



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

April 16, 2012

Mr. K. Scott Oliver
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

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

OR2012-05390

Dear Mr. Oliver:

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# 450692.

The San Antonio Water System (the "system") received a request for a specified pharmacy benefit management contract and extension.¹ Although you take no position on the public availability of the submitted information, you state the information at issue may implicate the proprietary interests of CaremarkPCS Health, L.L.C. ("Caremark"). Accordingly, you submit documentation showing you notified Caremark of the request for information and of the company's right to submit arguments to this office as to why the submitted 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 submitted by an attorney for Caremark. We have considered the submitted arguments and reviewed the submitted information.

¹You state, and provide documentation showing, the system sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if 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); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Caremark asserts its “pricing, rebate, and other proprietary commercial information” is excepted from disclosure pursuant to 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. *See* Gov’t Code § 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *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 (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

²The 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).

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. 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.*; *see also* 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 has failed to demonstrate how any portion of the information it seeks to withhold meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* ORDs 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), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). 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; ORDs 319 at 3, 306 at 3. Therefore, the system may not withhold any of Caremark’s information pursuant to section 552.110(a) of the Government Code.

Caremark contends release of the information at issue would cause Caremark and vendors like it to be reluctant or unwilling to offer governmental bodies their “most favorable and aggressive pricing structures.” 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 commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the 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 its remaining information.

Caremark also contends portions of its information are excepted under section 552.110(b) of the Government Code. We note the information at issue pertains to a contract awarded to Caremark. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *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). Further, we find Caremark has made only conclusory allegations the release of any of its information would result in substantial damage to the company's competitive position. Thus, Caremark has not demonstrated substantial competitive injury would result from the release of any of the submitted information. *See* ORD 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). Accordingly, none of Caremark's information at issue may be withheld under section 552.110(b).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section 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 system may not withhold any of the submitted information under section 552.101 on those bases. As no further exceptions to disclosure are raised, the system must release the submitted information.

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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 450692

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 60654-5313
(w/o enclosures)

JUN 08 2016

At 9:00 A.M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-12-001220

CAREMARK, L.L.C and CAREMARKPCS	§	IN THE DISTRICT COURT OF
HEALTH, L.L.C.,	§	
Plaintiffs,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON, ATTORNEY GENERAL	§	
OF TEXAS,	§	
Defendant.	§	126th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, Plaintiffs Caremark, L.L.C. and CaremarkPCS Health L.L.C. (collectively, "Caremark"), and Defendant Ken Paxton, 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 OR2012-05390 (the "Ruling"). San Antonio Water System ("SAWS") received a request from Steffanie Mathewson (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain proposal and contract documents submitted to SAWS. 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"). SAWS 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 some of the Caremark Information. SAWS 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 Mathewson, on May 19, 2016, informing her of the setting of this matter on the uncontested docket on this date. The requestor was informed of the parties' agreement that SAWS 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.

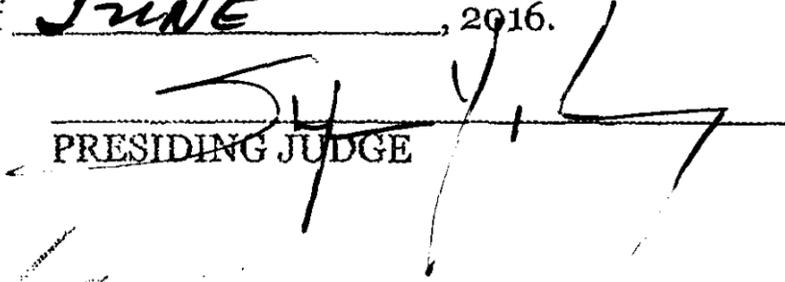
IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

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 the January 1, 2012 contract and the January 1, 2012 Amendment No. 2 to the contract between Caremark and SAWS can

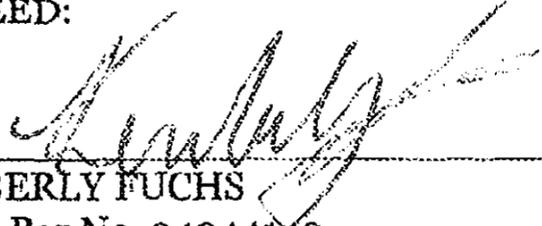
be redacted in accordance with the markings agreed to by the parties, which markings are reflected on the copies of the above-described documents that Caremark transmitted to the Attorney General on April 18, 2016. The Attorney General will provide a copy of the agreed markings to SAWS, with a letter instructing SAWS that Letter Ruling OR2012-05390 should not be relied upon as a prior determination.

2. All court costs 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.

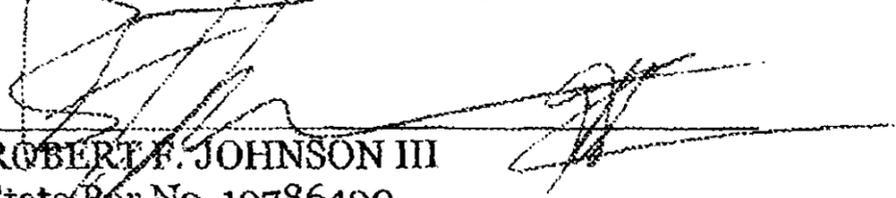
SIGNED the 8th day of JUNE, 2016.


PRESIDING JUDGE

AGREED:


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Agreed Final Judgment
Cause No. D-1-GN-12-001220

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ATTORNEY FOR PLAINTIFFS CAREMARK, L.L.C. AND CAREMARKPCS HEALTH, L.L.C.

A

CAUSE NO. D-1-GN-12-001220

CAREMARK, L.L.C and CAREMARKPCS HEALTH, L.L.C., Plaintiffs,	§ § § § § § § § § §	IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS 126th JUDICIAL DISTRICT
v.		
KEN PAXTON, ATTORNEY GENERAL OF TEXAS, Defendant.		

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Caremark, L.L.C. and 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

In January 2012, a request was made under the Public Information Act (PIA) for the bid and the finalized contract between Caremark and the San Antonio Water System (SAWS) for prescription benefit services.

In Letter Ruling OR2012-05390, the Open Records Division of the Attorney General (ORD) required SAWS 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 PLA 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 the January 1, 2012 contract and the January 1, 2012 Amendment No. 2 to the contract between Caremark and SAWS 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 via electronic file transfer and overnight delivery on April 18, 2016. The Attorney General will provide a copy of the agreed markings to SAWS, with a letter instructing SAWS that Letter Ruling OR2012-05390 should not be relied upon as a prior determination.

2. Caremark and the Attorney General agree to the entry of an agreed final judgment, a copy of which is attached as Exhibit A, 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 SAWS 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.

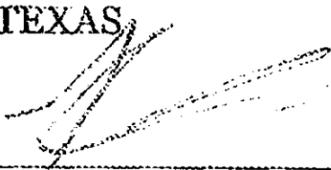
9. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

CAREMARK, L.L.C. AND
CAREMARKPCS HEALTH, L.L.C.

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

Date: 5/18/11

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS

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

Date: 5/18/11