



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 30, 2011

Ms. Cynthia Villarreal-Reyna
Section Chief - Agency Counsel
Legal & Regulatory Affairs MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2011-06598A

Dear Ms. Villarreal-Reyna:

This office issued Open Records Letter No. 2011-06598 (2011) on May 12, 2011. In that ruling we determined Blue Cross Blue Shield ("Blue Cross") established its reimbursement methodology is a trade secret under section 552.110(a) of the Government Code, and its provider reimbursement rate information constitutes commercial and financial information, the release of which would cause the company substantial competitive harm. Thus, we ruled the Texas Department of Insurance (the "department") must withhold the information we marked under section 552.110 of the Government Code. Blue Cross now contends the submitted information contained additional reimbursement rate information we did not mark to be withheld. In addition, the department informs us it failed to notify Blue Cross of its proprietary interest in an additional portion of the information at issue. Blue Cross has now submitted additional comments to this office addressing the additional proprietary information submitted by the department. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of this chapter). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on May 12, 2011. *See generally id.* § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act). Your request was assigned ID# 425152 (TDI No. 108267).

The department received a request for "all documents concerning or evidencing the investigation or enforcement" of a specified consent order. Although you take no position

on the public availability of the submitted information, you state the release of this information may implicate the proprietary interests of the Texas Health Insurance Risk Pool (the "Pool"), Blue Cross, and Hallmark Services Corporation ("Hallmark"). Accordingly, you state, and provide documentation showing, you have notified these companies of the request and of their 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) (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. We have received comments from Blue Cross. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note, and you acknowledge, the department did not comply with its ten- or fifteen-business-day deadlines under subsections 552.301(b) and (e) of the Government Code in requesting this decision. *See id.* § 552.301(b), (e). The submitted information, therefore, is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). As such, we will consider whether any of the submitted information may be excepted under the Act due to third-party interests. We also note portions of the information are subject to sections 552.101 and 552.136 of the Government Code, which provide compelling reasons to withhold information; thus, we will also address these exceptions for the submitted information.¹

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) of the Government Code 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, we have not received arguments from the Pool or Hallmark. We, thus, have no basis for concluding that any portion of the submitted information constitutes proprietary information of the Pool or Hallmark. *See id.* § 552.110; 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, the department may

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

not withhold any of the submitted information based on the proprietary interests of the Pool or Hallmark.

We note the submitted information may have been addressed in Open Records Letter No. 2008-15628A (2008). Blue Cross explains the ruling was challenged in a lawsuit styled *Health Care Service Corporation v. Greg Abbott, Attorney General of the State of Texas*, Cause No. D-1-GN-08-004184 (250th Dist. Ct., Travis County, Tex., filed November 18, 2008). Blue Cross explains that, subsequent to filing, a third party intervened and Blue Cross was unable to file a non-suit in the case. Based on Blue Cross's intention to file non-suit in the case, we understand Blue Cross no longer objects to the public disclosure of the information ordered released by the previous ruling. Thus, the department must release or withhold the information at issue in accordance with Open Records Letter No. 2008-15628A. *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). To the extent the submitted information was not at issue in the above referenced litigation, we will address Blue Cross's arguments against disclosure of this information.

Blue Cross claims the submitted information is excepted from disclosure by the litigation exception, Government Code section 552.103. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties, we do not address Blue Cross's argument under section 552.103. *See* Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate the rights of a third party), 522 (1989) (discretionary exceptions in general).

Section 552.110 of the Government Code 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 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 section 552.110(a) applies unless it has been shown the information meets the definition 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) 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* Open Record Decision No. 661 (1999).

Blue Cross contends some of the information at issue constitutes a protected trade secret. Upon review of the submitted information and the submitted arguments, we find Blue Cross has established its reimbursement methodology, which we have marked, is a trade secret under section 552.110(a). Therefore, the department must withhold this marked information

²The following are the six factors 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).

under section 552.110(a).³ However, we find Blue Cross has failed to demonstrate how any portion of the remaining information meets the definition of a trade secret, nor has Blue Cross demonstrated the necessary factors to establish a trade secret claim for the submitted information. *See* ORD 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). Therefore, the department may not withhold any portion of the remaining information pursuant to section 552.110(a) of the Government Code.

Blue Cross also claims section 552.110(b) of the Government Code for portions of its remaining information. Upon review, we find Blue Cross has established its provider reimbursement rate information, which we have marked, constitutes commercial and financial information, the release of which would cause the company substantial competitive harm. Accordingly, the department must withhold the marked reimbursement rate information under section 552.110(b) of the Government Code.⁴

We note some of the remaining information is subject to common-law privacy. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses the common-law right of privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department

³Although the requestor contends Blue Cross has publicly disclosed its provider reimbursement methodology, we note the publicly disclosed information is not identical to the information presently at issue.

⁴The requestor contends Blue Cross's provider reimbursement rate information should not be protected under section 552.110 because it is available to Blue Cross policyholders upon request. However, we find this limited disclosure is not a release to competitors or the general public and does not defeat the protection of section 552.110(b) of the Government Code.

must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], 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.” Gov’t Code § 552.136(b). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Therefore, the department must withhold the insurance group and policy numbers we have marked under section 552.136 of the Government Code.⁵

In summary, the department must release or withhold the information at issue in accordance with Open Records Letter No. 2008-15628A. The department must withhold the information we have marked under section 552.110 of the Government Code. The department must also withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, and the insurance group and policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released.

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, 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

⁵We note this office 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.

Ref: ID# 425152

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Brooke A. Spence
Greenberg Traurig, L.L.P.
For Blue Cross Blue Shield of Texas
2101 L Street, NW, Suite 1000
Washington, D.C. 20037
(w/o enclosures)

Ms. Betty DeLargy
Mitchell Williams
For Texas Health Insurance Risk Pool
106 East Sixth Street, Suite 300
Austin, Texas 78701
(w/o enclosures)

Ms. Gail Boudreaux
Hallmark Services Corporation
75 Executive Drive, Suite 300
Aurora, Illinois 60504
(w/o enclosures)