

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 15, 2010

Mr. Steve Aragon  
Chief Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2010-05344

Dear Mr. Aragon:

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# 375996.

The Texas Health and Human Services Commission (the "commission") received a request for information pertaining to a specified request for proposals. You state that the commission is releasing some of the requested information to the requestor. Although you take no position with respect to the public availability of the submitted information, you state that the submitted documents may contain proprietary information of a third party subject to exception under the Act. Accordingly, you provide documentation showing that the commission notified Superior HealthPlan Network ("Superior") of the request for information and of the company's right to submit arguments to this office as to why the submitted 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). Superior has responded to this notice. We have considered Superior's arguments and reviewed the submitted information.

Superior argues that a portion of its information is excepted from disclosure under section 552.101 of the Government Code in conjunction with 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 requires the Texas Department of Insurance (the "department"), or an examiner appointed by the department, to visit each insurance carrier and examine the carrier's financial condition, ability to meet liabilities, and

compliance with the laws affecting the conduct of the carrier's business. Ins. Code § 401.051(a), (b). In connection with this examination process, section 401.058 provides:

(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. We note the present request is for information held by the commission, not the department. We further note the commission did not obtain the information at issue through an examination conducted under chapter 401. Instead, Superior submitted the information at issue to the commission in response to a request for proposals. Thus, we find section 401.058 is not applicable to information that Superior submitted to the commission. Therefore, the commission may not withhold any of the information at issue under section 552.101 of the Government Code on the basis of section 401.058 of the Insurance Code.

Superior asserts that portions of its information are excepted from disclosure under section 552.110 of the Government Code.<sup>1</sup> Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). 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. 1957); *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

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<sup>1</sup>We note that Superior also seeks to withhold information that was not submitted by the commission for our review. 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).

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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

The 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.

*Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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.*; *see also* 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).

Upon review of Superior's arguments, we find the information we have marked relating to clients of Superior's parent company, provider network capacity, provider hotline, service coordination, behavioral health services hotline, management information system requirements, and certain process flowcharts must be withheld under section 552.110(a). However, we find that Superior has failed to demonstrate how its remaining information at issue meets the definition of a trade secret. *See* ORD Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the commission may not withhold any of the remaining information at issue under section 552.110(a).

Superior also claims that release of portions of its information at issue would cause the company substantial competitive harm. In this instance, Superior has made only conclusory allegations that release of its remaining information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. We therefore conclude that the commission may not withhold any of Superior's remaining information under section 552.110(b). *See* Open Records Decision Nos. 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 was entirely too speculative), 319 at 3.

We note the remaining information contains insurance policy numbers. Section 552.136 of the Government Code provides 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."<sup>2</sup> Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded that insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the commission must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>3</sup>

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

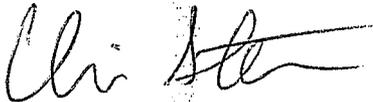
<sup>3</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the commission must withhold the information we have marked under sections 552.110(a) and 552.136 of the Government Code. The remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

Ref: ID# 375996

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Janet Farrer  
Greenberg Traurig LLP  
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Austin, Texas 78701  
(w/o enclosures)

Filed in The District Court  
of Travis County, Texas

JAN 06 2011

at 1:44 AM.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-10-001369

SUPERIOR HEALTHPLAN NETWORK, Plaintiff,	§ § § § § § § § §	IN THE DISTRICT COURT OF   TRAVIS COUNTY, TEXAS   53 <sup>RD</sup> JUDICIAL DISTRICT
v.		
GREG ABBOTT, ATTORNEY GENERAL FOR THE STATE OF TEXAS, Defendant.		

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Superior Healthplan Network (Superior), and Defendant Greg Abbott, Attorney General of Texas, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Dale Cannedy, was sent reasonable notice of this setting and of the parties' agreement that the Texas Health and Human Resources Commission must withhold some of the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Some of the information at issue, specifically, the yellow marked text behind the following tabs:

1. Quality Assurance and Performance Improvement
2. Coordination of Behavioral Health
3. Behavioral Health Care Quality Management
4. Provider Profiling
5. Covered Services and Value Added Services
6. Assessing Access to Care
7. MIS Requirements-Charts AA and Q
8. Clinical Practice Guidelines
9. Provider Network Capacity
10. Provider Hotline
11. Behavioral Health Hotline
12. HEDIS and other Quality Data
13. Services for Children with Special Health Care Needs,

in the submission from Superior's counsel, presented to HHSC's General Counsel, by letter dated November 23, 2010, is excepted from disclosure by Tex. Gov't Code § 552.110(b). Any text marked in blue is not excepted from disclosure.

2. HHSC must withhold from the requestor the information described in Paragraph 1 of this Judgment as well as the information held excepted from disclosure in Letter Ruling OR2010-05344. The text marked in blue is subject to disclosure.

3. Superior represents that it no longer contests the disclosure of the remaining information at issue in this lawsuit, including the text marked in blue. HHSC must release to the requestor Superior's proposal, which is redacted consistent with this agreement and Letter Ruling OR2010-05344.

4. All costs of court are taxed against the parties incurring the same;
5. All relief not expressly granted is denied; and

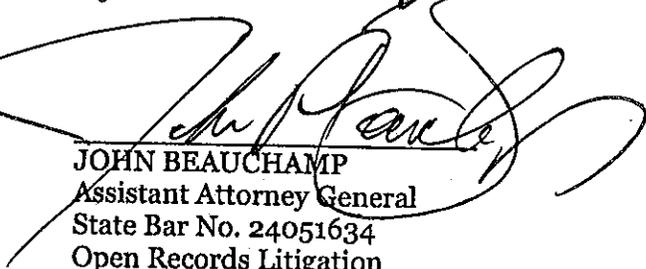
6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 4 day of January, 2011.

  
PRESIDING JUDGE

APPROVED:

  
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