ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2007

Mr. K. Scott Oliver
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2007-15122

Dear Mr. Oliver:

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# 294766.

The San Antonio Water System ("SAWS") received a request for (1) the contract between SAWS and its pharmacy benefit manager; (2) the most recent request for proposal soliciting pharmacy benefit management services and all bids submitted; and (3) all marketing materials submitted by any pharmacy benefit manager. SAWS states that it has released a copy of the most recent request for proposal. Although SAWS takes no position on the release of the submitted information, you explain that it may contain confidential and proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that SAWS notified Blue Cross Blue Shield of Texas ("Blue Cross"), Catalyst Rx ("Catalyst"), CVS Caremark Corporation ("Caremark"), Express Scripts ("Express"), PharmaCare Management Services, Inc. ("PharmaCare"), Systemed Rx ("Systemed"), and Walgreens Health Initiatives, Inc. ("Walgreens") of the request for information and the right of each 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 considered the submitted arguments and reviewed the submitted information.

Initially, we 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 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 Blue Cross, Express, PharmaCare, or Systemed explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the requested information constitutes these parties' proprietary information protected under section 552.110, and none of it may be withheld on that basis. *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 (1990).

Walgreens and Catalyst each raise section 552.104 of the Government Code as an exception to disclosure for parts of the submitted information. Section 552.104 excepts from disclosure "information that, if released, would give 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 submitting information to the government), 522 (1989) (discretionary exceptions in general). As SAWS did not submit any arguments in support of withholding any information pursuant to section 552.104, it may not withhold any of Walgreens' or Catalyst's information pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Walgreens, Catalyst, and Caremark each raise 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. *See* Gov't Code § 552.110(a)–(b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

> may consist of any 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

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'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 this 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 (1939); *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). 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. ORD 552. 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). 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.*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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); Open Records Decision No. 661 (1999).

Walgreens, Catalyst, and Caremark each assert that specified information contained in their submitted proposals constitute trade secrets under section 552.110(a). Upon review, we determine that Walgreens, Catalyst, and Caremark have each failed to demonstrate that any of the information at issue constitutes a trade secret for purposes of section 552.110(a). Accordingly, no part of the information at issue may be withheld pursuant to section 552.110(a).

Catalyst and Caremark each assert that the same specified parts of information constitute commercial or financial information that, if released, would cause substantial competitive harm. Upon review, we determine that Catalyst has demonstrated, based on a specific or factual evidentiary showing, that the release of some of its information would result in substantial competitive harm. SAWS must withhold the information we have marked under section 552.110(b). However, as to Catalyst's remaining information at issue, we determine that it has failed to make such a specific factual or evidentiary showing. Accordingly, no part of Catalyst's remaining information may be withheld on this basis. We note that Caremark's information at issue is pricing information, and further, that Caremark is the winning bidder. Pricing information contained in a contract with a governmental body 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). *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). Upon review, no part of Caremark's information may be withheld on this basis.

Caremark also argues that some if its information 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 that Caremark has not demonstrated that 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.

Finally, we note that 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. 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, SAWS must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released. Information that is subject to copyright must be released in accordance with that 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).

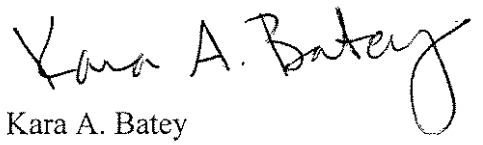
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/jh

Ref: ID# 294766

Enc. Submitted documents

c: Mr. Casey Cabalquinto
Change to Win
1900 L Street Northwest, Suite 900
Washington, DC 20036
(w/o enclosures)

Mr. Bryan R. Smith
Attorney to Walgreens Health Initiatives
1411 Lake Cork Road MS L319
Deerfield, Illinois 60015
(w/o enclosures)

Mr. Joseph M. Mott
Deputy General Counsel
Catalyst RX
800 King Farm Boulevard
Rockville, Maryland 20850
(w/o enclosures)

Mr. Frank E. Pasquesi
Foley & Lardner LLP
321 North Clark Street, Suite 2800
Chicago, Illinois 60610
(w/o enclosures)

Mr. John Lampton
Senior Strategies Account Executive
Blue Cross Blue Shield of Texas
901 South Central Expressway
Richardson, Texas 75080
(w/o enclosures)

Ms. Shannon Burke
Regional Vice President
PharmaCare Management Services, Inc.
11467 Huebner Road, Suite 260
(w/o enclosures)

Mr Bill Pearce
Sales Director
Express Scripts
300 Colonial Parkway, Suite 330
Roswell, Georgia 30076
(w/o enclosures)

Mr. Stan Shults
Sales Director
SystemendRX
805 Portofino Drive
Arlington, Texas 76012
(w/o enclosures)