



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

May 20, 2003

Mr. Steve Aragon
General Counsel
Texas Health & Human Services Commission
P. O. Box 13247
Austin, Texas 78711

OR2003-3372

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181359.

The Texas Health and Human Services Commission (the "commission") received a request for copies of two specified contracts, information explaining the "current out of network (OON) provider reimbursement methodology" employed by a specified business entity, and information explaining the "OON methodology" used by the same entity before January 1, 2003. The commission also received a request from a different requestor for "1) the State issued determination enabling the Managed Care Products to base provider reimbursement upon in-network versus out-of-network considerations and 2) the Amerigroup Star Plan set percentages for each county in Texas." You state that the second requestor subsequently clarified that she was seeking "1. Amerigroup's approved STAR out-of-network payment methodology, 2. and correspondence between the Commission and Amerigroup relating to Amerigroup's proposed STAR out-of-network methodology." *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). You also state that some responsive information does not exist.¹ You claim that the remaining requested information

¹ We note that it is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See* Gov't Code §§ 552.002, .021, .227, .351. The Act does not require a governmental body to prepare new information in response to a request. *See* Attorney General Opinion H-90 (1973); *see also* Open Records Decision Nos. 87 (1975), 342 at 3 (1982), 416 at 5 (1984), 452

may be excepted from disclosure pursuant to section 552.110 of the Government Code, but you take no position with regard to the application of this exception to disclosure to the remaining requested information.

In accordance with section 552.305(d) of the Government Code, the commission notified Amerigroup Texas, Inc. (“Amerigroup”) of the records requests and of its right to submit arguments to this office as to why the requested information pertaining to Amerigroup should not be released. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 (1990). 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 disclosure. *See* Gov’t Code § 552.305(d)(2)(B). We have received comments from Amerigroup as to why the requested information pertaining to Amerigroup is excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code. We have considered the claimed exceptions to disclosure and have reviewed the submitted information.

Initially, we note that we previously addressed portions of the submitted information in Open Records Letter No. 2003-2465 (2003). Specifically, we ruled in that decision that the commission must withhold portions of the information submitted in that instance pursuant to sections 552.110(b) and 552.137 of the Government Code. We also ruled in that decision that the commission must release the remaining submitted information to the requestor. You do not inform us, nor are we aware, of any changes with regard to the law, facts, and circumstances on which that ruling was based. Accordingly, we conclude that the commission must rely on our decision in Open Records Letter No. 2003-2465 (2003) with respect to the information submitted in this instance that was previously ruled upon in that decision. *See* Gov’t Code § 552.301(f); *see also* 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).

We now address Amerigroup’s arguments with respect to the remaining submitted information. Amerigroup contends that its out-of-network provider payment methodologies constitute both “trade secret” information under section 552.110(a) and “commercial or financial” information the disclosure of which would cause Amerigroup substantial competitive harm under section 552.110(b) of the Government Code. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts.

at 2-3 (1986), 555 at 1-2 (1990), 572 at 1 (1990); *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). A governmental body must only make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990).

See Hyde Corp. v. Huffines, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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 *See id.* This office has held that we must accept a 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. *See* Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

After considering Amerigroup's submissions, we find that Amerigroup has established that the release of portions of the remaining submitted information would result in substantial competitive injury to Amerigroup. Accordingly, we conclude that the commission must withhold the information that we have marked pursuant to section 552.110(b) of the Government Code.³

We note that some of the remaining submitted information may be excepted from disclosure pursuant to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in relevant part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

² The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(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).

³ Because we resolve your request under section 552.110(b), we need not address the applicability of section 552.101 of the Government Code to this information.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 does not apply to a public employee's governmental e-mail address or a business' general e-mail or web page address. Accordingly, we conclude that the commission must withhold all e-mail addresses that are contained within the remaining submitted information that were provided for the purpose of communicating electronically with the commission pursuant to section 552.137 of the Government Code, unless the commission has received an affirmative consent from the individual associated with the e-mail address to release it to the requestor.

In summary, the commission must withhold the information that we have marked pursuant to section 552.110(b) of the Government Code. The commission must also withhold all e-mail addresses that are contained within the remaining submitted information that were provided for the purpose of communicating electronically with the commission pursuant to section 552.137 of the Government Code, unless the commission has received an affirmative consent from the individual associated with the e-mail address to release it to the requestor. The commission must release the remaining submitted information to the requestor.

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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

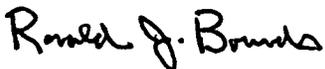
that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Texas Building and Procurement Commission 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 181359

Enc. Marked documents

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