



**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

January 4, 2012

Ms. Victoria Huynh  
Deputy City Attorney  
City of Plano  
P.O. Box 860358  
Plano, Texas 75086

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

OR2012-00138

Dear Ms. Huynh:

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# 441355.

The City of Plano (the "city") received a request for a specified contract for prescription benefit services. You state the city has released some of the requested information. Although we understand you take no position as to whether the remaining requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of CaremarkPCS Health, L.L.C. ("Caremark"). Accordingly, you state, and provide documentation showing, you notified 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, the requestor argues the information at issue, submitted as Exhibit C is 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[.]

Gov't Code § 552.022(a). Upon review, we find the information at issue consists of an executed contract amendment relating to the expenditure of public funds. Thus, this information is subject to section 552.022(a)(3). Accordingly, the information at issue may only be withheld if it is confidential under the Act or other law. 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." *Id.* § 552.101. Additionally, Caremark raises section 552.110 of the Government Code, which makes information confidential under chapter 552. *See id.* § 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 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 its information are protected under section 552.110 of the Government Code, which 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. *See id.* § 552.110(a), (b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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.<sup>1</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that 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. *See* Open Records Decision No. 402 (1983).

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).

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). 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.”

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<sup>1</sup>The Restatement of Torts lists the following six factors 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 other 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).

RESTATEMENT of Torts § 757 cmt. b; *see Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Therefore, the city may not withhold any of Caremark's information under section 552.110(a).

Caremark also contends portions of Exhibit C are excepted under section 552.110(b) of the Government Code because release of the information at issue would harm the city'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 Exhibit C.

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. *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). Further, 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 city may not withhold any of Exhibit C under section 552.110(b).

Section 552.101 encompasses information protected by other statutes. Caremark 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, and the city may not withhold Exhibit C under section 552.101 on those bases. As no further arguments against disclosure have been raised, Exhibit C must be released.

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](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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/dls

Ref: ID# 441355

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

CaremarkPCS Health, L.L.C.  
c/o Mr. Robert H. Griffith  
Foley & Lardner, L.L.P.  
321 North Clark Street, Suite 2800  
Chicago, Illinois 60610-4764  
(w/o enclosures)

Filed in The District Court  
of Travis County, Texas

SC DEC 30 2015  
At 3:30 P.M.  
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-12-000106

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

v.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS,  
Defendant.

§ IN THE DISTRICT COURT OF  
§  
§  
§ TRAVIS COUNTY, TEXAS  
§  
§  
§ 53<sup>RD</sup> JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which CaremarkPCS Health, L.L.C. (Caremark), sought to withhold certain information which is in the possession of the City of Plano (Plano). All matters in controversy between Plaintiff, Caremark, and Defendant, Ken Paxton<sup>1</sup>, Attorney General of Texas (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 Mathewson, on Dec. 14, 2015, informing her of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that Plano 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

<sup>1</sup> Because the Attorney General was sued in his official capacity, Ken Paxton is now the correct defendant.



the withholding of this information. A copy of the certified mail receipt is attached to this motion.

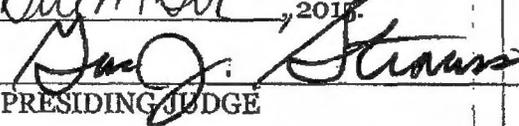
The requestor has not filed a motion to intervene.

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 Exhibit 1 to the contract between Caremark and Plano can be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of Exhibit 1 that Caremark transmitted to the Attorney General via email and overnight delivery on November 25, 2015. The Attorney General will provide a copy of the agreed markings to Plano, with a letter instructing Plano that Letter Ruling OR2012-00138 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 30 day of December, 2015.

  
PRESIDING JUDGE

PRESIDING JUDGE

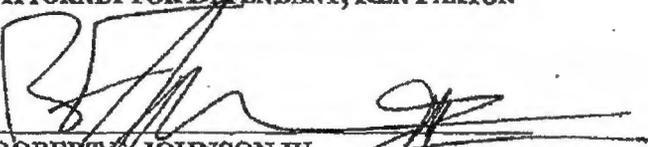
AGREED:



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**KIMBERLY FUCHS**  
Texas Bar No. 24044140  
Chief, Open Records Litigation  
Administrative Law Division  
P. O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
Telephone: (512) 475-4195  
Facsimile: (512) 320-0167  
Kimberly.Fuchs@texasattorneygeneral.gov

**ATTORNEY FOR DEFENDANT, KEN PAXTON**



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

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