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.

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ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

September 8, 2010

Ms. Judith N. Benton
Assistant City Attorney
City of Waco
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Waco, Texas 76702-2570

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

OR2010-13609

Dear Ms. Benton:

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# 392894 (Waco Ref. # LGL-10-857).

The City of Waco (the "city") received a request for the responses to the pharmacy benefits manager portion of a request for proposals for health plan services. You claim that the submitted information is excepted from disclosure under section 552.104 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 interested third parties of the request and of each company's right to submit arguments to this office as to why its information should not be released.[1] *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

[1]The interested third parties are as follows: Blue Cross Blue Shield of Texas ("BCBS"); TML Intergovernmental Employee Benefits Pool ("TML"); Assured Benefits Administrators ("Assured"); Humana Insurance Company ("Humana"); CIGNA; Serve You; Walgreens Health Initiatives, Medco Health Solutions, Inc.; LDI Integrated Pharmacy Services; Dental Select; Superior Vision Services, Inc.; QCD of America; Davis Vision, Inc.; Chartis Insurance; Hartford Life and Accident Insurance Company; ING Employee Benefits; Guardian Life Insurance Company; Unum Life Insurance Company of America; Metropolitan Life Insurance Company; Sun Life Assurance Company of Canada; HM Insurance Group; Eyemed Vision Care, Inc.; Ameritas Life Insurance Corp.; Block Vision of Texas, Inc.; Avesis Vision; Reliance Standard Life Insurance Company; Standard Insurance Company; Lincoln Financial Group; and VSP.

circumstances). We have received comments from BCBS, Assured, and Humana. We have also received and considered arguments submitted by CVS Caremark ("Caremark"). *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the that the request seeks only the proposals related to pharmacy benefits management. Accordingly, the submitted information relating to other health plan services is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the city is not required to release that information in response to the request. We note that Assured's information is not responsive to the request; therefore, we do not address Assured's arguments.

Next, we must address the city's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). In this instance, you explain that the city received the request for information on June 17, 2010. However, you did not submit a copy of the information requested until July 14, 2010. Consequently, we find the city failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Generally, a governmental body's failure to comply with section 552.301 results in the waiver of its claims under the exceptions at issue, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). You assert the submitted information is excepted under section 552.104 of the Government Code. This section, however, is discretionary in nature. It serves only to protect a governmental body's interests, and may be waived; as such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. *See also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Consequently, the city may not withhold any of the submitted information under section 552.104 of the Government Code. However, because section 552.136 of the Government Code and the interests of third parties can provide compelling reasons to

overcome this presumption, we will consider whether that exception and the submitted third party arguments require the city to withhold the information at issue.

Next, 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, we have only received comments from BCBS and Humana. The remaining third parties have not submitted to this office any reasons explaining why their information should not be released. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3. Accordingly, we conclude the city may not withhold any portion of the responsive information on the basis of any proprietary interest the remaining third parties may have in the information.

BCBS and Humana raise section 552.110 of the Government Code for specific portions of their proposals; Caremark also raises section 552.110 for specific portions of TML's proposal. 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* ORD 552 at 2. 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.[2] 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). We note pricing information pertaining to a particular solicitation or contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3.

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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing the submitted arguments and the information at issue, we conclude Humana has demonstrated its client information constitutes a trade secret for purposes of section 552.110(a). Accordingly, the city must withhold the information we have marked in Humana's proposal under section 552.110(a). However, we conclude that BCBS, Humana, and Caremark have failed to establish a *prima facie* case that any of the remaining information at issue is a trade secret protected by section 552.110(a). Therefore, the city may not withhold any of the remaining responsive information under section 552.110(a).

BCBS, Humana, and Caremark each claim release of specific portions of their remaining information would cause each company specific harm. Upon review, we find Humana and

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[2]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).

Caremark have established that release of portions of their proposals would cause them substantial competitive harm. Accordingly, the city must withhold the information we have marked in the Humana and TML proposals under section 552.110(b). However, we find BCBS, Humana, and Caremark have failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to any of their competitive positions. *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). Furthermore, we note the pricing information of a winning bidder, such as BCBS, is generally not excepted from disclosure under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (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). Accordingly, the city may not withhold any of the remaining responsive information pursuant to section 552.110(b) of the Government Code.

Caremark also argues portions of TML's 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 the 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 the remaining responsive information contains insurance policy numbers that are excepted from disclosure under section 552.136 of the Government Code.[3] 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). Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.[4]

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. Open Records Decision No. 180 at 3 (1978). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, the city must withhold the information we have marked pursuant to section 552.110 of the Government Code and the insurance policy numbers we have marked pursuant to section 552.136 of the Government Code. The remaining responsive 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.

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

[4]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 an insurance policy number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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,

Kate Hartfield

Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 392894

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Filed in The District Court
of Travis County, Texas

LM JAN 16 2014

At 2:04 M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-10-003351

CAREMARKPCS, L.L.C., Plaintiff,	)	IN THE DISTRICT COURT
v.	)	TRAVIS COUNTY, TEXAS
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Defendant.	)	353rd JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff, CaremarkPCS, LLC, ("Caremark") and Defendant Greg Abbott, Attorney General of Texas (Attorney General) 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 Caremark to challenge Letter Ruling OR2010-13609 (the "Ruling"). The City of Waco ("the City") received a request from U.S. Script pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain documents related to a request for proposal for health plan services to which Caremark responded. These documents contain information designated by Caremark as confidential and proprietary information exempt from disclosure under the PIA ("Caremark Information"). TheCity 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 some of the Caremark Information. The City 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 the 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 was withdrawn, no information should be released in reliance on Letter Ruling OR2010-13609. Letter Ruling OR2010-13609 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 signing of this Final Judgment, the Office of the Attorney General shall notify the City 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 instruct the City that pursuant to Tex. Gov't Code § 552.301(g), it shall not rely upon Letter Ruling OR2010-13609 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any information in reliance on said Ruling, and if the City receives any future requests for the same or similar Caremark Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2010-13609.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on January 16, 2014.

JUDGE PRESIDING

Tim Sulak

AGREED:

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