



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

November 21, 2011

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

Mr. Wm. Clarke Howard
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2011-17179

Dear Mr. Howard:

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# 436722.

The Teacher Retirement System of Texas (the "system") received a request for the system's "[p]harmacy [b]enefit [m]anager contracts" for 2011-2012, 2010-2011, 2009-2010, and 2008-2009, as well as any rebid of the contracts. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also inform us release of the submitted information may implicate the proprietary interests of Caremark, L.L.C. ("Caremark") and Medco Health Solutions, Inc. ("Medco"). Accordingly, you notified Caremark and Medco of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from attorneys for Caremark and Medco. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us portions of the requested information are the subject of litigation pending against the Office of the Attorney General. *See Caremark, Inc. v. Abbott*, No. GN-06-003470 (261st Dist. Ct., Travis County, Tex.); *Caremark, Inc. v. Abbott*, No. D-1-GN-07-004459 (250th Dist. Ct., Travis County, Tex.); *Caremark, LLC v. Abbott*,

No. D-1-GN-08-004330 (353rd Dist. Ct., Travis County, Tex.); *Caremark PCS Health, LLC v. Abbott*, No. D-1-GN-10-002136 (419th Dist. Ct., Travis County, Tex.); *Medco Health Solutions, Inc. v. Abbott*, No. D-1-GN-10-002144 (345th Dist. Ct., Travis County, Tex.); and *CaremarkPCS Health, L.L.C. v. Abbot*, No. D-1-GN-10-002751 (53rd Dist. Ct., Travis County, Tex.). Accordingly, we will allow the trial courts to resolve the issue of whether the information at issue in the pending litigation must be released to the public.

Next, you inform us some of the remaining information is the subject of previous requests, as a result of which this office issued Open Records Letter Nos. 2006-10313 (2006), 2007-16246 (2007), and 2010-08904 (2010). As we have no indication there has been any change in the law, facts, or circumstances on which these previous rulings were based, we conclude the system must rely on Open Records Letter Nos. 2006-10313, 2007-16246, and 2010-08904 as previous determinations and continue to treat the remaining previously ruled upon information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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). We now address the submitted arguments for the information not subject to litigation and that was not previously ruled upon.

Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated that the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates that public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (1982) (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

You state the system serves as trustee for two health benefit plans. You assert the information in Exhibit 2.1 includes “recent, relevant, and material information on fees, rates,

pharmaceutical provider discounts, and other unit-pricing information” related to pharmacy benefit manager services for these health benefit plans. You also assert the information in Exhibit 2.1 could be used by a company to estimate another bidder’s proposal, thereby hindering the system’s ability to obtain the best value in the marketplace for pharmacy benefit manager services for these health benefit plans. We note, however, the information in Exhibit 2.1 consists of the following: an amendment to a contract which addresses the addition and removal of certain sections without providing the substance of the sections; the disclosure and retention of records; policies to detect and reduce fraud, waste, and abuse; and cost-reporting services. Upon careful examination of Exhibit 2.1 and the submitted arguments, we find you have failed to demonstrate that public release of the information in Exhibit 2.1 would cause specific harm to the system’s interests in a particular competitive bidding situation. Accordingly, we find the system has failed to demonstrate the applicability of section 552.104 to Exhibit 2.1. Therefore, the system may not withhold any of the information in Exhibit 2.1 from required public disclosure under section 552.104.

Next, Caremark and Medco raise section 552.110 of the Government Code for portions of their remaining information in Exhibits 2.1, 2.2, 2.3, and 2.4. 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. Gov’t Code § 552.110. 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.” *Id.* 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.¹ 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 section 552.110(a) applies unless it has been shown 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 Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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* 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).

After consideration of the arguments submitted by Caremark and Medco and review of their information in Exhibits 2.1, 2.2, 2.3, and 2.4, we conclude Caremark and Medco have failed to demonstrate that any of the remaining information at issue meets the definition of a trade secret. Thus, the system may not withhold any portion of the information in Exhibits 2.1, 2.2, 2.3, and 2.4 under section 552.110(a) of the Government Code.

Caremark and Medco also claim release of some of their information in Exhibits 2.1, 2.2, 2.3, and 2.4 would cause them substantial competitive harm. However, upon review, we find Caremark and Medco have failed to demonstrate that release of any portion of the remaining information at issue 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

¹The 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).

information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder is generally not excepted 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). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); ORD 541 at 8 (public has interest in knowing terms of contract with state agency). Accordingly, the system may not withhold any portion of Caremark's or Medco's information in Exhibits 2.1, 2.2, 2.3, or 2.4 pursuant to section 552.110(b) of the Government Code.

Caremark also argues some of its information in Exhibits 2.1, 2.2, and 2.3 fits 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.

Caremark and the system state some of the information is 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). 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 the 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. With respect to the remaining information, the system must continue to rely on Open Records Letter Nos. 2006-10313, 2007-16246, and 2010-08904 to withhold or release the information at issue in those prior rulings. 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/agn

Ref: ID# 436722

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Russell C. Lewis
Counsel for Medco Health
Solutions, Inc.
Baker Botts, L.L.P.
910 Louisiana Street
Houston, Texas 77002-4995
(w/o enclosures)

Ms. Jill Stearns
National Accocunts Executive
Medco Health Solutions, Inc.
6836 Austin Center Boulevard
Suite 165
Austin, Texas 78731
(w/o enclosures)

Mr. Roger Holland
Vice President, Sales
Medco Health Solutions, Inc.
41 St. Raphael
Laguna Niguel, California 92667
(w/o enclosures)

Mr. Benno Weisberg
Counsel for Caremark, Inc.
And CaremarkPCS Health, L.L.C.
Foley & Lardner, L.L.P.
321 North Clark Street, Suite 2800
Chicago, Illinois 60654-5313
(w/o enclosures)

Mr. Dana Merry
Director Strategic Accounts
CaremarkPCS Health, L.L.C.
109 Village Glen
Georgetown, Texas 78633
(w/o enclosures)

Ms. Jennifer Molinar
Senior Legal Counsel
CVS Caremark
2211 Sanders Road
NBT-10
Northbrook, Illinois 60062
(w/o enclosures)

Filed in The District Court of Travis County, Texas

MAY 05 2014

At 2:10 PM. Amalia Rodriguez-Mendoza, Clerk Jm

Notice sent: Final Interlocutory None
Disp Parties: ALL
Disp code: CVD CLS 4611
Redact pgs:
Judge GJS Clerk BH

CAUSE NO. D-1-GN-11-003672

CAREMARK, L.L.C. and
CAREMARKPCS HEALTH, L.L.C.
Plaintiffs,

v.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT
§
§
§ 261st JUDICIAL DISTRICT
§
§
§
§ TRAVIS COUNTY, TEXAS
§

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiffs Caremark, L.L.C. and CaremarkPCS Health, L.L.C. (collectively, "CaremarkPCS") 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 CaremarkPCS to challenge Letter Ruling OR2011-17179 (the "Ruling"). The Teacher Retirement System of Texas ("TRS") 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 CaremarkPCS and TRS that include information that CaremarkPCS claims is confidential, proprietary, trade secret, and commercial and financial information ("CaremarkPCS Information"). CaremarkPCS asserted that the CaremarkPCS Information was exempt from disclosure under the PIA. TRS 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 CaremarkPCS Information. TRS holds the information that has been ordered to be disclosed.

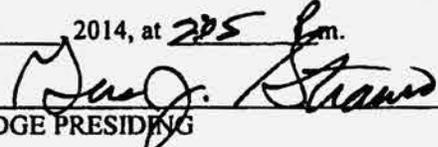
The parties represented to the Court that: (1) pursuant to Tex. Gov't Code §

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 CaremarkPCS Information should be released in reliance on Letter Ruling OR2011-17179. Letter Ruling OR2011-17179 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 TRS in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In this notice, the Office of the Attorney General shall expressly instruct TRS that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2011-17179 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any CaremarkPCS Information in reliance on said Ruling, and if TRS receives any future requests for the same or similar CaremarkPCS Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2011-17179.
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 2:05 p.m.

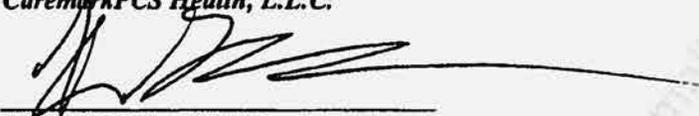

JUDGE PRESIDING

AGREED:



ROBERT F. JOHNSON III
Gardere Wynne Sewell LLP
600 Congress Avenue, Suite 3000
Austin, Texas 78701-2978
Telephone: (512) 542-7127
Facsimile: (512) 542-7327
State Bar No. 10786400

*Attorneys for Plaintiffs, Caremark, L.L.C. and
CaremarkPCS Health, L.L.C.*



KIMBERLY L. FUCHS
State Bar # 24044140
Assistant Attorney General
Open Records Litigation
Administrative Law Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: (512) 475-4151
Facsimile: (512) 320-0167

Attorney for Defendant, Greg Abbott