



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.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2011

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

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2011-05658

Dear Ms. Sims:

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# 415264.

The City of Lubbock (the "city") received a request for bid evaluation documents and submissions in response to Request for Proposals No. 10-113. While you raise sections 552.101 and 552.110 of the Government Code as possible exceptions to disclosure, you make no arguments and take no position regarding the applicability of those exceptions. Instead, you state release of the submitted information may implicate the proprietary interests of several 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

¹The interested third parties are as follows: Aetna, Inc. ("Aetna"); Blue Cross Blue Shield of Texas ("BCBS"); TML Intergovernmental Employee Benefits Pool ("TML"); Assured Benefits Administrators ("Assured"); Script Care, Ltd. ("Script Care"); Eyetopia Vision Care; Humana Insurance Company; Dental Select; Superior Vision Services, Inc. ("Superior"); Davis Vision, Inc.; Guardian Life Insurance Company; Metropolitan Life Insurance Company; HM Insurance Group; Eyemed Vision Care, Inc.; Block Vision of Texas, Inc. ("Block"); Avesis Vision; Reliance Standard Life Insurance Company; Maxor Plus ("Maxor"); SHA, L.L.C. d/b/a First Care; Innovante Benefit Administrators & Benescript's; HealthScope Benefits ("HealthScope"); Hartford Life and Accident Insurance Company; RH Administrators, Inc.; United Concordia Companies, Inc.; Delta Dental Insurance Company; Spectera Insurance Company, Inc; Envision Pharmaceutical Services, Inc. ("Envision"); Wage Works; and Vision Service Plan ("VSP").

third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from Assured, Aetna, BCBS, Block, Envision, Healthscope, Maxor, Script Care, Superior, VSP, and Wage Works. We have also received arguments submitted by an attorney on behalf of CVS Caremark and Silver Script, L.L.C. (collectively "Caremark").² We have considered the submitted arguments and reviewed the submitted information.³

Initially, we note, and you acknowledge, the city failed to meet the deadlines prescribed by section 552.301 of the Government Code in submitting a portion of the responsive information to this office. *See id.* § 552.301(e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 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). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As such, we will consider whether any of the submitted information may be excepted under the Act due to third-party interests. We also note portions of the information may be subject to section 552.136 of the Government Code, which provides a compelling reason to withhold information; thus, we will also address this exception for the submitted information.⁴

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 Assured, Aetna, BCBS, Block, Caremark, Envision, Healthscope, Maxor, Script Care, Superior, VSP, and Wage Works. The remaining third parties have not submitted to this office any reasons explaining why their information should not be released. Thus, the remaining companies have not demonstrated 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

²We note the information Caremark seeks to withhold is contained within TML's proposal.

³Block states it has presumed the city is a governmental body as defined in the Act, but requests if our office determines the city is not a governmental body subject to the Act that no part of its proposal be released to the requestor. We note the city does not assert it is not subject to the Act. Accordingly, we address the submitted arguments against disclosure of the information at issue.

⁴The 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).

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.

Assured generally asserts its proposal should be kept confidential, but raises no exceptions to disclosure and makes no arguments. VSP argues some of its submitted information is confidential because it was marked as "confidential" when given to the city. We note 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. *See* 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 Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Maxor and VSP assert portions of their submitted proposals are excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the city, not the proprietary interests of private parties such as Maxor and VSP. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the city does not raise section 552.104 as an exception to disclosure. Therefore, the city may not withhold any of the information at issue under section 552.104 of the Government Code.

Aetna, BCBS, Block, Caremark, Envision, Healthscope, Maxor, Script Care, Superior, VSP, and Wage Works each claim section 552.110 for portions of the submitted 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* 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.⁵ 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 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." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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).

⁵The following are the six factors 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).

After reviewing the submitted arguments and the information at issue, we conclude Block, Envision, Script Care, and VSP have demonstrated that portions of their respective information constitute trade secrets for purposes of section 552.110(a). Accordingly, the city must withhold the information we have marked under section 552.110(a). We note, however, that Envision has made some of the customer information it seeks to withhold publicly available on its website. Because Envision has published this information, it has failed to demonstrate this information is a trade secret, and none of it may be withheld under section 552.110(a). Additionally, we find BCBS, Block, Caremark, Envision, Healthscope, Maxor, Script Care, and VSP have failed to establish any of the 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 the remaining information. Thus, the city may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

Aetna, BCBS, Block, Caremark, Envision, Healthscope, Maxor, Script Care, Superior, VSP, and Wage Works assert portions of the remaining information are excepted from disclosure under section 552.110(b). After reviewing the submitted arguments and the information at issue, we conclude Aetna, BCBS, Block, Caremark, Envision, Healthscope, Script Care, Superior, VSP and Wage Works have established that release of portions of the remaining information would cause them substantial competitive harm. Accordingly, the city must withhold the information we have marked in the remaining information under section 552.110(b). We note, as previously stated, Envision has made some of its client information publicly available on its website. Because Envision has published this information, it has failed to demonstrate how release of this information would cause it substantial competitive injury. Further, we find Block, Caremark, Envision, Healthscope, Maxor, Script Care, Superior, VSP, and Wage Works have failed to provide specific factual evidence demonstrating 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, and qualifications 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 Maxor, 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* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (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 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.

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of [the Act], 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"). The submitted information contains insurance policy, bank account, and bank routing numbers, which we have marked. The city must withhold the insurance policy, bank account, and bank routing numbers under section 552.136. We note Wage Work's proposal may contain a credit card number also subject to section 552.136. However, we are unable to determine whether the marked credit card number constitutes a real account number for purposes of section 552.136. Thus, to the extent the marked credit card number constitutes a real account number, the city must also withhold the marked credit card number under section 552.136 of the Government Code.⁶

⁶We note this office 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, bank account, bank routing, and credit card numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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 (1977). 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 marked insurance policy, bank account, and bank routing numbers pursuant to section 552.136 of the Government Code. To the extent the marked credit card number constitutes a real account number, the city must also withhold this information pursuant to section 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.⁷

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

⁷We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. See Gov't Code § 552.147.

Ref: ID# 415264

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

cc: Ms. Brooke Spence
Greenberg Traurig
2101 L. Street, N.W., Suite 1000
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El Paso, Texas 79912
(w/o enclosures)

Mr. Russell Rice
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Mr. Tom McMaken
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Houston, Texas 77084
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Mr. Brian A. Mills
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(w/o enclosures)

Mr. John Provenzano
Group Administrative Concepts
P. O Box 24420
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Amy Lohman
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Mr. Dale Paustian
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Mr. Dee VanSchoick, Jr
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Reliance Standard
c/o Amy L. Sims
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Mr. Hal Binkley
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Mr. Marty Ward
Innovante' Benefit Administrators & Benescripts
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GreenWood Village, Colorado 80111
(w/o enclosures)

CAUSE NO. D-1-GN-11-001362

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

CAREMARKPCS HEALTH, L.L.C.,
Plaintiff,

§ IN THE DISTRICT COURT

§

§

v.

§ 201st 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., ("Caremark") 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 Caremark to challenge Letter Ruling OR2011-05658 (the "Ruling"). The City of Lubbock ("the City") received a request from Onvia (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain documents submitted to the City by Caremark and certain documents used by the City to evaluate Caremark's bid submissions. These documents contain information designated by Caremark as confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA ("Caremark Information"). The City 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.

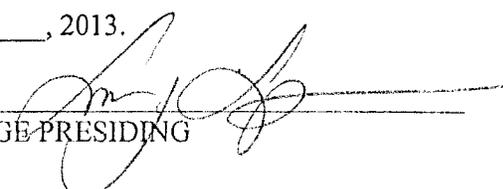
The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in

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 OR2011-05658. Letter Ruling OR2011-05658 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 expressly instruct the City that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2011-05658 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 OR2011-05658.
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.



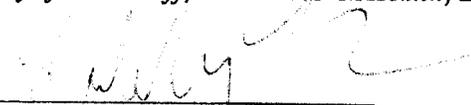
JUDGE PRESIDING

AGREED:



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Attorneys for Plaintiff, CaremarkPCSHHealth, L.L.C.



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Attorney for Defendant, Greg Abbott