



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2008

Mr. Ken Johnson
Assistant City Attorney
City of Waco
P.O. Box 2570
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OR2008-02066

Dear Mr. Johnson:

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# 302122.

The City of Waco (the "city") received a request for information pertaining to the city's request for proposal for health care insurance. Although you take no position on the submitted information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the city notified TML Intergovernmental Employee Benefits Pool ("TML"), FirstCare, Humana Insurance Company ("Humana"), Blue Cross Blue Shield of Texas ("Blue Cross"), United Healthcare ("United"), and Fiserv Health ("Fiserv") of the request for information and of each company's right to submit arguments to this office as to why the requested information should not be released. *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 third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from FirstCare, Humana, and Fiserv. We have considered the submitted arguments and reviewed the submitted information.

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, TML, Blue Cross, and United have not submitted to this office any reasons explaining why their submitted information should not be released. Therefore, these companies have not provided us with any basis to conclude that they have protected proprietary interests in any of the submitted information. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual 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. Accordingly, we conclude that the city may not withhold any portion of the submitted information on the basis of any proprietary interest TML, Blue Cross, or United may have in the information.

FirstCare argues that a portion of its information is excepted from disclosure under section 401.058 of the Insurance Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 401.051 of the Insurance Code states:

(a) The [Texas Department of Insurance (the "department")] or an examiner appointed by the department shall visit at the carrier's office:

(1) each carrier that is organized under the laws of this state; and

(2) each other carrier that is authorized to engage in business in this state.

(b) The department or examiner appointed by the department may visit the carrier for the purpose of investigating the carrier's affairs and condition. The department or an examiner appointed by the department shall examine the carrier's financial condition and ability to meet the carrier's liabilities and compliance with the laws of this state that affect the conduct of the carrier's business.

Ins. Code § 401.051(a), (b). Section 401.058 states:

(a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

Id. § 401.058. FirstCare has not informed this office that the information at issue, an independent auditor's report, was obtained by the department or an examiner appointed by the department during the course of an examination under chapter 401 of the Insurance Code. Further, we have no indication that this information was obtained under chapter 401 of the Insurance Code. Therefore, we conclude that the city may not withhold the information at issue under section 552.101 of the Government Code on the basis of section 401.058 of the Insurance Code.

FirstCare also asserts a portion of its information is confidential under section 843.156 of the Insurance Code, which is also encompassed by section 552.101. Section 843.156 provides in relevant part as follows:

(d) On request of the commissioner [of insurance], 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 [Act].

Id. § 843.156(d). This section makes confidential a contract, agreement, or other arrangement between a health maintenance organization and a physician or other health care provider that is requested by and provided to the department. Upon review of the submitted argument and the information at issue, however, we find FirstCare has not established that the information at issue consists of a contract, agreement, or other arrangement between a health maintenance organization and a physician or other health care provider. Thus, we find FirstCare has failed to establish that the information at issue is confidential under section 843.156, and the city may not withhold any portion of this information under section 552.101 of the Government Code on that ground.

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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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* ORD 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. ORD 552. 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. *Id.* § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

FirstCare, Humana, and Fiserv each claim that portions of their information are excepted from disclosure under section 552.110. Having considered the submitted arguments, we conclude that Humana and FirstCare have established a *prima facie* case that portions of the submitted information, which we have marked, constitute trade secrets. Therefore, the city

must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that information is generally not a 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." RESTATEMENT OF TORTS § 757 cmt.b (1939). FirstCare states that portions of its remaining information were "designed specifically for the [c]ity[.]" Thus, we conclude that FirstCare has failed to make a *prima facie* showing that any of the remaining information at issue consists of a trade secret. See ORD 552 at 5-6. Additionally, Fiserv and Humana have failed to demonstrate that any of their remaining information at issue constitute trade secrets; thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Humana and Fiserv have established, however, that release of some of their remaining information would cause each company substantial competitive injury; therefore, the city must withhold this information, which we have marked, under section 552.110(b) of the Government Code. For the remaining information at issue, we find that FirstCare, Humana, and Fiserv each have made only conclusory allegations that the release of their remaining information would result in substantial damage to their competitive position. Thus, FirstCare, Humana, and Fiserv have not demonstrated that substantial competitive injury would result from the release of the remaining information at issue. Accordingly, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note that a portion of the submitted information appears to 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 protected by copyright. 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 materials protected by copyright, 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 law and the risk of a copyright infringement suit. See Open Records Decision No. 550 (1990).

In summary, the city must withhold the information we have marked under section 552.110. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

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 file suit in

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

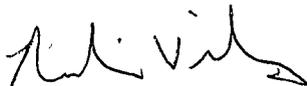
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

MJV/jh

Ref: ID# 302122

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