



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 16, 2010

Ms. Leena Chaphekar  
Assistant General Counsel  
Employees Retirement System of Texas  
P.O. Box 13207  
Austin, Texas 78711-3207

OR2010-12379

Dear Ms. Chaphekar:

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# 390489.

The Employees Retirement System of Texas (the "system") received a request for specified fee and rebate information concerning pharmacy benefit managers for specified periods of time. You state you have released some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.103 and 552.104 of the Government Code.<sup>1</sup> You also state release of portions of the submitted information may implicate the proprietary interests of a third party. Accordingly, pursuant to section 552.305 of the Government Code, you notified Caremark, LLC ("Caremark") of the request and of its 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

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<sup>1</sup>You raise section 552.022 of the Government Code; however, section 552.022 is not an exception to disclosure. Rather, section 552.022 lists categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022. Furthermore, although you appear to raise section 552.101 of the Government Code in conjunction with sections 552.103, 552.104, and 552.110 of the Government Code, section 552.101 does not encompass other exceptions in the Act. Additionally, you have not submitted arguments explaining how section 552.101 applies to the submitted information; therefore, we presume you have withdrawn any arguments under that exception. *See* Gov't Code §§ 552.301, .302.

under Act in certain circumstances). We have received comments from Caremark. We have considered the submitted arguments and reviewed the submitted information.<sup>2</sup>

The system and Caremark contend the submitted 2009 fee and rebate information are currently the subject of a lawsuit pending against the Office of the Attorney General. *Caremark, L.L.C. v. Greg Abbott, Attorney General of Texas, et. al*, No. D-1-GN-08-003359 (345th Dist. Ct., Travis County, Tex.). Upon review, we determine the submitted 2009 fee and rebate information are not at issue in the pending lawsuit. Accordingly, we will address the submitted arguments against their disclosure.

The system and Caremark claim the submitted 2009 fee and rebate information are excepted from disclosure by the litigation exception, Government Code section 552.103. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties, we do not address Caremark's argument under section 552.103. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate the rights of a third party), 522 (1989) (discretionary exceptions in general). Furthermore, although the system states the information at issue is related to pending litigation initiated by Caremark against our office, we note, and the system acknowledges, it is not a party to this lawsuit. The litigation exception only applies when the governmental body is a party to the pending or reasonably anticipated litigation. *See* Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Accordingly, none of the submitted information may be withheld under section 552.103 of the Government Code.

Section 552.104 of the Government Code protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). A fundamental tenet of this section is that "[o]nce the competitive bidding process has ceased . . . , [section 552.104] will not except from disclosure either information submitted with a bid or the contract itself." *See* Open Records Decision No. 541 at 4 (1990); *see also* Open Records Decision No. 331 at 2 (1982) (exception inapplicable when there is no competitive situation). *Compare* Open Records Decision Nos. 170 (1977) (release of bids not required while bid negotiations still ongoing), 46 (1974) (list of bidders closed until after last day of bidding). As a result, section 552.104

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<sup>2</sup>The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). We note the system makes no assertion that it did not have information responsive to this request. We further understand the submitted information existed on the date the system received the request; thus, we do not address Caremark's contention to the contrary.

seldom, if ever, can be used to protect the terms of a contract. *See also* Open Records Decision No. 514 (1988) (Secretary of State's contract with Westlaw not protected by section 552.104). This office's interpretation of section 552.104, over the past thirty years, has not been disturbed by the Legislature or the court.

We note the information at issue relates to a contract that is fully executed. You have provided general assertions that release of the 2009 fee and rebate information would harm the interests of the system. However, we conclude the system is not engaging in any particular competitive bidding situation, and you have not sufficiently explained the applicability of section 552.104 to the information you seek to withhold under this exception. Consequently, the system may not withhold the information at issue under section 552.104 of the Government Code.

Next, Caremark raises section 552.110 of the Government Code for the 2009 fee and rebate information. 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 . . . . 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.<sup>3</sup> 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 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 consideration of the arguments submitted by Caremark and review of the information at issue, we conclude Caremark has not demonstrated any of the information at issue meets the definition of a trade secret. Thus, the system may not withhold any portion of the submitted information under section 552.110(a) of the Government Code.

Caremark also claims release of the information at issue would cause it substantial competitive harm. We note the information at issue is a document created by the system showing fees the system paid to Caremark and rebates received by the system in 2009 rather than Caremark's commercial information. We find Caremark has failed to provide specific factual evidence demonstrating release of any of the 2009 fee and rebate information would result in substantial competitive harm to the company. *See* ORD 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). Accordingly, the system may not withhold any of the submitted information pursuant to section 552.110(b) of the Government Code.

Caremark also argues the information at issue fits the definition of a trade secret found in section 1839(3) of title 18 of the United States Code, and indicates this information is

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<sup>3</sup>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).

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 under section 1839(3). Accordingly, we need not determine whether section 1831 or section 1832 applies. As no other exceptions to disclosure are raised, the submitted information must be released.

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](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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/eeg

Ref: ID# 390489

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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