



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

This ruling has been modified by court action  
The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 11, 2008

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

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

OR2008-12580

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# 321529.

The Teacher Retirement System of Texas (the "system") received a request for the pharmacy benefit management services proposals, final scoring sheets, and the original contract and any subsequent amendments between the system and Caremark, Inc. ("Caremark").<sup>1</sup> You state that you have provided the requestor with some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.104, and 552.111 of the Government Code. You also state, and provide documentation showing, that the system notified AdvancePCS ("Advance"), Aetna, Catalyst Rx ("Catalyst"), Caremark, CIGNA HealthCare ("CIGNA"), EHS-Eckerd ("EHS"), Express Scripts, Inc. ("Express"), MedImpact, NMHC Rx ("NMHC"), Prescription Solutions ("Solutions"), Rx America, UnitedHealthCare ("United"), and Walgreens Health Initiatives ("Walgreens"). *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). Advance, Caremark, EHS, MedImpact, NMHC, Rx America, United, and Walgreens have responded to the notice and argue that some or all of their information is excepted from disclosure. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup> We note that the requestor clarified her original request and excluded proposals submitted by Medco, LDI, and ProCare. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of narrowing or clarifying request for information). Accordingly, this information is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the system is not required to release that information.

Initially, you inform this office that the portions of the information you have highlighted in Exhibits 3(A) through 3(L) are currently at issue in lawsuits pending against the Office of the Attorney General: *Teacher Retirement Sys. of Texas v. Abbott*, No. D-1-GN-07-004356, 98<sup>th</sup> District Court of Travis County, Texas; *Caremark, Inc. v. Abbott*, No. D-1-GN-07-004459, 250<sup>th</sup> District Court of Travis County, Texas; *Teacher Retirement Sys. of Texas v. Abbott*, No. D-1-GN-06-003817, 53<sup>rd</sup> District Court of Travis County, Texas; and *Caremark, Inc. v. Abbott*, No. D-1-GN-06-003470, 53<sup>rd</sup> 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 the highlighted information must be released to the public. We note, however, that the remaining information you have marked, although possibly related to the lawsuits, is not at issue in those lawsuits. Therefore, we will address the submitted arguments to withhold the information at issue under the Act. We will also address whether the remaining information is excepted from disclosure.

Section 552.104 of the Government Code excepts from public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). 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. *See* 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 is in effect. *See id.* at 5. However, this office has determined that under 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. *Id.*

You state that the information in Exhibits 2(A) through 2(E) consists of final scoring sheets. You further state, however, that next year the system will select a vendor for the same pharmacy benefit management services. You argue that "prospective vendors would have an unfair advantage if they were to obtain the submitted information for use in developing their proposal to the upcoming procurement process to award a new [pharmacy benefit management] contract for [the system]." You further argue that the system would be disadvantaged in the bargaining process by revealing information on financial terms, performance guarantees, and other sensitive contractual terms. Based on your representations and our review of the information at issue, we find that you have demonstrated that release of the information in Exhibits 2(A) through 2(E) would harm the interests of the system in a particular ongoing competitive situation. *See* ORD 592. Therefore, the system may withhold the information in Exhibits 2(A) through 2(E) under section 552.104.<sup>2</sup>

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<sup>2</sup> As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

We now turn to the remaining information at issue, which you assert may be subject to third-party claims. 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 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 Aetna, Catalyst, Cigna, Express, and Solutions have not submitted any comments to this office explaining how release of the submitted information would affect their proprietary interests. Therefore, these companies have not provided us with any basis to conclude that they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the system may not withhold any portion of the submitted information related to Aetna, Catalyst, Cigna, Express, or Solutions on the basis of any proprietary interest these parties may have in the information.

Next, we note that the third parties which briefed our office argue that portions of the submitted information are marked as confidential. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W. 2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, we note that the system has not submitted information that Walgreens identifies as information from 2007. Walgreens asserts that this information is confidential. We also note that Advance seeks to withhold certain information that the system has not submitted for our review. This ruling only addresses information submitted by the system as responsive to the instant request for information. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

MedImpact raises section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. However, MedImpact has cited no law under which any of its submitted information is considered to be confidential for purposes of

section 552.101 of the Government Code. Therefore, the system may not withhold any of MedImpact's submitted information under section 552.101.

Rx America and Walgreens raise section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the system does not seek to withhold Rx America's or Walgreen's information under this exception, no portion of Rx America's or Walgreen's information may be withheld on this basis.

Advance, Caremark, EHS, MedImpact, NMHC, Rx America, and United raise 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." Gov't Code § 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* 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 . . . [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.

RESTATEMENTS OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776.

There are six factors to be assessed in determining whether information qualifies as 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). This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exemption as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5.

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.* § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

After reviewing the submitted information, we conclude that Advance, EHS, MedImpact, NMHC, Rx America, and United have each established that release of a portion of the submitted information would cause substantial competitive injury to the company; therefore, the system must withhold this information, which we have marked, under section 552.110(b). We find, however, that Advance, Caremark, EHS, MedImpact, NMHC, Rx America, and United have made only conclusory allegations that release of the remaining submitted information would cause the companies substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision Nos. 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 was entirely too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Additionally, we note that the pricing information of a company contracting with a governmental body is generally not excepted under section 552.110. *See* Open Records Decision No. 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, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Therefore, the system may only withhold the information we have marked under section 552.110(b).

In addition, we find that Advance, Caremark, EHS, MedImpact, NMHC, Rx America, and United, have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. We therefore determine that no portion of the remaining submitted information is excepted from disclosure under section 552.110(a) of the Government Code.

We note that some of the remaining information is confidential. Section 552.101 encompasses common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found some kinds of medical information or information indicating disabilities or specific illnesses are excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). We find that portions of the remaining submitted information, which we have marked, are highly intimate or embarrassing and not of legitimate concern to the public. Therefore, the system must withhold the information we have marked under section 552.101 in conjunction with common-law privacy.

Section 552.136 of the Government Code states 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.”<sup>3</sup> Gov’t Code § 552.136. Accordingly, we find that the system must withhold the types of information we have marked under section 552.136 of the Government Code.

We also note that some of the submitted information, and the information you state you are releasing, appears 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 protected by copyright. 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 material protected by copyright, 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).

In summary, we will allow the trial courts to determine whether the highlighted information in Exhibit 3 must be released to the public. The system may withhold the information in Exhibits 2(A) through 2(E) under section 552.104 of the Government Code. The system must withhold the information we have marked in Exhibits 1(A) through 1(L) under (1) section 552.101 of the Government Code in conjunction with common-law privacy; (2) section 552.110(b) of the Government Code; and (3) section 552.136 of the Government Code. The remaining information must be released.

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). If the governmental body does not file suit over 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

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<sup>3</sup> The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

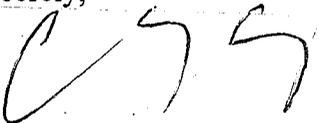
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/mcf

Ref: ID# 321529

Enc. Submitted documents

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Filed in The District Court  
of Travis County, Texas

LM SEP 04 2013

At 2:13 M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-08-003462

CAREMARKPCS HEALTH, L.P.	§	IN THE DISTRICT COURT
<i>Plaintiff,</i>	§	
	§	
v.	§	353d JUDICIAL DISTRICT
	§	
GREG ABBOTT, ATTORNEY GENERAL	§	
OF TEXAS,	§	
<i>Defendant.</i>	§	TRAVIS COUNTY, TEXAS

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff CaremarkPCS Health, L.P., ("CaremarkPCS") 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 Plaintiff CaremarkPCS to challenge Letter Ruling OR2008-12580 (the "Ruling"). The Teacher Retirement System of Texas ("TRS") received a request from Medco Health Solutions, Inc. (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain documents submitted to TRS by CaremarkPCS and created by TRS in response to bids received from CaremarkPCS, as well as a copy of a contract between TRS and CaremarkPCS. These documents contain information designated by CaremarkPCS as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA ("CaremarkPCS 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 CaremarkPCS Information. TRS holds the information that has been ordered to be disclosed.

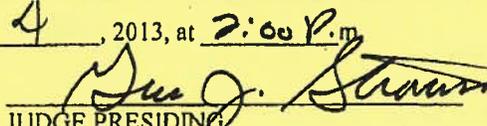
The parties represented to the Court that: (1) pursuant to Tex. Gov't Code §

552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn its request 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.

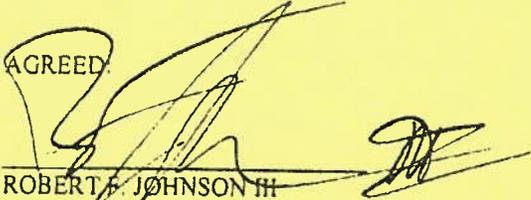
**IT IS THEREFORE ORDERED** that:

1. Because the request has been withdrawn, no CaremarkPCS Information should be released in reliance on Letter Ruling OR2008-12580. Letter Ruling OR2008-12580 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 Ruling OR2008-12580 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any CaremarkPCS Information in reliance on said Ruling, and if TRS receives any future requests for the same or similar CaremarkPCS Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2008-12580.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on Sept. 4, 2013, at 2:00 P.M.

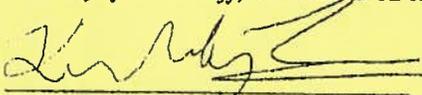
  
JUDGE PRESIDING

AGREED



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