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

July 10, 2012

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

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

OR2012-10660

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# 458404.

The Employees Retirement System of Texas (the "system") received two requests for information. The first request seeks specified information about the system's Pharmacy Benefit Manager ("PBM") contract since 2008. The second request seeks a copy of the system's current PBM contract. You state the system will make some responsive information available to the requestors. You claim some of 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, second, and third amendments 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), 2010-09892 (2010), and 2011-16869 (2011).[1] Additionally, the system and Caremark inform this office portions of the 2008 contract between Caremark and the system and the first and third amendments at issue are currently the subject of three 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; *Caremark PCS Health, LLC v. Greg Abbott, Attorney General of Texas*, in the 353rd Judicial District of Travis County, Texas; and *Caremark, L.L.C. v. Greg Abbott, Attorney General of Texas*, in the 250th 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 an executed contract amendment that 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)(3). Caremark raises section 552.101 of the Government Code, which protects information made confidential under other law. Additionally, the system and Caremark both raise section 552.110 of the Government Code, which makes information confidential under the Act. *See id.* § 552.110 (providing for "confidentiality" of trade secrets and certain commercial or financial information under section 552.110). Therefore, we will consider the submitted information under sections 552.101 and 552.110.

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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, 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, 2010-09892, and 2011-16869 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).

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 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 (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. *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. 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

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[2]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).

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. 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; ORDs 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 the 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 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). Further, 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); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Thus, the system may not withhold any of the submitted information 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.

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, 2010-09892 and 2011-16869 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,

Paige Lay

Paige Lay
Assistant Attorney General
Open Records Division

PL/som

Ref: ID# 458404

Enc. Submitted documents

cc: 2 Requestors
(w/o enclosures)

Mr. Jason Britt
Counsel for Caremark
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321 North Clark Street, Suite 2800
Chicago, Illinois 60654-5313
(w/o enclosures)

Filed in The District Court
of Travis County, Texas
MR
JUN 23 2016
At 8:37 A M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-12-002202

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

AGREED FINAL JUDGMENT

On this date, Plaintiffs Caremark Rx, L.L.C., Caremark, L.L.C. and CaremarkPCS 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 OR2012-10660 (the "Ruling"). The Employees Retirement System of Texas ("ERS") received two requests for information pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for the contract between Caremark and ERS. The first request was from Tony Hernandez and the second was from Michael Hajdun of National Employee Benefit Companies, Inc. 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"). 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 the Caremark Information. ERS holds the information that has been ordered to be disclosed.

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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 certified letters to the requestors, Mr. Tony Hernandez and Mr. Michael Hajdun, on _____, 2016, informing them of the setting of this matter on the uncontested docket on this date. The requestors were informed of the parties' agreement that ERS will be told to withhold the designated portions of the information at issue. The requestors were also informed of their right to intervene in the suit to contest the withholding of this information. Verification of the delivery of these letters is attached to this motion as Exhibit "B".

Neither requestor has 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 information contained in Amendment 4 to the Contractual Agreement for Pharmacy Benefit Services between ERS and Caremark can be redacted in accordance with the

for Pharmacy Benefit Services between ERS and Caremark 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 26, 2016. The Attorney General will provide a copy of the agreed markings to ERS, with a letter instructing ERS that Letter Ruling OR2012-10660 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 23 day of June, 2016

PRESIDING JUDGE
Hon. Gus J. Strauss

AGREED:

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

A

CAUSE NO. D-1-GN-12-002202

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

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Plaintiffs Caremark Rx, L.L.C., Caremark, L.L.C. and CaremarkPCS L.L.C., (collectively "Caremark") and Ken Paxton, Attorney General of Texas (the Attorney General). This Agreement is made on the terms set forth below.

Background

In April and May 2012, two requests were made under the Public Information Act (PIA) for the contract between Caremark and the Employees Retirement System of Texas (ERS). ERS asked for an Attorney General decision on whether portions of this information could be withheld.

In Letter Ruling OR2012-10660, the Open Records Division of the Attorney General (ORD) required ERS to release the 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 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 information contained in Amendment 4 to the Contractual Agreement for Pharmacy Benefit Services between ERS and Caremark 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 26, 2016. The Attorney General will provide a copy of the agreed markings to ERS, with a letter instructing ERS that Letter Ruling OR2012-10660 should not be relied upon as a prior determination.

2. Caremark and the Attorney General agree to the entry of an agreed final judgment, 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 requestors.

3. The Attorney General agrees that he will also notify the requestors, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of their right to intervene to contest Caremark's right to have ERS 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 RX, L.L.C, CAREMARK, L.L.C. AND CAREMARKPCS, L.L.C.

By: _____
name: Robert F. Johnson
firm: Gardere Wynne Sewell, LLP
Date: May 27, 2016

KEN PAXTON, ATTORNEY GENERAL OF TEXAS

By: _____
name: Kimberly Fuchs
title: Assistant Attorney General, Administrative Law Division
Date: May 31, 2016