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

December 17, 2012

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

Mr. Jonathan T. Koury
Assistant City Attorney
City of Bryan
P.O. Box 1000
Bryan, Texas 77805

OR2012-20262

Dear Mr. Koury:

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# 473831.

The City of Bryan (the "city") received a request for the winning bids, utilization data, ASO agreement and amendments, and a list of the top 100 drugs utilized with strength and dosage in relation to request for proposal numbers 12-029 and 12-030. Although you state the city takes no position as to whether the requested information is excepted under the Act, you contend release of this information may implicate the proprietary interests of third parties. Accordingly, you notified Blue Cross Blue Shield of Texas ("BCBS") and CaremarkPCS Health, L.L.C. ("Caremark") as well as Action Rx and McGriff, Seibels & Williams of Texas, Inc., two consultants involved in the selection process, of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d); *see also* 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 to disclosure under Act in certain circumstances). We have received comments from BCBS and Caremark. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the consultants for the city explaining why any of the submitted information

should not be released. Therefore, we have no basis to conclude these entities have 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. Accordingly, the city may not withhold any of the information at issue on the basis of any proprietary interest the two notified consultants may have in it.

Next, we note BCBS seeks to withhold information the city has not submitted for our review. 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, Caremark claims section 552.103 of the Government Code for some of the submitted information. Section 552.103 of the Government Code provides in relevant part as follows:

> (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.
>
> . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate the rights of a third party), 522 (1989) (discretionary exceptions in general). Thus, we do not address Caremark's argument under section 552.103 of the Government Code.

BCBS and Caremark argue portions of their 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* Gov't Code § 552.110. 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* ORD 552. Section 757 provides a trade secret is

> any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.[1] RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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 section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

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

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[1]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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Caremark has established a *prima facie* case its references constitute trade secrets. Therefore, the city must withhold this information, which we have marked, under section 552.110(a) of the Government Code. However, we find BCBS and Caremark have failed to demonstrate any of the remaining information at issue meets the definition of a trade secret, nor has either company demonstrated the necessary factors to establish a trade secret claim for this information. We note that 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 business," rather than "a process or device for continuous use in the operation of the business." *See* RESTATEMENT OF TORTS § 757 cmt. b; *Huffines*, 314 S.W.2d at 776; ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Caremark also contends portions of its information 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 its information.

Upon review, we find BCBS and Caremark have made only conclusory allegations that release of any of the remaining information at issue would result in substantial damage to each company's competitive position. Thus, BCBS and Caremark have not demonstrated

substantial competitive injury would result from the release of any of the remaining information at issue. *See* ORD 661 at 5-6. Furthermore, we note BCBS and Caremark were the winning bidders with respect to their respective bids, and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (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 the remaining 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 remaining 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 any of the remaining information under section 552.101 on those bases.

We note some of the remaining information may 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 section 552.110(a) of the Government Code. The remaining information must be released, but 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, 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,

Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/ag

Ref: ID# 473831

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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CAUSE NO. D-1-GN-12-004050

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| CAREMARKPCS HEALTH, L.L.C. | § | IN THE DISTRICT COURT |
| *Plaintiff,* | § | |
| | § | |
| v. | § | 98th JUDICIAL DISTRICT |
| | § | |
| KEN PAXTON, ATTORNEY GENERAL | § | |
| OF TEXAS, | § | |
| *Defendant.* | § | TRAVIS COUNTY, TEXAS |

**AGREED FINAL JUDGMENT**

Plaintiff CaremarkPCS Health, L.L.C., ("CaremarkPCS") and Defendant Ken Paxton, Attorney General of Texas, agree that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by Plaintiff CaremarkPCS to challenge Letter Ruling OR2012-20262 (the "Ruling"). The City of Bryan (the "City") received a request from Tobin Hawkins, of Cigna (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for certain proposal and other documents submitted to the City. These documents contain information CaremarkPCS claims is confidential, proprietary, trade secret, and commercial and financial information exempt from disclosure under the PIA ("CaremarkPCS 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 CaremarkPCS Information. The City holds the information that has been ordered to be disclosed.

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

**IT IS THEREFORE ORDERED** that:

1. Because the request has been withdrawn, no CaremarkPCS Information should be released in reliance on Letter Ruling OR2012-20262. Letter Ruling OR2012-20262 should not be cited for any purpose related to the CaremarkPCS Information as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the Court signing this Final Judgment, the Office of the Attorney General shall notify the City in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct the City that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2012-20262 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any CaremarkPCS Information in reliance on said Ruling, and if the City receives any future requests for the same or similar CaremarkPCS Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2012-20262.
3. All costs of court and attorney fees are taxed against the parties incurring same.
4. All other requested relief not expressly granted herein is denied.
5. This cause is hereby DISMISSED without prejudice.
6. This order disposes of all the parties and all the claims and is final.

SIGNED on July 2, 2015.

JUDGE PRESIDING

AGREED:

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