



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 27, 2003

Ms. Cynthia Villareal-Reyna
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2003-6029

Dear Ms. Villareal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 186653.

The Texas Department of Insurance (the "department") received a request for several categories of information relating to PacifiCare of Texas ("PacifiCare"), Humana Health Plan of Texas ("Humana"), Princeton Integrated Physicians Association, and WellMed Medical Management. The requestor subsequently modified the request to exclude certain categories of information and to seek "E-79 (clean claim) complaints from providers against HMO's." You state that you will provide some responsive information to the requestor. In addition, you inform us that you will withhold some of the responsive information in accordance with previous determinations issued to the department. *See* Open Records Letter Nos. 2001-4777 (2001) (identifying information regarding enrollees in health plans), 99-1264 (1999) (information obtained during course of examination of entities regulated by department); *see also* Open Records Decision No. 673 (2001) (criteria of previous determination regarding specific categories of information). You claim that other requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. In addition, pursuant to section 552.305 of the Government Code, you have notified PacifiCare and Humana of the request and of their opportunity to submit comments to this office. *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 that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain

circumstances). We have considered all submitted arguments and reviewed the submitted information.¹

Initially, we note that the submitted records include bank account information, which we have marked. Because the requestor specifically excluded “bank account and credit card numbers and bank routing numbers,” this information is not responsive. Therefore, we do not address it in this ruling. *See generally* Gov’t Code § 552.301 (indicating that this office has authority to render decisions only with respect to information sought by written request).

We turn now to the department’s arguments regarding the responsive information. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information protected by other statutes. Section 843.156 of the Insurance Code provides:

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).²

You contend that one of the submitted documents is confidential because it constitutes a contract between Humana, a health maintenance organization, and MHHNP Primary Care Physicians, a provider. After reviewing the contract at issue, we agree that it must be withheld pursuant to section 552.101 of the Government Code as information made confidential by law.

You claim that one of the submitted documents implicates the department’s policymaking functions. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the deliberative process privilege. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000). The deliberative process privilege incorporated by section 552.111 protects from disclosure interagency and intra-agency communications consisting of advice, opinion, or recommendations on policymaking matters

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²Although you cite article 20A.17(b)(2) of the Insurance Code, this provision has been repealed. *See* Acts 2001, 77th Leg., ch. 1419, § 31(b)(13) to (15), eff. June 1, 2003. Section 843.156 replaces this provision.

of a governmental body. *See id.*; Open Records Decision No. 615 at 5 (1993). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, the deliberative process privilege does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); ORD 615 at 4-5. We have considered your arguments and reviewed the document at issue. We agree that the portion of this document that we have marked may be withheld pursuant to section 552.111. The remainder of the document does not constitute advice, opinion, or recommendation regarding department policymaking and may not be withheld pursuant to this exception.

We turn now to the remaining information, for which the department raises no objection and makes no argument. We note that some of this information has been designated as confidential or proprietary. However, information is not confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas 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. Attorney General Opinion JM-672 (1987); Open Records Decision No. 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."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement otherwise.

PacifiCare asserts that portions of the requested information are excepted under section 552.103 of the Government Code. This section excepts from disclosure "information relating to litigation . . . 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." The purpose of section 552.103 is to protect a governmental body's interests in pending or reasonably anticipated litigation. This exception is designed to protect the interests of governmental bodies, not third parties. *See* Open Records Decision No. 392 (1983) (litigation exception applies only where litigation involves or is expected to involve governmental body that is claiming exception). Because section 552.103 is designed to protect the interests of governmental bodies and not third parties, we reject PacifiCare's claim that this section protects the requested information.

PacifiCare also asserts that portions of the requested information are confidential by law or are the subject of a protective order and must be withheld pursuant to section 552.101. Based on our review of PacifiCare's arguments, the request and subsequent modifications, the department's representations, and the submitted information, it is our understanding that the requestor excluded the information PacifiCare seeks to withhold pursuant to this exception from his request and that the department has therefore not submitted such information for our review. Therefore, this ruling does not address this information, and is limited to the information submitted as responsive by the department.

Humana also asserts that portions of the responsive information are confidential and must be withheld pursuant to section 552.101. Having reviewed the information at issue and considered Humana's arguments, we find that most of the information that the company claims is covered by this exception was either excluded from the request or is being withheld pursuant to the previous determinations issued to the department. The only document that Humana seeks to withhold under this exception that is not otherwise disposed of is a single letter that was sent from the company to the department and is dated February 22, 2002.

The company contends that this letter constitutes information "obtained during the course of an examination and, therefore, not subject to disclosure." Section 552.101 of the Government Code also encompasses section 9 of article 1.15 of the Insurance Code, which provides:

A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law This section applies if the carrier examined is under supervision or conservation but does not apply to an examination conducted in connection with a liquidation or a receivership under this code or another insurance law of this state.

Ins. Code art. 1.15, § 9. Section 843.156(h) of the Insurance Code provides that article 1.15 generally applies to a health maintenance organization such as Humana. Whether information is obtained in the course of an examination is a question of fact. This office is unable to make factual determinations or resolve factual disputes in the opinion process. *See* Attorney General Opinions GA-0087 at 1 (2003), GA-0003 at 1 n. 2 (2003), JC-0534 at 1 (2002). We therefore must rely on a governmental body's representations with regard to such issues.

Humana asserts that the letter at issue was obtained in the course of an examination. However, as noted above, the department indicates that it has withheld the information that it considers to have been obtained during the course of an examination and has not submitted such information for our review. Thus, by submitting this letter for our review, the department implicitly represents that the letter does not constitute information obtained during the course of an examination. Because the department indicates that the letter was not obtained in the course of an investigation, we find it is not made confidential by article 1.15, and it may not be withheld under section 552.101 on that basis.

Finally, we address Humana's arguments that portions of its information are excepted from disclosure under section 552.110. This section protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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.

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.), *cert. denied*, 358 U.S. 898 (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). 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. *Id.*³ 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).

Section 552.110(b) of the Government Code 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

³The 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).

information was obtained[.]” Gov’t Code § 552.110(b). 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 information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having considered Humana’s arguments and reviewed the information it seeks to withhold, we find that the company has established that the information is protected under section 552.110, and it must be withheld on that basis. We have marked the types of information that the department must withhold pursuant to this exception.

In summary, identifying information regarding enrollees in health plans must be withheld in accordance with the previous determination issued by this office in Open Records Letter Nos. 2001-4777 (2001). Similarly, the department must withhold information obtained during the course of examinations of entities regulated by the department in accordance with the previous determination we issued in Open Records Letter No. 99-1264 (1999). We have marked the contract that the department must withhold under section 552.101 as information made confidential by law. The department may also withhold the information we have marked as being excepted pursuant to section 552.111. Pursuant to section 552.110, the department must withhold the types of information that we have marked. The remaining responsive information must be released.

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

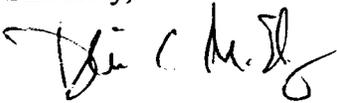
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 186653

Enc. Submitted documents

c: Mr. Jeff Jowers
Clemens & Spencer
112 East Pecan Street, Suite 1500
San Antonio, Texas 78205
(w/o enclosures)

Ms. Lisa Michaux
Smith, Robertson, Elliot & Glen, L.L.P.
1717 West Sixth Street, Suite 300
Austin, Texas 78703
(w/o enclosures)

Ms. Penny Hobbs
McGinnis, Lochridge & Kilgore, L.L.P.
919 Congress Avenue
Austin, Texas 78701
(w/o enclosures)