



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

September 29, 2011

Mr. J. Scott Wilson
In-House Counsel
Texas Municipal League
1821 Rutherford Lane, Suite 300
Austin, Texas 78754-5151

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

OR2011-14135

Dear Mr. Wilson:

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# 431519.

The Public Employee Benefits Alliance ("PEBA") received a request for all proposals submitted for the Pre and Post 65 Retiree Medical and Prescriptions Benefit contract and all materials submitted from a third party consultant or PEBA used to evaluate the submitted proposals. You state portions of the submitted information are excepted under sections 552.101 and 552.110 of the Government Code. You also state release of this information may implicate the proprietary interests of Aetna Life Insurance Company ("Aetna"); The Hartford ("Hartford"); TAGCO Associates, L.P. ("TAGCO"); CaremarkPCS Health, L.L.C. ("Caremark"); Humana, Inc. ("Humana"); Group Administrative Concepts, Inc. ("GAC"); and United Healthcare (collectively, the "third parties"). Accordingly, you have notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Aetna, United Healthcare, and representatives of Caremark and Humana. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the second part of the request. To the extent any such information existed on the date PEBA received the request,

we assume you have released it. *See* 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). If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this decision, we have not received correspondence from Hartford, TAGCO, or GAC. Therefore, we have no basis to conclude that these third parties have protected proprietary interests in the submitted information. *See id.* § 552.110(a)-(b); 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, PEBA may not withhold any portion of the submitted information based upon the proprietary interests of Hartford, TAGCO, or GAC.

We first address the submitted arguments under section 552.110 of the Government Code. Although PEBA raises section 552.110 of the Government Code, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address PEBA's arguments under section 552.110 of the Government Code.

Aetna, United Healthcare, Humana, and Caremark argue portions of their submitted information is confidential under section 552.110 of the Government Code.¹ Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process

¹Although United also raises section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code, section 552.101 does not encompass other exceptions in the Act.

or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (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* ORD 232. This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 2. However, we cannot conclude section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); ORD 661 at 5-6 (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).

Caremark, United Healthcare, and Humana claim portions of their information contain trade secrets that should be protected by section 552.110(a) of the Government Code. Having reviewed their arguments, we find Caremark, United Healthcare, and Humana have made a *prima facie* case that information identifying their respective clients, which we have marked, constitutes trade secret information. Accordingly, PEBA must withhold the information we have marked under section 552.110(a) of the Government Code. However, we find Caremark, United Healthcare, and Humana failed to demonstrate how any of their remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Thus, PEBA may not withhold any of the remaining information under section 552.110(a).

Aetna asserts portions of its submitted information, and United Healthcare, Caremark, and Humana assert portions of their remaining information, are confidential under section 552.110(b). Upon review, we find Aetna, United Healthcare, Caremark, and Humana have demonstrated portions of their respective information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, PEBA must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Aetna, United Healthcare, Caremark, and Humana have made only conclusory allegations that release of any of their remaining information at issue would cause the companies substantial competitive injury. *See* ORD 661; *see also* Open Records Decision Nos. 509 at 5 (1988) (because costs, bids 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 (1982) (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). Further, we note United Healthcare was a winning bidder in this instance. This office considers the prices charged in governmental contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1998) (public has interest in knowing pricing charged by governmental 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, we conclude PEBA may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a

reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. This office has found personal financial information not related to a financial transaction between an individual and a governmental body is intimate or embarrassing and of no legitimate public interest. See Open Records Decision Nos. 600 (1992) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, are protected under common-law privacy), 545 (1990) (deferred compensation information, mortgage payments, assets, bills, and credit history protected under common-law privacy), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we conclude the personal financial information we have marked is intimate and embarrassing and of no legitimate public interest. Accordingly, PEBA must withhold the marked information under section 552.101 of the Government Code in conjunction with common-law privacy.

Finally, we note that some of the remaining information at issue appears to be 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, PEBA must withhold the marked information under section 552.110 of the Government Code. PEBA must also withhold the information we have marked under common-law privacy in conjunction with section 552.101 of the Government Code. The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.²

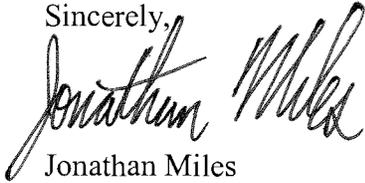
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,

²We note the information being released contains partial 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. Gov't Code § 552.147.

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 431519

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Mr. Mark Gale
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(w/o enclosures)

MAY 17 2016 *mp*

At 8:57 A.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-11-003343

CAREMARKPCS HEALTH, L.L.C.
Plaintiff,

v.

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS

§ IN THE DISTRICT COURT OF
§
§
§ 201st JUDICIAL DISTRICT
§
§
§
§ 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 Ken Paxton, 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 OR2011-14135 (the "Ruling"). The City received a request from T-Scan Corporation (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain proposal documents submitted to the Public Employee Benefits Alliance (PEBA). 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"). PEBA 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 Caremark Information. PEBA holds the information that has been ordered to be disclosed.

The parties represent 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, (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:

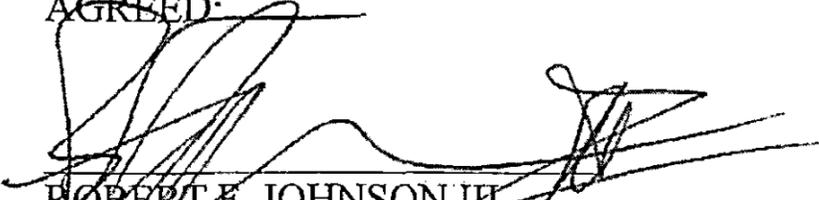
1. Because the request has been withdrawn, no Caremark Information should be released in reliance on Letter Ruling OR2011-14135. The Attorney General shall notify PEBA, in writing, that it shall not release any Caremark information pursuant to Letter Ruling OR2011-14135, and if PEBA receives any future 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 OR2011-14135.
2. Letter Ruling OR2011-14135 shall not be cited for any purpose related to the Caremark Information as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on May 17, 2016.



JUDGE PRESIDING
Amy Clark Meachum

AGREED:



ROBERT F. JOHNSON III

State Bar # 10786400

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