



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2006

Mr. Robert W. Patterson
Open Records Coordinator
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2006-02335

Dear Mr. Patterson:

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# 243759.

The Texas Health and Human Services Commission (the "commission") received six requests for information pertaining to the commission's Medicaid/CHIP Joint HMO RFP #529-04-272. However, in subsequent correspondence, you inform this office that four of the six requests have been withdrawn. You state that the commission has released some of the requested information, including responsive evaluation materials. The commission takes no position on whether the submitted information is excepted from disclosure, but you state that release of this information may implicate the proprietary interests of Molina Healthcare of Texas, Inc. ("Molina"), Amerigroup Texas, Inc. ("Amerigroup"), Superior HealthPlan, Inc. ("Superior"), Evercare of Texas, LLC ("Evercare"), and Aetna. Accordingly, you inform us, and provide documentation showing, that you notified these entities of the requests and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 the submitted arguments and reviewed the submitted information.

Initially, we note that you have submitted proposal information pertaining to Community First Health Plan and Unicare Health Plans of Texas, Incorporated. While this information was responsive to two of the withdrawn requests, it is not responsive to the two remaining requests. This ruling does not address the public availability of any information that is not responsive to the two remaining requests, and the commission is not required to release that information in response to the requests. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Next, we note, and you acknowledge, that the commission has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See Gov't Code § 552.302; Hancock*, 797 S.W.2d at 381. Because third-party interests can provide a compelling reason to withhold information, we will address the submitted arguments.

Next, we note that section 552.305 of the Government Code allows an interested third party ten business days from the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code § 552.305(d)(2)(B)*. However, as of the date of this letter, we have not received arguments from Molina, Evercare, or Aetna for withholding the submitted information. Therefore, we have no basis to conclude that the release of this information would harm the proprietary interests of these entities. *See id.* § 551.110(b); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, we conclude that the commission may not withhold any portion of the submitted information on the basis of any proprietary interest that Molina, Evercare, or Aetna may have in the information.

Next, we note that although you state that you have submitted "complete copies of the proposals at issue[.]" you have not submitted the following information that Amerigroup seeks to withhold: 4.3.2.2-1 Resumes of Key Personnel, 4.3.8.1.4-2 AGP Texas QM Workplan, 4.5.1.2-1 STAR+PLUS Resumes, 4.5.3.1-1 LTC Provider Listing, and 4.5.6.9-1 Amerigroup Complex Needs Assessment Tool. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the commission. *See Gov't Code § 552.301(e)(1)(D)* (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Amerigroup contends that its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 391.101(1) of title 1 of the Texas Administrative Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Section 391.101 provides:

A purchasing entity must, except as provided in this chapter, employ a competitive procurement method as the primary method of purchasing goods or services. Approved competitive procurement methods include the following:

- (1) Competitive sealed bidding as provided in § 391.141 of this chapter;
- (2) Competitive proposals or negotiation as provided in § 391.151 of this chapter.

1 Tex. Admin. Code § 391.101. Section 391.141 prescribes competitive bidding standards for the commission. *See id.* § 391.141. We note that neither section 391.101 nor section 391.141 contains express language that makes information confidential. This office has held that the statutory confidentiality encompassed by section 552.101 requires express language making certain information confidential or by stating that information shall not be released to the public. Open Records Decision No. 478 (1987) (construing statutory predecessor to section 552.101). Thus, because sections 391.101 and 391.141 do not expressly make information confidential or expressly state that the information shall not be released to the public, the commission may not withhold Amerigroup’s information under section 552.101.

Next, Superior contends that some of its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 8 of article 1.15 of the Insurance Code. Article 1.15 relates to examinations of insurance carriers by the Texas Department of Insurance (“department”). *See* Open Records Decision No. 640 (1996). Section 8(a) of article 1.15 provides that “[i]n conducting an examination under this article, the department shall use audits and work papers prepared by an accountant or accounting firm that meets the requirements of Section 12, Article 1.15A, of this code that are made available to the department by the carrier.” Ins. Code art. 1.15 § 8(a). Section 8(b) provides that “[i]nformation obtained under this section is confidential and may not be disclosed to the public except when introduced as evidence in a hearing.” *Id.* art. 1.15 § 8(b). Although Superior states that the information at issue relates to an insurance matter, it has not explained how or why section 8 of article 1.15 of the Insurance Code would be applicable to information held by the commission. *See* Open Records Decision No. 640 at 4 (1996) (the department must withhold any information obtained from audit “work papers” that are “pertinent to the accountant’s examination of the financial statements of an insurer” under section 8 of article 1.15 of the Insurance Code); *see also* Gov’t Code § 552.305(d). Thus, Superior has not demonstrated that the information at issue is confidential under article 1.15 of the Insurance Code, and the commission may not withhold it under section 552.101.

Amerigroup and Superior both contend that their information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *See Gov't Code § 552.104*. However, we note that 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 commission does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the information at issue, and it may not be withheld on that basis. *See Open Records Decision No. 592 (1991) (governmental body may waive section 552.104)*.

Next, Amerigroup and Superior contend that portions of their information are excepted from disclosure under 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. 1958); *Open Records Decision Nos. 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 No. 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. Open Records Decision No. 552 (1990). 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).

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. *See id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Oper. Records Decision No. 661 (1999).

Upon review of the submitted briefs and information at issue, we find that Amerigroup and Superior have established a *prima facie* case that some of the information they seek to withhold, which we have marked, constitutes trade secret information or commercial and financial information, the release of which would cause the companies substantial competitive harm. The commission must withhold the information we have marked under section 552.110 of the Government Code. However, we determine that Amerigroup and Superior have not demonstrated that any portion of the remaining information constitutes trade secret information or commercial or financial information, the release of which would cause them substantial competitive harm. *See* Open Records Decision Nos. 552 at 5-6 (1990), 661 (1999) (must show by specific factual evidence that substantial competitive

injury would result from release of particular information at issue), 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 is too speculative), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if 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”). Accordingly, pursuant to section 552.110, the commission must withhold only those portions of the submitted information that we have marked.

We note that some of the submitted proposals contain insurance policy numbers. Section 552.136 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. In accordance with section 552.136, the commission must withhold the insurance policy numbers in the submitted proposals.

In summary, the commission must withhold the information we have marked under section 552.110 of the Government Code. The commission must also withhold the submitted insurance policy numbers under section 552.136 of the Government Code. 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, 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,



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JAP/sdk

Ref: ID#

Enc. Submitted documents

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