



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

October 18, 2011

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

Mr. Jonathan T. Koury
Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR2011-15186

Dear Mr. Koury:

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# 433422.

The City of Bryan (the "city") received a request for "vendor proposals, finalist papers, and the final contract" pertaining to request for proposals number 10-042. You state the requested final contract does not exist.¹ You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state release of this information may implicate the proprietary interests of CaremarkPCS Health, Inc. ("Caremark"); Envision Pharmaceutical Services ("Envision"); HEB; informedRx, an SXC Health Solutions ("informedRx"); LDI Integrated Pharmacy Services ("LDI"); Mutual Assurance Administrators, Inc.; Medco Health Solutions, Inc.; Scott & White Prescription Services; and US Script, Inc. (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 Caremark, Envision, informedRx, and LDI. We have considered

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note LDI seeks to withhold information the city did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the city. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

The city asserts the submitted information is confidential under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. The city raises section 552.101 in conjunction with section 252.049 of the Local Government Code, which provides as follows:

(a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

(b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This provision merely duplicates the protection section 552.110 of the Government Code provides to trade secret and commercial or financial information. Therefore, we will address the third parties' arguments under section 552.110 against disclosure of the submitted information.

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 Caremark, Envision, informedRx, and LDI. 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 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.

Caremark, Envision, informedRx, and LDI 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.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)

²The 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).

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).

After reviewing the submitted arguments and the information at issue, we conclude Caremark, informedRx, and LDI 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). However, we find Caremark, Envision, informedRx, and LDI 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.

Caremark, Envision, informedRx, and LDI assert portions of the remaining information are excepted from disclosure under section 552.110(b). In advancing its argument, Caremark appears to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to

continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Caremark's interest in its information.

After reviewing the submitted arguments and the information at issue, we conclude Envision, informedRx, and LDI 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). However, we find Caremark, Envision, informedRx, and LDI 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 Caremark, 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 the submitted information 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.

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. 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/ag

Ref: ID# 433422

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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(w/o enclosures)

JAN 31 2017

At 1:43 p.m.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-11-003314

| | | |
|------------------------------|---|--------------------------|
| CAREMARKPCS HEALTH, L.L.C., | § | IN THE DISTRICT COURT OF |
| Plaintiff, | § | |
| | § | |
| v. | § | TRAVIS COUNTY, TEXAS |
| | § | |
| KEN PAXTON, ATTORNEY GENERAL | § | |
| OF TEXAS, | § | |
| Defendant. | § | 250th JUDICIAL DISTRICT |

AGREED FINAL JUDGMENT

On this date, Plaintiff Caremark LLC, ("Caremark") and Defendant Ken Paxton, 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 OR2011-15186 (the "Ruling"). A Public Information Act (PIA), Tex. Gov't Code ch. 552, request was made to the City of Bryan (the City) for proposals, finalist papers, and the resulting contract submitted in response to a request for proposals to contract with the City to provide pharmacy benefit management services. The City concluded that some of Caremark's information, contained in proposal documents Caremark submitted to the City, was responsive to this request. The documents at issue 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 the Caremark Information. The City holds the information that has been ordered to be disclosed.

All matters in controversy between Plaintiff Caremark and Defendant 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. Steffanie Matthewson, on January 6, 2017, 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 withholding of this information. Verification of the delivery of this letter is attached to this motion as Exhibit "B".

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 portions of the responsive information contained in Caremark's September 2010 bid to the City can be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of the above-described documents that Caremark

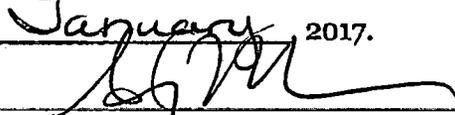
transmitted to the Attorney General on October 3, 2016. The Attorney General agrees to provide a copy of the agreed markings to the City, with instructions that Letter Ruling OR2011-15186 should not be relied upon as a prior determination.

2. All court cost and attorney fees are taxed against the parties incurring the same;

3. All relief not expressly granted is denied; and

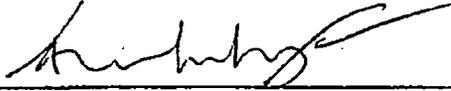
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between Caremark and the Attorney General and is a final judgment.

SIGNED the 31ST day of January 2017.



PRESIDING JUDGE

AGREED:



KIMBERLY FUCHS

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ATTORNEY FOR PLAINTIFF CAREMARKPCS HEALTH, L.L.C.

A

CAUSE NO. D-1-GN-11-003314

| | | |
|---|---|--------------------------|
| CAREMARKPCS HEALTH, L.L.C., Plaintiff, | § | IN THE DISTRICT COURT OF |
| | § | |
| v. | § | TRAVIS COUNTY, TEXAS |
| | § | |
| KEN PAXTON, ATTORNEY GENERAL OF TEXAS, Defendant. | § | |
| | § | |
| | § | 250th JUDICIAL DISTRICT |

SETTLEMENT AGREEMENT

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

Background

On July 27, 2011, a Public Information Act (PIA) request was made to the City of Bryan (the City) for proposals, finalist papers, and the resulting contract submitted in response to a request for proposals to contract with the City to provide pharmacy benefit management. The City concluded that some of Caremark's information, contained in proposal documents Caremark had submitted to the City, was responsive to this request and asked for an Attorney General decision on whether portions of this information could be withheld.

In Letter Ruling OR2011-15186, the Open Records Division of the Attorney General (ORD) required the City to release some information Caremark claims is proprietary.

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*

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 portions of the responsive information contained in Caremark's September 2010 bid to the City can be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of the above-described documents that Caremark transmitted to the Attorney General on October 3, 2016. The Attorney General agrees to provide a copy of the agreed markings to the City, with instructions that Letter Ruling OR2011-15186 should not be relied upon as a prior determination.

2. Caremark and the Attorney General agree to the entry of an agreed final judgment, 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 requestor, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of her 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.

CAREMARKPCS HEALTH, L.L.C.

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

Date: 1/24/17

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS

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

Date: 1/6/17