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

November 16, 2011

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

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

OR2011-16869

Dear Ms. Chaphekar:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 436953.

The Employees Retirement System of Texas (the "system") received a request for the system's Pharmacy Benefit Manager contract for the past four years. You state the system will make some responsive information available to the requestor. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of a third party. Accordingly, pursuant to section 552.305 of the Government Code, you notified Caremark, LLC ("Caremark") of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from Caremark. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the 2008 contract between Caremark and the system and the first amendment to that contract were the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2008-11771 (2008) and 2010-09892

(2010).[1] Additionally, the system and Caremark inform this office portions of the 2008 contract between Caremark and the system and the amendment at issue are currently the subject of two lawsuits pending against the Attorney General: *Caremark, L.L.C. v. Greg Abbott, Attorney General of Texas*, in the 345th Judicial District of Travis County, Texas and *Caremark PCS Health, LLC v. Greg Abbott, Attorney General of Texas*, in the 353rd Judicial District of Travis County, Texas. We will not address whether the information at issue in the lawsuits is excepted from required public disclosure under the Act, but will instead allow the trial courts to determine whether this information must be withheld from the public.

Next, we note the submitted information consists of executed contract amendments that are subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

> (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:
>
> . . .
>
> (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). Caremark raises section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Additionally, the system and Caremark raise section 552.110 of the Government Code, which makes information confidential under chapter 552. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 5 (to be codified as an amendment to Gov't Code § 552.110) (providing for "confidentiality" of trade secrets and certain commercial or financial information under section 552.110). Because section 552.101 excepts from disclosure information that is made confidential under other law and section 552.110 makes information

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[1]With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the system must continue to rely on Open Records Letter Nos. 2008-11771 and 2010-09892 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

confidential under chapter 552, we will consider the submitted claims under sections 552.101 and 552.110.

We now turn to Caremark's argument that portions of the contract amendment are protected under the common-law as trade secrets. Section 552.101 of the Government Code encompasses the common-law. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.[2] RESTATEMENT OF TORTS § 757 cmt. b. Having considered its arguments, we find Caremark has failed to demonstrate any of the information it seeks to withhold meets the definition of a trade secret, nor has Caremark demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the submitted information may be withheld under section 552.101 in conjunction with the common-law as a trade secret.

Next, both the system and Caremark raise section 552.110 of the Government Code. Although the system argues the information is excepted under section 552.110, that

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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).

exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the system's arguments under section 552.110. 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). As stated above, the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. RESTATEMENT OF TORTS § 757 cmt. b. 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 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).

Upon review, we find Caremark failed to establish a *prima facie* case that any of its information at issue is a trade secret protected by section 552.110(a). *See id.* We further 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; *see Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Therefore, the system may not withhold any of Caremark's information under section 552.110(a).

Section 552.110(b) of the Government Code excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Caremark also contends portions of the submitted information are excepted under section 552.110(b) of the Government Code because release of the information at issue would harm the system's ability and the ability of other governmental entities to obtain qualified candidates in response to future searches. In advancing this argument, Caremark appears to rely 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 at 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 the submitted information.

Upon review, we find Caremark has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information Caremark seeks to withhold would cause it substantial competitive harm. We note 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 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Thus, the system may not withhold any of the submitted information under section 552.110(b).

Caremark also argues portions of its 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 under section 1839(3). Accordingly, we need not determine whether section 1831 or section 1832 applies.

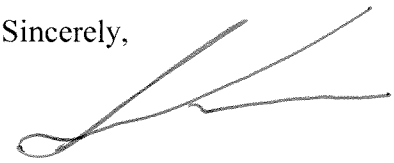
Lastly, Caremark argues its information is protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted 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 copyright law and the risk of a copyright infringement suit.

In summary, we will not address whether the information at issue in the lawsuits pending against this office is excepted from required public disclosure under the Act, but will instead allow the trial courts to determine whether this information must be released to the public. The system must continue to rely on Open Records Letter Nos. 2008-11771 and 2010-09892 and withhold or release the same information that was at issue in the prior rulings in accordance with those rulings. The submitted information must be released, but any information that is protected by copyright 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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/agn

Ref: ID# 436953

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Robert H. Griffith
For Caremark, LLC
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Notice sent: Final Interlocutory None
Disp Parties:
Disp code: CVD / CLS
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Judge GJB Clerk

DC BK14128 PG1023

Filed in The District Court of Travis County, Texas

MAY 05 2014

At 2:10 P.M.

Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-11-003638

CAREMARK, L.L.C., *Plaintiff,*	§	IN THE DISTRICT COURT
	§	
v.	§	250th 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 Caremark, 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 Caremark to challenge Letter Ruling OR2011-16869 (the "Ruling"). The Employees Retirement System of Texas ("ERS") received a request from Texas Budget Source (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for, among other things, certain documents reflecting a contract between Caremark and ERS that include information that Caremark claims is confidential, proprietary, trade secret, and commercial and financial information ("Caremark Information"). Caremark asserted that the Caremark Information was exempt from disclosure under the PIA. ERS 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. ERS 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 its 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 has been withdrawn, no Caremark Information should be released in reliance on Letter Ruling OR2011-16869. Letter Ruling OR2011-16869 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 Court signing this Final Judgment, the Office of the Attorney General shall notify ERS 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 ERS that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2011-16869 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any Caremark Information in reliance on said Ruling, and if ERS 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 OR2011-16869.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on May 5 2014, at 2:06 p.m.

JUDGE PRESIDING

AGREED:

4818-1719-1191.1

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