The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 2, 2007

Mr. Don M. Dean
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P.O. Box 9158
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OR2007-03687

Dear Mr. Dean:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter552 of the Government Code. Your request was assigned ID#274936.

The Amarillo Independent School District (the "district"), which you represent, received a request for all responses to an RFP for medical prescription drug plans for the district. You do not take a position as to whether the submitted information is excepted under the Act; however, you state, and provide documentation showing, that you notified all the interested third parties of the district's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor.[1] *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).We have reviewed the submitted arguments and the submitted information.

Initially, we note that UnitedHealthcare has submitted information to this office that it asserts is excepted from release under section 552.110 of the Government Code; however, the district did not submit this information for our review. This ruling does not address information beyond what the district 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 district submitted as responsive to the request for information. *See id.*

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[1]You inform us that the following third parties were notified: Aetna; Alliance Regional Health Network ("Alliance"); Blue Cross/Blue Shield of Texas; EBC; Entrust; Health Administrative Services ("HAS"); IMS; ING Employee Benefits; Insurance One Management, Inc.; Kroger Prescription Plans; Maxor; RX West; Southwest Life and Health Insurance Company ("Southwest"); United Drugs; and UnitedHealthcare. You also inform us that Alliance and Southwest were awarded contracts pursuant to this RFP.

We must next address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). The district received the request for information on January 12, 2006, but it did not submit the information pertaining to Southwest until February 11, 2007. Thus, the district failed to comply with the procedural requirements mandated by section 552.301 for the information pertaining to Southwest.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.–Austin 1990, no writ); Open Records Decision No. 319 (1982). Because Southwest's interests are at stake here, we will address the arguments for exception of this information.

We also note that 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Blue Cross/Blue Shield of Texas, EBC, IMS, ING Employee Benefits, Insurance One Management, Inc., Kroger Prescription Plans, Maxor, RX West, and United Drugs have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of these companies, and the district may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Southwest and UnitedHealthcare assert that some of the information at issue is excepted under section 552.101 of the Government Code. This section encompasses information protected by other statutes. UnitedHealthcare does not cite to any specific law, and we are not aware of any, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Southwest asserts its information is confidential under section 843.156 of the Insurance Code, which provides in relevant part as follows:

> On request of the commissioner, a health maintenance organization shall provide to the commissioner a copy of any contract, agreement, or other arrangement between the health maintenance organization and a physician or provider. Documentation provided to the commissioner under this subsection is confidential and is not subject to the public information law, Chapter 552, Government Code.

Ins. Code § 843.156(d). This section makes confidential a contract, agreement, or other arrangement between a health maintenance organization and a physician or other health care provider that is requested by and provided to the Texas Department of Insurance (the "department"). Upon review of the information at issue, however, we find that Southwest has not established that the information at issue consists of contracts, agreements, or other arrangements between a health maintenance organization and a physician or other health care provider. Thus, we find Southwest has failed to establish that the information at issue is confidential under section 843.156. Therefore, we conclude that the district may not withhold any portion of the submitted information under section 552.101 of the Government Code.

UnitedHealthcare asserts that the submitted information is excepted under section 552.104 of the Government Code; however, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the district does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the information. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the district may not withhold any of the information at issue pursuant to section 552.104.

Aetna, Alliance, Entrust, HAS, Southwest, and UnitedHealthcare assert that some of their information is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 1958); *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 has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We also 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 the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) 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." 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

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[2]The following are the six factors that the Restatement gives 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 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 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).

enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). However, 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), 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors).

After reviewing the information at issue and the submitted arguments, we conclude that Aetna and UnitedHealthcare have established a *prima facie* case that some of the information at issue is a trade secret; therefore, the district must withhold this information, which we have marked, under section 552.110(a). We also find that Aetna, Entrust, HAS, and UnitedHealthcare have established that the release of some of the information at issue would cause each company substantial competitive injury; therefore, the district must withhold this information, which we have marked, under section 552.110(b). But we conclude that Aetna, Alliance, Southwest, and UnitedHealthcare have failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See* Open Records Decision No. 402 (1983). In addition, Aetna, Alliance, Entrust, HAS, Southwest, and UnitedHealthcare have made only conclusory allegations that release of the remaining information at issue would cause any of these companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Thus, the district may not withhold any of the remaining information under section 552.110.

The submitted information contains insurance policy numbers. Section 552.136(b) of the Government Code states that "[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." Gov't Code § 552.136. The district must withhold the insurance policy number we have marked under section 552.136.

Finally, we note that some of the materials at issue 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

To conclude, the district must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The district must release the remaining information to the requestor, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

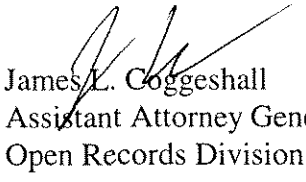
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/jb

Ref: ID# 274936

Enc. Submitted documents

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CAUSE NO. D-1-GN-07-001080

NORTHWEST TEXAS HEALTHCARE SYSTEM, INC., d/b/a ALLIANCE REGIONAL HEALTH NETWORK, Plaintiff,	§	IN THE DISTRICT COURT OF
	§	TRAVIS COUNTY, TEXAS
V.	§	
GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Defendant.	§	250TH JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas
DEC 06 2007
At 2:01 P M.
Amalia Rodriguez-Mendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Northwest Texas Healthcare System, d/b/a Alliance Regional Health Network, (Alliance) and Defendant Greg Abbott, 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 have been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Scott Koenig, was sent reasonable notice of this setting and of the parties' agreement that the Amarillo Independent School District (AISD) must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. 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. The information bracketed for redaction on Exhibit A to Mr. Bailey's September 7, 2007 e-mail to counsel to the Attorney General, specifically, on pages 1, 12-19, 25-31, and on pages 32-33 (October 2nd brackets), and in Exhibit B to Mr. Bailey's September 7, 2007 email to counsel to the Attorney General, specifically, on pages 1-16, is excepted from disclosure by Tex. Gov't Code § 552.110(b).

2. AISD must withhold from the requestor the bracketed information described in Paragraph 1 of this Judgment.

3. Alliance no longer contests the disclosure of the remaining information in its proposal. AISD must release to the requestor all information pertaining to Alliance that is responsive to the request for information and that is not held excepted from disclosure by Paragraph 1 of this Judgment.

4. All costs of court are taxed against the parties incurring the same; all relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 6 day of December, 2007.

PRESIDING JUDGE

APPROVED:

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