 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, or representative sample if voluminous amount of information was requested).³

We now address your claim that the submitted information in Exhibits A and B 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." 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 awarded and executed. Open Records Decision Nos. 541 (1990). However, this office

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

³We note that Caremark raises no exception to public disclosure of the information submitted in Exhibit C.

has determined that in some circumstances, section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id* at 5.

You inform this office that the system, "as trustee, is responsible for the implementation and administration of the statewide healthcare benefits plan [which] involves contracting for group health coverage, including contracting with a pharmacy benefits manager." *See* Ins. Code § 1575.106(a) (contract to be awarded only through competitive bidding), (b) (trustee must submit each contract for competitive bidding at least every six years). You assert that release of the information at issue could "give a future prospective bidder . . . an unfair competitive advantage if [the system] decides to issue a new RFP for pharmacy benefit services in two years at the expiration of the initial Caremark contract term." Upon careful review of the arguments submitted by the system, we believe that the system has demonstrated that public release of the information at issue would cause specific harm to the system's interests in particular competitive bidding situations. Accordingly, we believe the system has adequately demonstrated the applicability of section 552.104 to the information at issue. Therefore, the system may withhold the information in Exhibits A and B from required public disclosure under section 552.104.⁴

In summary, the system may withhold the information in Exhibits A and B under section 552.104 of the Government Code. The information in Exhibit C must be released to the requestor.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

⁴As section 552.104 is dispositive, we do not address your remaining claims for this information.

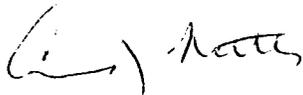
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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); *Tex. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 218038

Enc. Submitted documents

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