ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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

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ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 27, 2010

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

Mr. Hans P. Graff
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2010-01284

Dear Mr. Graff:

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# 368385.

The Houston Independent School District (the "district") received a request for responses to requests for proposals for pharmacy benefit services submitted by CaremarkPCS Health, L.P. ("Caremark"); Express Scripts, Inc. ("Express"); and Medco Health Solutions, Inc. ("Medco") in the two years prior to the request and any resulting contract with the district. You state the submitted information may implicate the proprietary interests of third parties.[1] Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified Caremark and Medco of the request and of each company's right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from Caremark and Medco. We have considered the submitted arguments and reviewed the submitted information.

[1] We note that the district raises sections 552.101, 552.104, and 552.110 of the Government Code as exceptions to disclosure. However, you have not provided this office with arguments applying those exceptions to the submitted information. *See* Gov't Code §§ 552.301, .302. Furthermore, we note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body.

Initially, we note that you have not submitted any proposals by Express. Therefore, to the extent any information responsive to this category of the request existed on the date the district received this request, we assume you have released it. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We also note that you have redacted page 000247 of Medco's information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See id.* § 552.301(a), (e)(1)(D). You do not assert, nor does our review of the records indicate, that you have been authorized to withhold the redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, the information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. Because we are unable to discern the nature of the redacted information, the district has failed to comply with section 552.301, and such information, which we have marked, is presumed public under section 552.302. *See* Gov't Code §§ 552.301(e)(1)(D), .302. Thus, we conclude that the district must release the marked information to the requestor. If you believe that the marked information is confidential and may not lawfully be released, you must challenge this ruling in court. In the future, the district should refrain from redacting any information it submits to this office when seeking an open records ruling.

We further note that the requestor does not seek "the financial terms set forth in the documents." Therefore, any financial information is not responsive to the present request. The district need not release nonresponsive information in response to this request, and this ruling will not address that information.[2]

Caremark and Medco each raise section 552.110 of the Government Code for portions of their submitted information, and Caremark raises section 552.110 for its contract with the district. 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

[2] As the financial information is not responsive, we need not address either Caremark's or Medco's arguments against its disclosure.

(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.[3] Restatement of Torts § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 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).

Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not

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[3] 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).

conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing Caremark's and Medco's arguments and the information at issue, we conclude each company has demonstrated the majority of its client information constitutes a trade secret for purposes of section 552.110(a). Accordingly, the district must withhold the information we have marked under section 552.110(a). We note that Medco has made some of the information it seeks to withhold publicly available on its website. Because Medco has published this information, it has failed to demonstrate that this information is a trade secret. Further, Caremark and Medco have failed to establish that their remaining information at issue meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for their information. Thus, the district may not withhold any portion of the remaining information under 552.110(a) of the Government Code.

Medco has established that release of some of its remaining information would cause the company substantial competitive harm. Accordingly, the district must withhold the information we have marked in the submitted information under section 552.110(b). However, we find Caremark and Medco have failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to the companies. *See* Open Records Decision Nos. 661 (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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the district may not withhold any of the remaining information pursuant to section 552.110(b) of the Government Code.

Caremark also argues portions of its proposal fit the definition of a trade secret found in section 1839(3) of title 18 of the United States Code, and indicates this information is therefore confidential under sections 1831 and 1832 of title 18 of the United States Code. *See* 18 U.S.C. §§ 1831, 1832, 1839(3). Section 1839(3) provides in relevant part:

> (3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes ... if-

> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public[.]

Id. § 1839(3). Section 1831 provides criminal penalties for the unauthorized disclosure of trade secrets to foreign governments, instrumentalities, or agents. *Id.* § 1831. Section 1832 provides criminal penalties for the unauthorized appropriation of trade secrets related to products produced for or placed in interstate or foreign commerce. *Id.* § 1832. We find Caremark has not demonstrated the information at issue is a trade secret for purposes of section 1839(3). Accordingly, we need not determine whether release of information at issue in this instance would be a violation of section 1831 or section 1832 of title 18 of the United States Code.

We note that the submitted information includes information excepted under section 552.136 of the Government Code.[4] Section 552.136 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.[5]

Portions of both Caremark's and Medco's proposals are 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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).

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[4] 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).

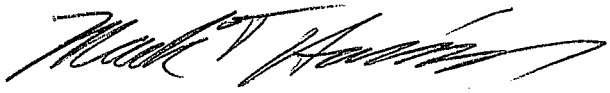
[5] We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the district must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/rl

Ref: ID# 368385

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Mr. Richard Josephson
Baker Botts L.L.P.
Counsel for Medco Health Solutions, Inc.
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995
(w/o enclosures)

Filed in The District Court
of Travis County, Texas

AUG - 6 2013
At 1:55 M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-10-000440

CAREMARKPCS HEALTH, L.L.C.	§	IN THE DISTRICT COURT
Plaintiff,	§	
	§	
v.	§	53d 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 CaremarkPCS Health, L.L.C., ("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 OR2010-01284 (the "Ruling"). The Houston Independent School District ("Houston ISD") received a request from Jennifer Low (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain contract and proposal documents submitted to the Houston ISD by 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"). The Houston ISD 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. The Houston ISD 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 to the extent it sought any CaremarkPCS-related 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 to the extent it seeks any CaremarkPCS Information, no CaremarkPCS Information should be released in reliance on Letter Ruling OR2010-01284. Letter Ruling OR2010-01284 should not be cited for any purpose related to the CaremarkPCS Information 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 the Houston ISD 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 the Houston ISD that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2010-01284 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 the Houston ISD 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 OR2010-01284.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on August 6th, 2013, at 1:40 p.m.

JUDGE PRESIDING

4819-3465-52531

AGREED:

ROBERT F. JOHNSON III
Gardere Wynne Sewell LLP
600 Congress Avenue, Suite 3000
Austin, Texas 78701-2978
Telephone: (512) 542-7127
Facsimile: (512) 542-7327
State Bar No. 10786400

Attorneys for Plaintiff, CaremarkPCS Health, L.L.C.

KIMBERLY L. FUCHS
State Bar # 24044140
Assistant Attorney General
Open Records Litigation
Administrative Law Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4151
Facsimile: (512) 320-0167

Attorney for Defendant, Greg Abbott