

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



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 28, 2005

Ms. Maleshia B. Farmer
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street
Fort Worth, Texas 76102

OR2005-03636

Dear Ms. Farmer:

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# 222970.

The City of Fort Worth (the "city") received a request for information related to responses received by the city for its request for proposal #04-0025 for prescription drug benefit management services. Although you make no arguments and take no position as to whether the requested information is excepted from disclosure, you indicate that this information may be subject to third party proprietary interests. You indicate that pursuant to section 552.305 of the Government Code, you notified interested third parties, Systemed, L.L.C. ("Systemed") and Caremark, Inc. ("Caremark"), of the request and of their opportunity to submit comments to this office. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in certain circumstances). Systemed provided this office with arguments against disclosure of some of the requested information. We have considered the submitted arguments and have reviewed the information you have submitted. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that 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, Caremark has not submitted to this office any reasons explaining why their information should not be released. We thus have no basis for concluding that any portion of the submitted information relating to Caremark constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g.*, Gov't Code § 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 (1990).

We note, however, that the Caremark proposal contains insurance policy numbers that are subject to section 552.136 of the Government Code. This section provides that “[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, the city must withhold the policy numbers we have marked pursuant to section 552.136.¹

We further note that portions of Caremark's proposal appear to 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

We now turn to the arguments submitted by Systemed. First, Systemed argues that some of its information was designated as confidential by agreement with the city. We note that information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests confidentiality. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976). Further, it is well-settled that a governmental body's promise to keep information confidential is not a basis for withholding that information from the public, unless the governmental body has specific authority to keep the information confidential. *See* Open Records Decision Nos. 514 at 1 (1988), 476 at 1-2 (1987), 444 at 6 (1986). Consequently, the submitted information must fall within an exception to disclosure in order to be withheld.

¹ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Systemed argues that portions of its information are excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). 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 (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person’s claim

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).

for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that 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) 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. Gov’t Code § 552.110(b); see also *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having considered Systemed’s arguments and reviewed the information at issue, we conclude that Systemed has failed to make a *prima facie* case that its information constitutes trade secrets. Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. Gov’t Code § 552.022(a)(3) (contracts with governmental body expressly made public); see also Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Further, we find that Systemed has made only conclusory allegations that release of the requested information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support these allegations. See Open Records Decision Nos. 661 (1999) (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 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). Accordingly, no portion of the submitted information may be withheld pursuant to section 552.110.

In summary, the city must withhold the information we have marked under section 552.136 of the Government Code. The remaining submitted information must be released in accordance with applicable copyright laws for any information protected by copyright.

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 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/jev

Ref: ID# 222970

Enc. Submitted documents

c: Ms. Dawn Morgenstern
Walgreens
1417 Lake Cook Road, MS L468
Deerfield, Illinois 60015
(w/o enclosures)

Mr. Philip S. Zou
Senior Attorney
Walgreens
1417 Lake Cook Road, MS L468
Deerfield, Illinois 60015
(w/o enclosures)

Mr. Richard Josephson
Baker Botts, L.L.P.
910 Louisiana
Houston, Texas 77002-4995
(w/o enclosures)

Mr. Mark Dickey, Director of Sales
Systemed, L.L.C., A Subsidiary of Medco
1490 Woodhaven Drive
Prosper, Texas 75078
(w/o enclosures)

Ms. Dana Merry, Region Sales Manager
Caremark, Inc.
2211 Sanders Road
Northbrook, Illinois 60062
(w/o enclosures)

CAUSE NO.017-211582-05

CAREMARK, INC.	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TARRANT COUNTY, TEXAS
	§	
CITY OF FORT WORTH AND	§	
ATTORNEY GENERAL OF TEXAS,	§	
Defendant.	§	17 th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Caremark, Inc. (Caremark) and Defendants Greg Abbott, Attorney General of Texas, and the City of Fort Worth 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 compromised and settled. This cause is an action under the Public Information Act (PIA), TEX. GOV'T CODE ch. 552. The parties represent to the Court that, in compliance with TEX. GOV'T CODE § 552.325(c), the requestor, Dawn Morgenstern, was sent reasonable notice of this setting and of the parties' agreement that the City of Fort Worth must withhold the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information in the prescription drug plan proposal which has been marked by the Attorney General is commercial or financial information and, therefore, is excepted from disclosure by TEX. GOV'T CODE § 552.110(b). Specifically, the information in Caremark's proposal which has been marked by the Attorney General on bates stamped pages FW00001R- FW00285R and 296R-297R is excepted from disclosure, with these exceptions:

a) the names, addresses, and e-mail addresses of Caremark employees on pages FW00110R-FW00112R, FW00114R-FW00115R;

b) the average response time values on page FW00116R;

c) the contact name, telephone number, and fax number on pages FW00117R-FW00118R;

d) the Dallas ISD pay activity report on page FW00297R.

2. The City of Fort Worth must withhold from the requestor the information described in Paragraph 1 of this Agreed Judgment. If it has not done so, the City of Fort Worth shall release to the requestor all information pertaining to Caremark's proposal that is responsive to the request for information and that is not held excepted from disclosure in Letter Ruling 2005-03636 or by Paragraph 1 of this judgment.

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

6. \$ 500 bond to be released to Plaintiff

SIGNED this the 31 day of March, 2006.



PRESIDING JUDGE

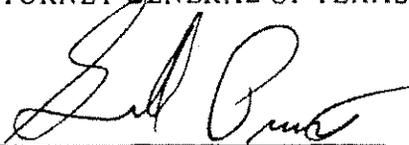
APPROVED:



CRAIG J. LEDET
King & Spalding, L.L.P.
1100 Louisiana, Suite 4000
Houston, Texas 77002
Phone: (713) 276-7426
Fax: (713) 751-3290
State Bar No. 00794152
ATTORNEY FOR PLAINTIFF



JASON RAY
Assistant Attorney General
Open Records Litigation Section
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 936-1838
Fax: (512) 320-0167
State Bar No. 24000511
ATTORNEY FOR DEFENDANT,
ATTORNEY GENERAL OF TEXAS



GERALD PRUITT
Deputy City Attorney
The City of Fort Worth
1000 Throckmorton
Fort Worth, Texas 76102-6311
Phone: (817) 392-7600
Fax: (817) 392-8359
State Bar No. 24028205
ATTORNEY FOR DEFENDANT, CITY
OF FORT WORTH