ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 12, 2009

Ms. Marney Collins Sims
General Counsel
Cypress-Fairbanks Independent School District
P.O. Box 692003
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OR2009-01927

Dear Ms. Sims:

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# 333537.

The Cypress-Fairbanks Independent School District (the "district") received two requests for 1) a specified contract regarding Proposal #07-09-9610, a request for pharmacy benefit management services; 2) a list of all third parties who responded to the RFP; 3) copies of all proposals submitted; 4) copies of all of the best and final offers and follow-up documents; and 5) information produced by the district during the review process for the proposals received. You state you have released some of the requested information, and the district does not have information responsive to item 4. The Act does not require a governmental body to disclose information that did not exist at the time the request was received or to create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.— San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). You state the submitted information may be excepted from disclosure under sections 552.101 and 552.110 of the Government Code but make no arguments in support of these exceptions. In addition, you believe the requests for information may implicate the proprietary interests of Aetna Life Insurance Company ("Aetna"); CaremarkPCS Health, L.P. ("Caremark"); Catalyst RX ("Catalyst"); CIGNA Health Care ("CIGNA"); Envision Pharmaceutical Services, Inc. ("Envision"); Express Scripts, Inc. ("Express"); Innoviant, Medco Health Solutions, Inc. ("Medco"); PTRX, Inc. ("PTRX"); Script Care, Ltd. ("Script Care"); SXC Health Solutions,

Inc. ("SXC"); and Walgreens Health Initiatives, Inc. ("Walgreens"). You state you have notified the third parties of the requests for information and of their right to submit arguments to this office as to why the requested information should not be released. *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 received arguments from Aetna, Caremark, Express, Innoviant, Medco, PTRX, Script Care, SXC, and Walgreens. We have considered these arguments and reviewed the submitted information.

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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter Catalyst, CIGNA, and Envision have not submitted any comments to this office explaining how release of the submitted information would affect their proprietary interests. Therefore, these companies have not provided us with any basis to conclude they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, it actually faces competition and substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the district may not withhold the information related to Catalyst, CIGNA, or Envision on the basis of any proprietary interest these parties may have in the information.

Next, we note Innoviant argues portions of the information are marked as confidential or were submitted to the district with the understanding the information would remain confidential. Information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W. 2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The following companies seek to withhold certain information from the requestors that the district did not submit to us for review: 1) PTRX's CIQ form; 2) Innoviant's and Medco's Exhibit B containing repriced claims; and 3) Express' customer list and Pharmacy Benefit

Management Services Follow-up. Accordingly, this decision does not address such information. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested, or representative sample, if voluminous amount of information was requested).

Walgreens claims its proposal is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure information that, if released, would give an advantage to a competitor or bidder. Gov't Code § 552.104. 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 submitted information to the government), 522 (1989) (discretionary exceptions in general). Because the district did not assert section 552.104, the district may not withhold Walgreens' information pursuant to section 552.104. *See* ORD 592 (governmental body may waive section 552.104).

Aetna, Caremark, Express, Innoviant, Medco, PTRX, Script Care, SXC, and Walgreens assert some of their information is excepted under section 552.110 of the Government Code. This section 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 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 . . . [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.

Restatements of Torts § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776.

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of the company;
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> (2) the extent to which it is known by employees and others involved in the company's business;
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> (3) the extent of measures taken by the company to guard the secrecy of the information;
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> (4) the value of the information to [the company] and its competitors;
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> (5) the amount of effort or money expended by the company in developing the information;
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> (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). This office must accept a claim that information subject to the Act is excepted 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. 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. Open Records Decision No. 402 (1983). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990).

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); *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing the information at issue and the arguments of the interested third parties, we conclude Aetna, Caremark, Innoviant, Medco, Script Care, SXC, Express, PTRX, and

Walgreens have demonstrated release of certain information would result in substantial competitive harm to them for purposes of section 552.110(b). We have marked the information that must be withheld on this basis. However. we find the companies have made only conclusory allegations that release of their remaining information would result in substantial competitive harm and have not provided a specific factual or evidentiary showing to support this allegation. *See* Open Records Decision No. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative). We also note the pricing information of a winning bidder, in this instance PTRX, is not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview at 219 (2000) (federal cases applying analogous Freedom of Information Act exemption reason disclosure of prices charged government is a cost of doing business with government). Moreover, 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).

Furthermore, Medco and PTRX have made a *prima facie* showing that portions of their remaining information, which we have marked, are protected trade secret information; therefore, the district must withhold the marked information under section 552.110(a). However, we find the other seven companies have not shown the remaining information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Thus, the district may not withhold the remaining information under section 552.110(a).

Caremark also argues a portion of its proposal fits 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 for purposes of section 1839(3). Accordingly, we need not determine whether release of Caremark's information in this instance would be a violation of section 1831 or 1832 of title 18 of the United States Code.

We note the remaining submitted information contains insurance policy numbers, a bank account number, and a routing number that are excepted from disclosure under section 552.136 of the Government Code.[1] Section 552.136 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(b). Accordingly, the district must withhold these access device numbers, which we have marked, under section 552.136 of the Government Code.

Finally, we note 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).

In summary, the district must withhold the proprietary information we have marked under section 552.110 and the insurance policy numbers, banking account number, and routing number we have marked under section 552.136 of the Government Code. The remaining information must be released; however, in releasing the information that is copyrighted, the district must comply with applicable copyright law.

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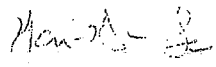
[1]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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_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 at (512) 475-2497.

Sincerely,



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YHL/cc

Ref: ID# 333537

Enc. Marked documents

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