



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2006

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

OR2006-05196

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# 248118.

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to the commission's Medicaid/CHIP Joint HMO RFP #529-04-272. 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 Unicare Health Plans of Texas, Inc. ("Unicare"), Community First Health Plan ("Community First"), Cook Children's Health Plan ("Cook"), UTMB Health Plans, Inc. ("UTMB"), Seton Health Plan, Inc. ("Seton"), Texas Children's Health Plan ("TCHP"), El Paso First Health Plans ("El Paso"), Parkland Community Health Plan, Inc. ("Parkland"), Firstcare, Mercy Health Plans ("Mercy"), Driscoll Children's Health Plan ("Driscoll"), Community Health Choice, Inc. ("Community Health"), Amerigroup Texas, Inc. ("Amerigroup"), Superior HealthPlan, Inc. ("Superior"), Molina Healthcare of Texas, Inc. ("Molina"), Evercare of Texas, LLC ("Evercare"), and Aetna. Accordingly, you inform us, and provide documentation showing, that you notified these entities of the request 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, you note that some of the requested information in the present request was the subject of a prior ruling of this office, issued as Open Records Letter No. 2006-02335 (2006). *See* Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). We understand that the pertinent facts and circumstances have not changed since the issuance of Open Records Letter No. 2006-02335. Thus, the commission may continue to rely on Open Records Letter No. 2006-02335 for the information that was at issue in that prior ruling.

Next, we note that Seton seeks to withhold information in Attachments O, P, Q, R, S, and T that the commission did not submit to this office for review. Driscoll also seeks to withhold some information that was not submitted by the commission.¹ 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).

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 UTMB, TCHP, Parkland, Firstcare, Community Health, Evercare, Molina, and 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 UTMB, TCHP, Parkland, Firstcare, Community Health, Evercare, Molina, and Aetna may have in the information.

¹Some of the additional information Driscoll seeks to withhold consists of: 4.2.6, 4.3.1, 4.3.3.1, 4.3.3.2, 4.3.4.2, 4.3.5.3, 4.3.5.4, 4.3.5.6, 4.3.6.1, 4.3.6.3, 4.3.6.4, 4.3.8.2, 4.3.8.3, 4.3.3.5, 4.3.10, 4.3.11, 4.3.12, 4.3.16, and 4.3.17.

Next, El Paso 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). Upon review, we find that El Paso 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, El Paso has not demonstrated that the information at issue that is held by the commission is confidential under article 1.15 of the Insurance Code, and the commission may not withhold it under section 552.101.

El Paso also contends that some of the remaining information is excepted from disclosure under section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operation, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Section 552.112 protects the interests of a governmental body, rather than the interests of third parties. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied). Because the commission does not raise section 552.112, this section is not applicable to the requested information. *Id.*

Next, Unicare, El Paso, Cook, Driscoll, Seton, and Mercy 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 exempted 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); Open Records Decision No. 661 (1999).

Upon review of the submitted briefs and information at issue, we find that Cook and Driscoll have established that some of the information they seek to withhold constitutes commercial or financial information, the release of which would cause the companies substantial competitive harm. The commission must withhold 4.3.5.5, pages 2 through 13 of 4.3.8.1, and 4.3.13.5 of Driscoll's proposal pursuant to section 552.110(b). The commission must also withhold 4.3.3.2; 4.3.5.3; 4.3.5.4; pages 159 through 164 of 4.3.5.5; 4.3.5.6; 4.3.6.2; 4.3.6.3; 4.3.6.4; 4.3.6.4(A); 4.3.6.4(B); 4.3.8.1; 4.3.8.1(A); 4.3.8.2; 4.3.8.3; 4.3.8.4; 4.3.8.4(A)-(B); 4.3.8.5; 4.3.10; 4.3.11; page 260, number 3 of 4.3.12; page 265, numbers 1, 3, and 4 of 4.3.13.1; 4.3.13.3, 4.3.13.5, and 4.3.13.6. However, we determine that Unicare, El Paso, Cook, Driscoll, Seton, and Mercy 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").

The submitted information contains social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the commission must withhold the social security numbers in the submitted information under section 552.147.²

Finally, we note that 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

²We note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

In summary, the commission must withhold the information we have listed under section 552.110 of the Government Code. The commission must withhold the social security numbers in the submitted information under section 552.147. The remaining responsive information must be released, but in doing so, the information must be released in accordance with applicable copyright laws for any information protected by copyright.

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), ©. 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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DKL/eb

Ref: ID# 248118

Enc. Submitted documents

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