



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2007

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

OR2007-16246

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#s 295567 and 296030. We have combined these files and will consider the issues presented in this single ruling assigned ID# 295567.

On May 31, 2006, the Teacher Retirement System of Texas (the "system") received a request for copies of the contracts between the system and its pharmacy benefit manager for both the retiree plan with Caremark, Inc. ("Caremark") and the active member plan with Medco Health Solutions, Inc. ("the first request"). On September 12, 2007, the system received a second request for the information related to Caremark. You state that the system previously released some of the requested information to both requestors. You also state that the system requested a ruling for information from this office for the first request in response to which this office issued Open Records Letter No. 2006-10313 (2006). You now submit information to this office that is responsive to the first request, but that you had inadvertently failed to submit when you requested a ruling in 2006. You state that the submitted information is responsive in its entirety to the second request. You claim that portions of the submitted information are excepted under sections 552.103, 552.104, and 552.110 of the Government Code. ⁽¹⁾ You also contend that release of the submitted information may implicate the proprietary interests of Caremark. Accordingly, you state, and provide documentation showing, that you notified Caremark of the additional information encompassed by the first request, as well as the second request, and of Caremark's right to submit arguments to this office as to why the 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 the Act in certain circumstances). We have received correspondence from two legal representatives for Caremark. ⁽²⁾ We have considered the submitted arguments and reviewed the submitted information. ⁽³⁾

Initially, you inform this office that the requested base contract and contract amendments labeled as Exhibits 1, 3, and 5 are currently at issue in lawsuits pending against the Office of the Attorney General: *Teacher Retirement System of Texas v. Abbott*, Cause No. D-1-GN-06-003817, 53rd District Court of Travis County, Texas; and *Caremark, Inc. v. Abbott*, Cause No. D-1-GN-06-003470, 53rd District Court of Travis County, Texas. We will not address whether this information is excepted under the Act, but will instead allow the trial courts to determine whether Exhibits 1, 3, and 5 must be released to the public. We note, however, that the remaining information, although possibly related to the lawsuits, is not at issue in those lawsuits. Therefore, we will address the submitted arguments to withhold the remaining information under the Act.

Next, you acknowledge that the system failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting an open records decision from this office with regard to the remaining information that is responsive to the first request. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and

must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Sections 552.103 and 552.104 of the Government Code are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Gov't Code § 552.007; *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 Record Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). In failing to comply with section 552.301, the system has waived all of its discretionary exceptions with regard to the information responsive to the first request and may not withhold any of this information under section 552.103 or 552.104. The system also raises section 552.110 of the Government Code, which protects third party interests and can provide a compelling reason for non-disclosure under section 552.302. Therefore, we will consider the system's argument under section 552.110 and the arguments submitted by Caremark with regard to the information responsive to both the first and second requests.

We note that one document is responsive only to the second request. The system timely requested a ruling for this information. Therefore, we will consider the system's claims under sections 552.103 and 552.104 for contract amendment six. We note, however, that contract amendment six is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The information at issue is a contract amendment relating to the receipt or expenditure of public or other funds by the system. Although you seek to withhold this information under section 552.103, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit*, 469 at 475-76; ORD 665 at 2 n.5. As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a)(3). Therefore, the system may not withhold any of the information that is subject to section 552.022 under section 552.103. However, because information that is subject to section 552.022 may be withheld under section 552.104 of the Government Code, we will consider your claims for this exception. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)).

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You inform us that in the future, the system "will engage in a procurement process to select a vendor to provide the same pharmacy benefit manager services for TRS-Care that Caremark currently provides." You further inform us that release of contract amendment six "could give a future prospective bidder an unfair competitive advantage" and would "compromise TRS's bargaining position in the procurement process." However, upon review of your arguments and the information at issue, we conclude the system has failed to demonstrate that release of contract amendment six would cause a specific threat of actual or potential harm to its interests in a particular competitive situation. Accordingly, the system may not withhold contract amendment six under section 552.104 of the Government Code.

Next, the system and Caremark claim that portions of the submitted information are excepted from disclosure under 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: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) commercial 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(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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. 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.⁽⁴⁾ 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 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. ORD 552 at 5-6. 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). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) of the Government Code 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 National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); 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). Also, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors).

In this instance, Caremark seeks to withhold portions of its proposal, including information related to clients, organizational structure, business operations, and pricing, under sections 552.110(a) and 552.110(b). The system seeks to withhold the information at issue in its entirety under section 552.110. Upon review, we find that Caremark has established that its client information, which we have marked, constitutes trade secret or commercial and financial information, the release of which would cause Caremark substantial competitive harm. The system must withhold this information, which we have marked, under section 552.110. We find, however, that neither the system nor Caremark has demonstrated that any portion of the remaining information is excepted under section 552.110 of the Government Code. *See* Open Record Decision Nos. 661 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm), 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, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Additionally, we note that although the system and Caremark argue confidentiality for Caremark's pricing terms, the pricing information of a company contracting with a governmental body is generally not excepted under section 552.110. *See* ORD 514 (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. Accordingly, the system may not withhold the pricing information under section 552.110 of the Government Code.

We also note that some of the submitted information is 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).

To conclude, we will allow the trial courts to determine whether Exhibits 1, 3, and 5 must be released to the public. The system must withhold the information we have marked pursuant to section 552.110 of the Government Code. Contract amendment six must be released to the second requestor. The remaining information must be released to both requestors, but any information protected by copyright must be released in accordance with copyright law.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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 Office of the Attorney General 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. 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,

Jordan Johnson

Assistant Attorney General

Open Records Division

JJ/jb

Ref: ID# 295567

Enc. Submitted documents

c: Mr. Raymund Flandez

Barbara Martinez

The Wall Street Journal

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(w/o enclosures)

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Footnotes

1. While you also raise sections 552.101 and 552.107 of the Government Code, you have provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we presume you no longer assert these exceptions to disclosure. Gov't Code §§ 552.301, .302.
2. We note that we received briefing on behalf of Caremark from both King and Spalding LLP and Foley and Lardner LLP. We have considered both briefs.
3. We note that Caremark has submitted information it seeks to withhold from disclosure; however, the system did not submit this information. This ruling does not address information that was not submitted 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).
4. The following are the six factors that the Restatement gives 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 others 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).

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Filed in The District Court of Travis County, Texas

OCT 20 2014

At 3:40 P.M. Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-07-004459

CAREMARK, INC.,
Plaintiff,

§ IN THE DISTRICT COURT

§

§

v.

§ 261st JUDICIAL DISTRICT

§

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,

§

§

Defendant.

§ TRAVIS COUNTY, TEXAS

§

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Caremark, Inc. ("Caremark") and Defendant Greg Abbott, 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 Caremark to challenge Letter Rulings OR2006-10313 and OR2007-16246 (the "Rulings"). The Teacher Retirement System of Texas ("TRS") received requests from the Wall Street Journal and Change to Win (the "Requestors") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for, among other things, certain documents reflecting a contract between Caremark and TRS that include commercial and financial information that Caremark contends is confidential, proprietary, and trade secret ("Caremark Information"). Caremark asserted that the Caremark Information was exempt from disclosure under the PIA. TRS requested a ruling from the Open Records Division of the Office of the Attorney General ("ORD"). ORD subsequently issued the Rulings, ordering the release of the Caremark Information. TRS holds the information that has been ordered to be disclosed.

The parties represented to the Court that: (1) pursuant to Tex. Gov't Code §

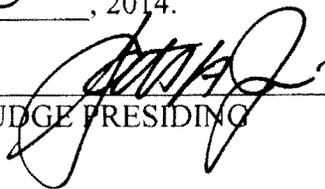
552.327(2) the Attorney General has determined and represents to the Court that the Requestors have

in writing voluntarily withdrawn their requests for information, (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 requests have been withdrawn, no Caremark Information should be released in reliance on Letter Rulings OR2006-10313 or OR2007-16246. Letter Rulings OR2006-10313 or OR2007-16246 should not be cited for any purpose 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 Rulings OR2006-10313 or OR2007-16246 as a prior determination under Tex. Gov't Code § 552.301(f), nor shall it release any Caremark Information in reliance on said Rulings, 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 Rulings OR2006-10313 or OR2007-16246.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on October 20, 2014.



JUDGE PRESIDING

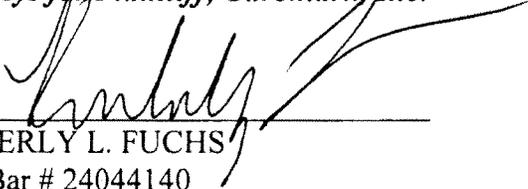
AGREED:



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Filed in The District Court
of Travis County, Texas

OCT 20 2014

At 3:40 P.M.
Amalia Rodriguez-Mendoza, Clerk

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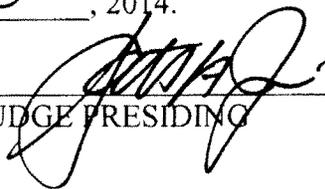
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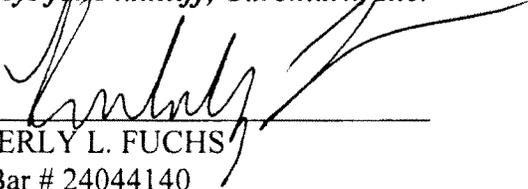
AGREED:



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