



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 9, 2007

Ms. Cynthia Villarreal-Reyna
Section Chief
Texas Department of Insurance
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OR2007-02692

Dear Ms. Villarreal-Reyna:

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# 273067.

The Texas Department of Insurance (the "department") received a request for information pertaining to the "quarterly and annual reports filed by preferred provider carriers and HMOs under the state's clean claim/prompt pay laws and accompanying regulations." The requestor subsequently modified her request to include only information from 2006 and to exclude information that would identify the submitted carriers.¹ You claim that portions of the submitted information are excepted from disclosure under section 552.137 of the Government Code. You also claim that the requested information may contain the

¹See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

proprietary information of third parties. Although you take no position on the proprietary nature of the information, you state, and provide documentation showing, that you have notified the interested third parties of the requests and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestors.² *See* Gov't Code § 552.305(d); *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 the applicability of exception to disclose under the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that you have submitted two sets of documents: (1) letters and (2) reports. We understand that all of the submitted letters are responsive to the present request. You inform us that only the information you have marked in the submitted reports is responsive to the present request. Accordingly, the remaining information in the submitted reports is not responsive to the request. We note, however, that the submitted letters and some of the responsive portions of the submitted reports contain information that would identify the submitted carriers, which the requestor excluded from her request. Thus, the information that would identify the submitted carriers is also not responsive to the request. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release such information in response to the request for information.

Next, 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 decision, we have only received responses from the following companies: Time Insurance Co. and Union Security Insurance Co. (collectively "Assurant Health"), Humana Health Plan of Texas, Inc. and Humana Insurance Co. (collectively "Humana"), Southern Farm Bureau Life Insurance Co. ("SFBLIC"), United Healthcare of Texas, Inc., and United Healthcare Insurance Co. Only

²The interested third parties are as follows: American Fidelity Assurance Co., American Heritage Life Insurance Co., American Medical Security Life Insurance Co., Best Life and Health Insurance Co., Blue Cross and Blue Shield of Texas, Celtic Insurance Co., Cigna Healthcare of Texas, Inc., Connecticut General Life Insurance Co., Continental Assurance Co., Empire Fire & Marine Insurance Co., Golden Rule Insurance Co., HealthMarkets, Inc., Humana Health Plan of Texas, Inc., Humana Insurance Co., Jefferson Life Insurance Co., Managed Dental Guard, Inc., Mega Life & Health Insurance Co., Mercy Health Plans of Missouri, Inc., New York Life Insurance Co., Pacific Life & Annuity Co., Pacific Life Assurance Co., Pacificare of Texas, Inc., PacifiCare Life Assurance Co., Physicians Mutual Insurance Co., Southern Farm Bureau Life Insurance Co., Time Insurance Co., Union Security Insurance Co., United Healthcare Insurance Co., and United Healthcare of Texas, Inc.

Humana raises objections to the release of portions of the responsive information.³ Assurant Health, SFBLIC, United Healthcare of Texas, Inc., and United Healthcare Insurance Co. raise no objections to the release of the responsive information to the requestor.

The remaining third parties have not submitted to this office any reasons explaining why their information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in any of the responsive information. *See, e.g., id.* § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, we conclude that the department may not withhold any portion of the responsive information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, Humana contends that portions of responsive 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

³We note that Humana seeks to withhold information that is not responsive to the present request. Because such information was not submitted as responsive information by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the department. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Consequently, we do not address Humana's arguments concerning information that is not responsive to the present request.

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

Having considered Humana's arguments and reviewed the submitted information, we determine that Humana has not demonstrated that any portion of the responsive information constitutes trade secret information or commercial or financial information, the release of which would cause it substantial competitive harm. *See* Open Records Decision Nos. 552 at 5-6, 661 (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue); *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, the department may not withhold any of the responsive information under section 552.110 of the Government Code.

Finally, the department claims that section 552.137 of the Government Code applies to the marked e-mail addresses. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses contained in the responsive information are not of a type specifically excluded by section 552.137(c). You inform us that the department has not received consent for the release of the e-mail addresses at issue. Accordingly, the department must withhold the e-mail addresses you have marked, as well as the additional e-mail addresses we have marked, pursuant to section 552.137 of the Government Code. As you raise no further arguments against disclosure, the remaining responsive information must be released 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).

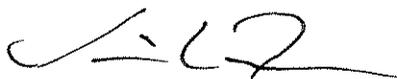
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/eb

Ref: ID#273067

Enc. Submitted documents

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