



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

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

February 17, 2010

Mr. Joseph P. Sanders
First Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

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

OR2010-02393

Dear Mr. Sanders:

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# 370594.

The City of Beaumont (the "city") received a request for information pertaining to a specified request for proposals and a copy of the contract between the city and the awarded vendor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. You also state the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified the following third parties: Envision Rx Pharmaceutical Services ("Envision"); Scott & White Health Plan ("Scott & White"); RESTAT; InformedRx; Medco Health Solutions ("Medco"); Navitus Health Solutions ("Navitus"); LDI Integrated Pharmacy Services ("LDI"); CVS Caremark ("Caremark"); and Script Care, Ltd. ("Script Care") 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 InformedRx, LDI, and Caremark. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note portions of the submitted information are the subject of litigation pending against the Office of the Attorney General. *See Medco Health Solutions v. Abbott*, No. D-1-

GN-10-000215 (200th Dist. Ct., Travis County, Tex.) and *Caremark v. Abbott*, No. D-1-GN-09-004191 (419th Dist. Ct., Travis County, Tex.). Accordingly, we will allow the trial court to resolve the issue of whether the information at issue must be released to the public.

Next, we note most of the remaining information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2009-17301 (2009). In that ruling, we determined the city must withhold the portions of LDI's, Envision's, Scott & White's, and InformedRx's information we marked under section 552.110 of the Government Code, but must release the remainder of the information at issue in accordance with copyright law. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, we conclude the city must rely on Open Records Letter No. 2009-17301 as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling.¹ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will, however, consider the submitted arguments for Script Care's information, as it was not previously ruled upon.²

Next, you assert the remaining information at issue is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, you do not cite to any specific law, and we are not aware of any, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, the city may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Next, you claim section 552.104 of the Government Code for the remaining information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. ORD 593 at 2. Generally, section 552.104 does not except information relating to competitive bidding situations once a bid has been awarded and a contract has been executed. *See id.*

¹As our ruling is dispositive for this information, we need not address your arguments against its disclosure.

²We note Script Care was the requestor in Open Records Letter No. 2009-17301.

The city asserts the release of the information at issue would "operate to undermine the city's efforts to get the lowest possible quotation," and would "establish a benchmark for those so inclined to use in response to the city's request for proposals." Upon review, however, we find the city has failed to demonstrate how the release of the remaining information would cause a specific threat of actual or potential harm to the city's interests in a specific competitive situation. Accordingly, the city may not withhold any portion of the remaining information from disclosure under section 552.104 of the Government Code.

You also state the remaining information may not be disclosed because it was marked confidential or has been made confidential by agreement. However, 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. 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 information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

We note 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, Script Care has not submitted any comments to this office explaining how release of the information at issue would affect its proprietary interests. On behalf of Script Care, you assert the remaining information is excepted under section 552.110 of the Government Code. However, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Because we have not received comments from Script Care, we have no basis to conclude it has a protected proprietary interest in the remaining 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, it actually faces competition and 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. Therefore, the city may not withhold the information at issue related to Script Care on the basis of any proprietary interest Script Care may have in the information.

Finally, we note some of the materials at issue 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the

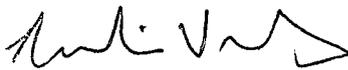
information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, we will allow the trial court to resolve the issue of whether the information at issue in the pending litigation must be released to the public. The city must continue to rely on Open Records Letter No. 2009-17301 and withhold or release the same information that was at issue in the prior ruling in accordance with that ruling. 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,



Melanie Villars
Assistant Attorney General
Open Records Division

MJV/rl

Ref: ID# 370594

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Script Care, Ltd.
c/o Joseph P. Sanders
~~First Assistant City Attorney~~
City of Beaumont
P.O. Box 3827
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Mr. Robert H. Griffith
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Mr. Blake O. Broderson
Assistant General Counsel
Scott & White Health Plan
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Mr. James H. Ferrick III
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10 South Broadway, Suite 2000
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Navitus Health Solutions
c/o Joseph P. Sanders
~~First Assistant City Attorney~~
City of Beaumont
P.O. Box 3827
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RESTAT
c/o Joseph P. Sanders
First Assistant City Attorney
City of Beaumont
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Mr. Clifford E. Berman
Casey, Gentz & Magness, L.L.P.
98 San Jacinto Boulevard, Suite 1400
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(w/o enclosures)

Ms. Elizabeth Miot
Regulatory Affairs Administrator
Envision Pharmaceutical Services, Inc.
2181 East Aurora Road
Twinsburg, Ohio 44087
(w/o enclosures)

SC DEC 02 2015 At 2:00 P.M. Velva L. Price, District Clerk

CAUSE NO. D-1-GN-09-004191

CAREMARK, L.L.C.,
Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 419th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Caremark L.L.C. (Caremark), sought to withhold certain information which is in the possession of City of Beaumont. All matters in controversy between Plaintiff, Caremark, and Defendant, Ken Paxton¹, Attorney General of Texas (Attorney General), have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent a certified letter to the requestor, Ms. Toni Hass on November 12, 2015, informing her of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that the City will be told to withhold the designated portions of the information at issue. The requestor was also informed of her right to intervene in the suit to contest the

¹ Because the Attorney General was sued in his official capacity, Ken Paxton is now the correct defendant.



withholding of this information. A copy of the certified mail receipt is attached to this motion.

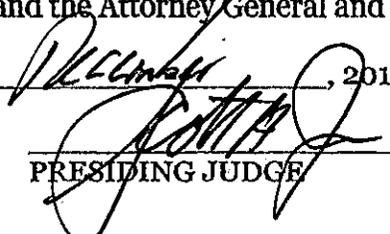
The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

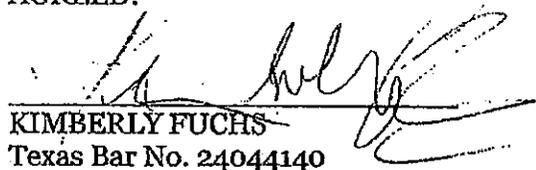
1. Caremark and the Attorney General have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, the Attorney General agrees that certain information from the bid proposals can be redacted in accordance with the markings agreed to by the parties. The Attorney General will provide a copy of the agreed markings to the City of Beaumont, with a letter instructing the City that Letter Ruling OR2009-16719 should not be relied upon as a prior determination.
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between Caremark and the Attorney General and is a final judgment.

SIGNED the 15th day of December, 2015.



PRESIDING JUDGE

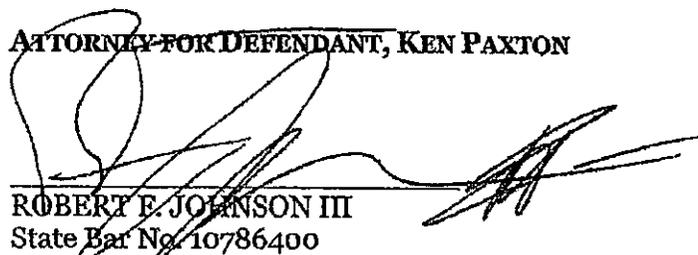
AGREED:



KIMBERLY FUCHS

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~~ATTORNEY FOR DEFENDANT, KEN PAXTON~~



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~~ATTORNEY FOR PLAINTIFF CAREMARK~~

Agreed Final Judgment
Cause No. D-1-GN-09-004191

A

CAUSE NO. D-1-GN-09-004191

CAREMARK, L.L.C.,
Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 419th JUDICIAL DISTRICT

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Caremark L.L.C. (Caremark) and Ken Paxton¹, Attorney General of Texas (the Attorney General). This Agreement is made on the terms set forth below.

Background

In 2009, three requestors made requests for information under the Public Information Act (PIA) which included a bid for services from Caremark to the City of Beaumont.

In Letter Rulings OR2009-16719, OR2009-17301, and OR2010-02393, the Open Records Division of the Attorney General (ORD) required the City to release some information Caremark claims is proprietary. While the requests giving rise to OR2009-17301 and OR2010-02393 have been withdrawn by the requestors, the request giving rise to OR2009-16719 remains outstanding.

After this lawsuit was filed, Caremark submitted information and briefing to the Attorney General establishing that some of the information at issue is excepted from disclosure under Texas Government Code section 552.104 in conjunction with *Boeing*

¹ Because the Attorney General was sued in his official capacity, Ken Paxton is now the correct defendant.

Company v. Paxton, 466 S.W.3d 831 (Tex. 2015). The Attorney General has reviewed Caremark's request and agrees to the settlement.

Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

Terms

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Caremark and the Attorney General have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, the Attorney General agrees that certain information from the bid proposals can be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of the bid proposals Caremark transmitted to the Attorney General via electronic file transfer and overnight delivery on October 20, 2015. The Attorney General will provide a copy of the agreed markings to the City of Beaumont, with a letter instructing the City that Letter Ruling OR2009-16719 should not be relied upon as a prior determination.

2. Caremark and the Attorney General agree to the entry of an agreed final judgment, a copy of which is attached as Exhibit A, the form of which has been approved by each party's attorney. The agreed final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor.

3. The Attorney General agrees that he will also notify the requestors, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of their right to intervene to contest Caremark's right to have the City withhold the information.

4. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

5. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

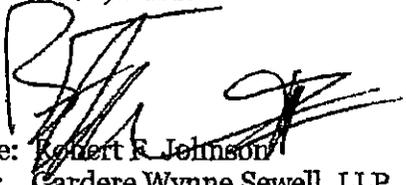
6. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

7. Caremark warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that Caremark has against the Attorney General arising out of the matters described in this Agreement.

8. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against Caremark arising out of the matters described in this Agreement.

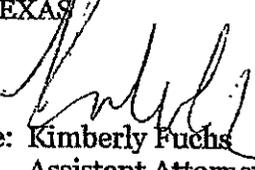
9. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

CAREMARK, L.L.C.

By: 
name: Robert F. Johnson
firm: Gardere Wynne Sewell, LLP

Date: 11/10/2015

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS

By: 
name: Kimberly Fuchs
title: Assistant Attorney General,
Administrative Law Division

Date: