



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 21, 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
Chief of the General Counsel Division
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2012-20730

Dear Mr. Ernst:

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# 474447.

The City of Dallas (the "city") received a request for all request for proposals ("RFP") submissions for RFP BDZ1112 by all bidders, except a named company. You state that, although the city takes no position with respect to the submitted information, it may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the city notified Block Vision, Inc. ("BVI"); CaremarkPCS Health, L.L.C. ("Caremark"); Delta Dental Insurance Company ("Delta Dental"); Humana Inc. ("Humana"); and Restat, L.L.C. ("Restat") of the request for information and of their right to submit arguments stating why their information should not be released. *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 BVI and Caremark.

Initially, the city states some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter No. 2012-02781 (2012). In this ruling, we determined the city must withhold portions of the

information at issue under section 552.110 of the Government Code and must release the remaining information at issue in accordance with copyright law, including Caremark's pricing information. In response to our ruling, Caremark has filed a lawsuit against our office. *See CaremarkPCS Health, L.L.C. v. Abbott*, No. D-1-GN-12-000697 (53rd Dist. Ct., Travis County, Tex.). Accordingly, to the extent any of the information at issue in this request is at issue in the pending litigation, we will allow the trial court to resolve the issue of whether Caremark's information at issue in the pending litigation must be released to the public. With respect to the remaining information at issue in Open Records Letter No. 2012-02781, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the requested information was at issue in Open Records Letter No. 2012-02781 and is not at issue in the pending lawsuit, we conclude the city must rely on Open Records Letter No. 2012-02781 as a previous determination and withhold or release the identical information in accordance with that ruling. *See Open Records Decision No. 673 (2001)* (so long as law, facts, and 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). To the extent the submitted information is not at issue in the pending litigation, we will address the submitted arguments.

Next, 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 Delta Dental, Humana, or Restat explaining why their information should not be released. Therefore, we have no basis to conclude Delta Dental, Humana, or Restat have protected proprietary interests 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 Delta Dental, Humana, or Restat may have in it.

We note BVI seeks to withhold information the city has not submitted for our review. This ruling does not address information beyond what the city has submitted to us for review. *See Gov't Code § 552.301(e)(1)(D)* (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the city submitted as responsive to the request for information. *See id.*

Next, Caremark claims section 552.103 of the Government Code for some of the submitted information. Section 552.103 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.

Id. § 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.

BVI and Caremark 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* ORD 552 at 2. 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.¹ *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is exempted 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 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); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

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

Upon review, we find BVI and Caremark have made a *prima facie* case information identifying their clients, which we have marked, constitutes trade secret information. Accordingly, the city must withhold the information we have marked under section 552.110(a) of the Government Code. However, we conclude BVI and Caremark have failed to demonstrate how any portion of the remaining 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 remaining information pursuant to section 552.110(a) of the Government Code.

BVI argues release of the information at issue may cause BVI and other vision plans to withdraw from the public bid process and “could jeopardize whether state and local governmental entities are able to provide vision benefits[.]” 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 these arguments, BVI and Caremark appear 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 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 BVI’s and Caremark’s interest in their remaining information.

BVI and Caremark also claim some of their information constitutes commercial information that, if released, would cause the companies substantial competitive harm. Upon review, we conclude BVI has established that release of its pricing information and financial statements would cause the company substantial competitive injury. Accordingly, the city must

withhold BVI's information we have marked under section 552.110(b) of the Government Code. However, we find BVI and Caremark 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 (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 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). We note Caremark is the winning bidder for pharmacy services in the RFP at issue. We note the pricing information of a winning bidder, such as Caremark, 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 552.101 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.

Section 552.136 of the Government Code states, “[n]otwithstanding 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.”² 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 information we have marked in Restat’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, to the extent any of the information at issue in this request is at issue in the pending litigation, we decline to render a decision regarding the specific portions of the information at issue in the pending lawsuit and will allow the trial court to determine the public availability of that information. With respect to the remaining information at issue in Open Records Letter No. 2012-02781, the city must rely on Open Records Letter No. 2012-02781 as a previous determination and withhold or release the identical information in accordance with that ruling. 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.

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

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_or1.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,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 474447

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Filed in The District Court
of Travis County, Texas

AUG 04 2015 MYR

At 203P M.
Velva L. Price, District Clerk

CAUSE NO. D-1-GN-13-000011

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

v.

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

§ IN THE DISTRICT COURT
§
§
§ 201st JUDICIAL DISTRICT
§
§
§ 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., ("CaremarkPCS") and Defendants Ken Paxton, Attorney General of Texas and City of Dallas, 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 CaremarkPCS to challenge Letter Ruling OR2012-20730 (the "Ruling"). The City of Dallas (the "City") received a request from Andrew MacRae (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 CaremarkPCS as 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 his 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 OR2012-20730. Letter Ruling OR2012-20730 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 OR2012-20730 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 OR2012-20730.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

SIGNED on August 4th, 2015.

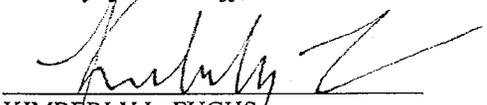
Muel D. Mari
JUDGE PRESIDING

AGREED:



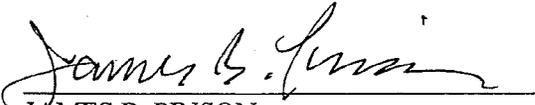
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