



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2008

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal Services Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2008-14649

Dear Ms. Villarreal-Reyna:

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# 325972.

The Texas Department of Insurance (the "department") received a request for third party administrator certificates of authority, applications for certification, any documentation filed with the department, and any correspondence or disciplinary action related to Caremark, L.L.C., CaremarkPCS Health, L.P., and PharmaCare Management Services, L.L.C. (collectively "Caremark").¹ You state you have released some of the requested information to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.101, 552.107, 552.111, 552.136, and 552.137 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503. In addition, you state that release of some of the remaining information may implicate the proprietary interests of Caremark. Pursuant to section 552.305, you state, and provide documentation showing, that you notified Caremark of the request and of its 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

¹We understand that the department received clarification from the requestor. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

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 have received arguments from Caremark. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we address your representation that some of the submitted information is subject to a previous determination. *See* Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)). In Open Records Letter No. 2001-4777 (2001), we authorized the department to withhold, under section 552.101 of the Government Code in conjunction with common-law privacy, information that identifies an enrollee in a health plan, including the enrollee's name, address, telephone number, birth date, social security number, and claim number. However, we note that the e-mail addresses you seek to withhold are not encompassed by the prior ruling and may not be withheld on that basis. Other than the e-mail addresses, we agree that the department must withhold the information it has marked, along with the additional information we have marked, in accordance with Open Records Letter No. 2001-4777.

Next, we note, and you acknowledge, that the department has failed to comply with the procedural requirements of section 552.301 of the Government Code with respect to a portion of the information at issue. Although you submitted some of the responsive records by the fifteen-business-day deadline, a portion of the responsive information was not submitted until September 2, 2008. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381.

As to the untimely submitted information, you raise sections 552.101 and 552.136 of the Government Code, Texas Rule of Evidence 503, and also claim that the information at issue may implicate the proprietary interests of a third party. This office has determined that rule 503 of the Texas Rules of Evidence is discretionary in nature and does not constitute a compelling reason to overcome the presumption of openness under section 552.302 of the Government Code. *See, e.g.*, Open Records Decision No. 676 at 11 (2002) (assertion of rule 503 does not demonstrate "compelling reason" under section 552.302 to prohibit governmental body's release of information). Consequently, in failing to comply with

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.

section 552.301, the department has waived rule 503 and may not withhold any of the untimely submitted information under that rule. However, because sections 552.101 and 552.136 and third party interests can provide compelling reasons to withhold information, we will consider whether the untimely submitted information is excepted on these bases.

Caremark asserts that some of the information at issue was submitted to the department with an expectation of privacy. However, information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. 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 section 552.110). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

We note that the submitted information includes Caremark’s 2005 tax return. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 6103 of title 26 of the United States Code makes federal tax return information confidential. The term “return information” includes “the nature, source, or amount of income” of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). We have marked the tax return information that the department must withhold under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code.

Caremark raises 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 and arguments, we find that Caremark has made a *prima facie* case that its customer list, which we have marked, is protected as trade secret information. We note that Caremark has made some of the information it seeks to withhold, consolidated balance sheets and statements of income, publicly available on its website. Because Caremark has published this information, it has failed to demonstrate that this information is a trade secret. Accordingly, we determine that Caremark has failed to demonstrate that any portion of the remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Furthermore, we determine Caremark has failed to demonstrate that any portion of the remaining information constitutes commercial or financial information the release of which would cause substantial competitive harm for the purposes of section 552.110(b). Thus, the department may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). The department must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code.

The department claims that some of the remaining untimely submitted information is excepted from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Common-law privacy protects information that (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common-law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). You have submitted biographical affidavits that include questions regarding personal financial information. Because this information, which you have marked, does not relate to a financial transaction between an individual and a governmental body, we conclude that it must be withheld under section 552.101 in conjunction with common law privacy.

Section 552.101 also encompasses section 59.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 59.001. The submitted biographical affidavits contain the social security numbers of company employees of the applicant companies. You inform us that the submitted biographical affidavits were required to be filed with the department by the Third Party Administrator applicants. Based on this representation, we agree that the social security numbers you have marked in the untimely submitted information are confidential under section 59.001 of the Occupations Code and thus must be withheld from disclosure under section 552.101 of the Government Code.

You have marked some of the remaining information as excepted from disclosure under section 552.130 of the Government Code. Section 552.130 excepts from disclosure information relating to a Texas motor vehicle driver's license and information relating to a Texas motor vehicle title or registration. Gov't Code § 552.130. We note that section 552.130 does not encompass motor vehicle record information of other states; thus, the department may not withhold the driver's license number from another state, which we have marked for release, under section 552.130.

Next, you claim that the marked bank account numbers, routing numbers, and insurance policy numbers are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 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 department must withhold the bank account, routing, and insurance policy numbers you have marked, as well as the ones we have marked, pursuant to section 552.136 of the Government Code.

Next, you acknowledge that the timely submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant 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:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the timely submitted information consists of a completed investigation made for or by the department. The department must release the completed investigation under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under other law. Sections 552.107 and 552.111 of the Government Code are discretionary exceptions that protect a governmental body's interests and may be waived. As such, they are not other law that make information confidential for purposes of section 552.022. See Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (2002) (attorney-client privilege under section 552.107 may be waived), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the information at issue may not be withheld on the basis of section 552.107 or section 552.111. However, the attorney-client privilege, which you raise for a portion of the information at issue, is also found in rule 503 of the Texas Rules of Evidence. In addition, you claim that a portion of the information subject to section 552.022 is protected by the attorney work product privilege under rule 192.5 of the Texas Rules of Civil Procedure. The Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); see also Open Records Decision No. 676 (2002). Accordingly, we will consider your arguments under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 with respect to the information subject to section 552.022. You also assert that section 552.137 is applicable to a portion of the information at issue. Because section 552.137 is a mandatory exception, we will address the applicability of this section to the submitted information.

Texas Rule of Evidence 503 encompasses the attorney-client privilege and provides in part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that portions of the timely submitted information consist of confidential communications between “staff attorneys in the Legal Services Division of TDI and authorized representatives of their client, the Texas Department of Insurance.” You further inform us that the communications were confidential, were made in furtherance of the rendition of professional legal services to the department, and were not intended to be disclosed to third parties. Having considered your representations and reviewed the information at issue, we find that you have established that these portions of the submitted information constitute privileged attorney-client communications. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (attorney’s entire investigative report was protected by attorney client privilege where attorney was retained to conduct investigation in her capacity as attorney for purpose of providing legal services and advice). Thus, the department may withhold the information we have marked pursuant to Texas Rule of Evidence 503.

Next, you state that portions of the timely submitted information are confidential under Texas Rule of Civil Procedure 192.5. For the purpose of section 552.022 of the Government Code, information is confidential under Texas Rule of Civil Procedure 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney’s representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney’s representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). A governmental body seeking to withhold information under this privilege bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of

preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

The department explains that the identified information pertains to a closed case file in the Enforcement Section of the department. You state that the case to which this information pertains is closed, and explain that the information at issue was prepared by the department's attorneys and investigators, and reveals their mental processes, conclusions, and legal theories. Based on your representations and our review of the information at issue, we agree that some of the information the department has marked is protected core work product. Accordingly, we find that the department may withhold that information, which we have marked, under Texas Rule of Civil Procedure 192.5. However, in some of the submitted information we find that you have failed to demonstrate that all parties to the communication are privileged parties. *See* TEX. R. EVID. 511 (stating that a person waives a discovery privilege if he voluntarily discloses the privileged information). Thus, the department may not withhold these portions of the information under Texas Rule of Civil Procedure 192.5.

Finally, you claim that some of the timely and untimely submitted information is excepted from disclosure under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. This section does not protect the work e-mail addresses of the employees of an entity with which a governmental body has a contractual relationship. *Id.* § 552.137(c)(1). You inform us that some of the individuals at issue have not affirmatively consented to the release of their e-mail addresses. Thus, you must withhold the marked e-mail addresses of the individuals who have not affirmatively consented to their release pursuant to section 552.137 of the Government Code. However, some of the individuals have affirmatively consented to the release of their e-mail address. You may not withhold the e-mail addresses, which we have marked, of the individuals who have affirmatively consented to the release of their e-mail addresses pursuant to section 552.137(b) of the Government Code. *See* Gov't Code § 552.137(b) (confidential information described by this section that relates to member of the public may be disclosed if member of public affirmatively consents to its release).

In summary, the department may withhold: 1) the information we have marked under rule 503 of the Texas Rules of Evidence; and 2) the information we have marked under rule 192.5 of the Texas Rules of Civil Procedure. The department must withhold: 1) the information marked in accordance with Open Records Letter No. 2001-4777; 2) the tax return information we have marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; 3) the trade secret

information we have marked under section 552.110(a); 4) the financial information you have marked under section 552.101 in conjunction with common-law privacy; 5) the social security numbers you have marked under section 552.101 in conjunction with section 59.001 of the Occupation Code; 6) the marked bank account, routing, and insurance policy numbers under section 552.136; and 7) the e-mail addresses of individuals who have not affirmatively consented to the release of their e-mail addresses under section 552.137. 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).

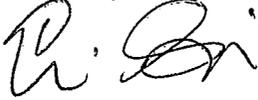
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/jh

Ref: ID# 325972

Enc. Submitted documents

c: Ms. Nell S. Geiser
Unite Here
275 7th Avenue, 11th Floor
New York, NY 10001
(w/o enclosures)