



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 11, 2007

Ms. Cynthia Villarreal-Reyna
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Legal and Compliance Division, MC 110-1A
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OR2007-04108

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# 275643.

The Texas Department of Insurance (the "department") received a request for "approved Health Care Provider Directories, including Access Plans, for each [specified] TDI/DWC Certified Workers' Compensation Health Care Networks[.]" You do not take a position as to whether the submitted information is excepted under the Act; however, you state, and provide documentation showing, that you notified all interested third parties of the department's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested

¹The following third parties were notified: Aetna Workers' Comp Access and its client Genex Services Inc./Genex Care for Texas Comp. Access ("AWCA"); Bunch and Associates, Inc. ("Bunch"); CMI Baron Rich Management ("CMI"); Concentra HCN & Concentra Texas Star Network, Zurich Services Corporation Healthcare Network/Corvel, and Zurich Services Corporation Healthcare Network (collectively, "Concentra"); Corvel Healthcare Corporation ("Corvel"); First Health TX HCN (FH) ("First Health"); IMO Med-Select Network ("IMO"); Interplan Health Group, Inc./Zenith Health Care Network ("Interplan Health"); Intracorp Lockheed Martin Aero Employee Slect Network ("Lockheed"); Liberty Mutual Managed Care, Inc. d/b/a Liberty Health Care Network ("Liberty"); Memorial Hermann Health Network Providers, Inc. ("Memorial"); National ChoiceCare, NC Choicenet ("ChoiceCare"); North Texas Innovative Healthcare Network Inc. ("North Texas"); Physicians Cooperative of Texas ("Physicians Cooperative"); Sha LLC d/b/a/ Firstcare ("Firstcare"). The following are First Health's clients whose information is at issue: Quality Rehabilitation Services, Inc. d/b/a Argus Provider Network; First Health/St. Paul Travelers HCN; International Rehabilitation Associates, Inc. d/b/a Intracorp; First Health/AIGCS TX HCN; Comp Key/First Health d/b/a Forte Inc. ("Forte"); The Hartford Workers' Compensation Health Care Network; GENEX Services, Inc. d/b/a/ GENEX Health Care Network ("GENEX"); and Speciality Risk Services Texas Workers' Compensation Health Care Network ("SRS").

third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, you inform us that some of the requested information was created after the department received the request for information. We also note that the submitted information contains a map, and the requestor specifically excludes maps associated with his request. Thus, these documents are not responsive to the request for information. 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 this information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

You also inform us that some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2006-12385 (2006), 2007-00157 (2007), and 2007-03118 (2007). With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the department must continue to rely on these rulings as previous determinations and withhold or release this information in accordance with these rulings. *See* 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 next 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the following third parties have not submitted to this office any reasons explaining why the requested information should not be released: AWCA; Bunch; CMI; IMO; Interplan Health; Lockheed; Liberty; Memorial; ChoiceCare; North Texas; Physicians Cooperative; and Firstcare. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of these companies, and the department may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual

²We assume that the "representative 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.

evidence, not conclusory or generalized allegations, 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), 542 at 3 (1990).

Forte asserts that its information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Section 1305.503 of the Insurance Code in relevant part provides the following:

Confidential information provided to or obtained by the department under this section remains confidential and is not subject to disclosure under [the Act]. The department may not release, and a person may not gain access to, any information that:

- 1) could reasonably be expected to reveal the identity of an injured employee; or
- 2) discloses provider discounts or differentials between payments and billed charges for individual providers or networks.

Ins. Code § 1305.503(b). Upon review of Forte’s arguments and the information at issue, we find Forte has failed to demonstrate how disclosure of its information would reveal the identity of an injured employee or disclose provider accounts or differentials between payments and billed charges for individual providers or networks. *See id.* Thus, Forte has failed to demonstrate that its information is confidential under section 1305.503(b), and the department may not withhold the submitted information under section 552.101 of the Government code on that ground.

Forte asserts the submitted information is excepted under section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See Gov’t Code § 552.104; see also Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986).* Section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See Open Records Decision Nos. 592 (1991)* (statutory predecessor to section 552.104 is designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the department does not raise section 552.104, this section is not applicable to the information at issue. *See Open Records Decision No. 592 (1991)* (stating that governmental body may waive section 552.104). Accordingly, we conclude that the department may not withhold any portion of the submitted information under section 552.104.

Concentra, Corvel, First Health, and some of First Health's clients assert that the information pertaining to these companies is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 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); *see also Huffines*, 314 S.W.2d at 776. 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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

³The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (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).

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) 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 information was obtained.” 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 requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

The submitted documents consist of access plan information and access provider lists. Having considered the submitted arguments of Concentra, Corvel, and First Health and its clients and reviewed the information at issue, we find that these third parties have not shown that any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. We also find these third parties have made only conclusory allegations that release of the information at issue would cause the companies substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. Thus, none of the information at issue may be withheld pursuant to section 552.110. The department must release the submitted information to the requestor.⁴

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).

⁴Concentra, First Health, and some of First Health’s clients note that some of the tax identification numbers in the submitted information are social security numbers. 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.

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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Open Records Division

JLC/jb

Ref: ID# 275643

Enc. Submitted documents

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