



**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

February 22, 2012

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

Mr. Warren M.S. Ernst and Ms. Heather Silver  
Office of the City Attorney  
City of Dallas  
1500 Marilla Street, Room 7BN  
Dallas, Texas 75201

OR2012-02781

Dear Mr. Ernst and Ms. Silver

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# 444681.

The City of Dallas (the "city") received one request for copies of the proposals submitted for request for proposal ("RFP") BDZ1112 by three named companies.<sup>1</sup> The city received a second request from a different requestor for the proposals submitted for RFP BDZ1112 by three named companies; all scoring sheets, the final assessment, and all reports created by consultants relating to RFP BDZ1112; and all contract documents between the city and United HealthCare Services, Inc. ("United"). You state some of the information responsive to the second request will be released to the second requestor upon receipt of payment for production. You state that, although the city takes no position with respect to the remaining requested information, it may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the city notified the following third parties of the request for information and of their right to submit arguments stating why their information should not be released: Aetna Life Insurance Company ("Aetna"); Block Vision, Inc.

---

<sup>1</sup>You inform our office the city sought and received clarification of the first request for information. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

("BVI"); Blue Cross Blue Shield of Texas ("BCBS"); CaremarkPCS Health, L.L.C. ("Caremark"); Cigna; Delta Dental; Humana Inc. ("Humana"); and United. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by attorneys for Aetna, BVI, BCBS, Caremark, Humana, and United.

Initially, Caremark argues some of its information is not responsive to the second request for information or, in the alternative, is excepted under sections 552.104 and 552.110 of the Government Code. However, the city did not submit the information for which Caremark makes these arguments. 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* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, you acknowledge, and we agree that the city did not comply with its ten- or fifteen-business-day deadlines as to the information responsive to the first request, or its fifteen-business-day deadlines as to the information responsive to only the second request under section 552.301 of the Government Code in requesting this decision. *Id.* § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *see also Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because a third party's interests can provide a compelling reason for non-disclosure under section 552.302, we will address the third parties' submitted arguments against disclosure. We also note some of the information is subject to section 552.136 of the Government Code, which also provides a compelling reason that overcomes the presumption of openness.<sup>2</sup>

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

---

<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). You inform our office Delta Dental does not object to the release of its information. As of the date of this letter, this office has not received comments from Cigna explaining why any portion of its information should not be released to the requestor. Thus, we have no basis to conclude Cigna has a protected proprietary interest in the submitted information. *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 (1990). Consequently, the city may not withhold any of the submitted information on the basis of any proprietary interest Cigna or Delta Dental may have in the information.

We understand United to argue some of its submitted information is confidential because it was marked as "confidential" when submitted to the city. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

United and Caremark assert their information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the city, not the proprietary interests of private parties such as United or Caremark. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the city does not raise section 552.104 as an exception to disclosure. Therefore, the city may not withhold any of the submitted information under section 552.104 of the Government Code.

Aetna, BVI, BCBS, Caremark, and United assert some of their information is excepted from disclosure under section 552.110 of the Government Code. 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. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and

information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny 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 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) (citation omitted); *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>3</sup> *See* 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 exemption is made 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) is applicable unless it has been shown that the information meets the definition of a trade secret

---

<sup>3</sup>There are six factors the Restatement gives as indicia of 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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); 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 conclude Aetna, BVI, BCBS, Caremark, Humana, and United have failed to demonstrate how any portion of their information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Further, 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; *see Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, the city may not withhold any of the information pursuant to section 552.110(a) of the Government Code.

Aetna, BVI, BCBS, Caremark, Humana, and United claim some of their information constitutes commercial information that, if released, would cause the companies substantial competitive harm. Upon review, we conclude Aetna, BVI, BCBS, and Humana have established that release of their pricing information would cause the companies substantial competitive injury. Additionally, we find United has established that release of its pricing information for its pharmacy services would cause the company substantial competitive injury. Accordingly, the city must withhold these companies’ pricing information we have marked under section 552.110(b) of the Government Code. However, we find Aetna, BVI, BCBS, Caremark, Humana, and United have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 661 (1999) (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 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 (1982). The city informs our office Caremark is the winning bidder for pharmacy services and United is the winning bidder for all services

except pharmacy services. We note the pricing information of winning bidders, such as Caremark and United, 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). Consequently, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136 states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device for the purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers we have marked in BCBS's information under section 552.136 of the Government Code.

We note some of the submitted information 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.

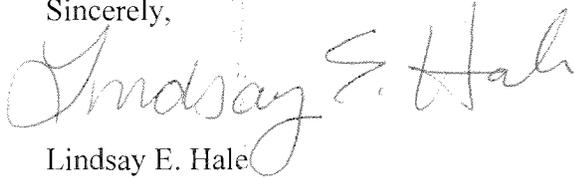
In summary, the city must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The city must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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](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,



Lindsay E. Hale  
Assistant Attorney General  
Open Records Division

LEH/ag

Ref: ID# 444681

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

Ms. Audrey Weinstein  
Block Vision  
4100 Alpha Road, Suite 910  
Dallas, Texas 75244  
(w/o enclosure)

Mr. Robert Griffith  
Counsel for Caremark  
Foley & Lardner LLP  
321 North Clark Street, Suite 2800  
Chicago, Illinois 60610  
(w/o enclosure)

Delta Dental  
c/o Warren Ernst/Heather Silver  
City of Dallas  
1500 Marilla Street, Room 7DN  
Dallas, Texas 75201  
(w/o enclosure)

Ms. Pati McCandless  
Counsel for Blue Cross Blue Shield of  
Texas  
Greenberg Traurig  
2101 L Street, NW, Suite 1000  
Washington, D.C. 20037  
(w/o enclosure)

Ms. Rachel Padgett  
Counsel for Humana  
McGinnis, Lochridge & Kilgore  
600 Congress Avenue, Suite 2100  
Austin, Texas 78701  
(w/o enclosure)

Mr. John K. Edwards  
Counsel for United HealthCare Services  
Jackson Walker L.L.P.  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
(w/o enclosure)

MR

APR 25 2016

At 8:47 A.M.  
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-12-000697

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

v.

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS , and the CITY OF DALLAS  
Defendants.

§ IN THE DISTRICT COURT OF  
§  
§  
§ 53rd JUDICIAL DISTRICT  
§  
§  
§ OF TEXAS , and the CITY OF DALLAS  
§ 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"), Defendant the City of Dallas (the City), and Defendant Ken Paxton<sup>1</sup>, 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 OR2012-02781 (the "Ruling"). The City received a request from Sally Imig of Aetna (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain proposal documents submitted to the City. 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"). 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.

---

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

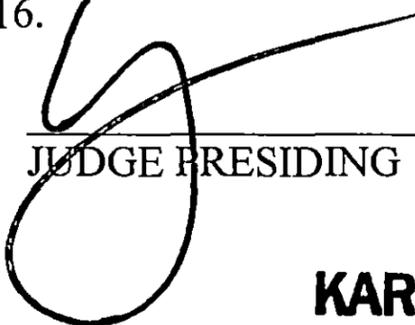


The parties represent to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn her request, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

**IT IS THEREFORE ORDERED** that:

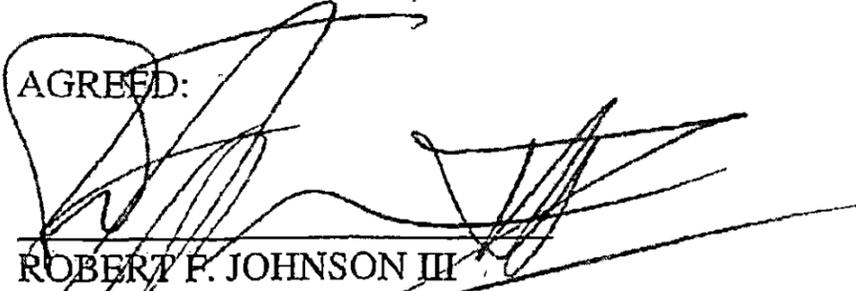
1. Because the request has been withdrawn, no Caremark Information should be released in reliance on Letter Ruling OR2012-02781. Letter Ruling OR2012-02781 should not be cited for any purpose related to the Caremark Information as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. The City shall not rely upon Letter Ruling OR2012-02781 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 the City 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 OR2012-02781.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on April 25, 2016.

  
\_\_\_\_\_  
JUDGE PRESIDING

**KARIN CRUMP**

AGREED:



ROBERT F. JOHNSON III

State Bar # 10786400

Gardere Wynne Sewell LLP

600 Congress Avenue, Suite 3000

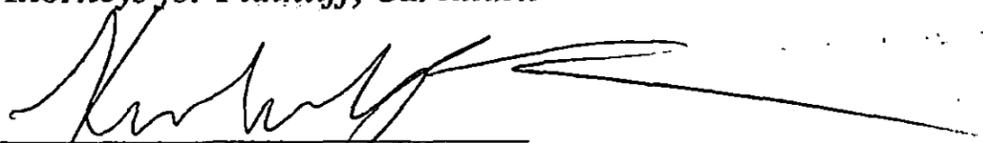
Austin, Texas 78701-2978

Telephone: (512) 542-7127

Facsimile: (512) 542-7327

RJohnson@gardere.com

*Attorneys for Plaintiff, Caremark*



KIMBERLY L. FUCHS

State Bar # 24044140

Assistant Attorney General

Open Records Litigation

Administrative Law Division

P.O. Box 12548, Capitol Station

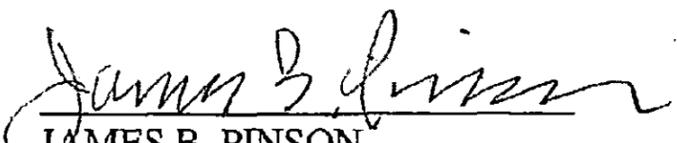
Austin, Texas 78711-2548

Telephone: (512) 475-4195

Facsimile: (512) 320-0167

Kimberly.Fuchs@texasattorneygeneral.gov

*Attorney for Defendant, Ken Paxton*



JAMES B. PINSON

State Bar # 16017700

Assistant City Attorney

Office of the City Attorney

1500 Marilla Street, Room 7BN

Dallas, TX 75201

Telephone: (214) 670-3519

Facsimile: (214) 670-0622

James.Pinson@DallasCityHall.com

*Attorney for Defendant, the City of Dallas*