



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 31, 2014

Ms. Danielle Folsom
Assistant City Attorney
City of Houston
P.O. Box 368
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OR2014-05323

Dear Ms. Folsom:

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# 518400 (GC Nos. 21106, 21147).

The City of Houston (the "city") received two requests for a specified report prepared by a consultant.¹ You claim the requested information is excepted from disclosure under section 552.111 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, the city notified Blue Cross Blue Shield Texas ("BCBS"); Cigna; Express Scripts, Inc. ("Express Scripts"); MedImpact HealthCare Systems, Inc. ("MedImpact"); Memorial Hermann Health Solutions ("MHHS"); PharmPix Corp. ("PharmPix"); and United Healthcare ("UHC") of the request for information and of each 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). We received comments from BCBS, Cigna, Express Scripts, MedImpact, and UHC. We have considered the submitted arguments and reviewed the submitted representative sample of 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 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 letter, we have not received comments from

¹By letter dated February 25, 2014, you inform this office the first requestor (GC No. 21147) withdrew her request for information.

MHHS or PharmPix explaining why the submitted information should not be released. Therefore, we have no basis to conclude MHHS or PharmPix has protected proprietary interests in the submitted information. *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 city may not withhold the submitted information on the basis of any proprietary interest MHHS or PharmPix may have in the information.

We note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The information at issue consists of a completed report that is subject to section 552.022(a)(1). The city must release the completed report pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under the deliberative process privilege encompassed by section 552.111 of the Government Code.² However, section 552.111 is a discretionary exception and does not make information confidential under the Act. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Therefore, the city may not withhold the information under section 552.111 of the Government Code. However, because information subject to section 552.022 may be withheld under section 552.104 of the Government Code, and because sections 552.101 and 552.110 of the Government Code make information confidential under the Act, we will address the third parties' arguments.³

²We note BCBS and Cigna also raise section 552.111 as an exception to disclosure. However, section 552.111 protects only the interests of a governmental body, not those of third parties. *See* Open Records Decision Nos. 592 (1991), 522 (1989) (discretionary exceptions in general). Therefore, we do not address these companies' arguments under section 552.111.

³*See* Gov't Code 552.104(b) (requirement that information subject to section 552.022(a) is not excepted from disclosure under Act does not apply to information excepted from disclosure under section 552.104).

BCBS, Cigna, and MedImpact assert their information is excepted from public disclosure under section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the city, not the proprietary interests of private parties such as BCBS, Cigna, and MedImpact. See ORD 592 at 8 (discussing statutory predecessor). In this instance, the city does not raise section 552.104 as an exception to disclosure. Therefore, the city may not withhold any of the information under section 552.104 of the Government Code.

BCBS, Cigna, Express Scripts, MedImpact, and UHC all claim some or all of the information at issue is excepted from public disclosure under section 552.110 of the Government Code.⁴ 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 trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

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 *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the

⁴MedImpact seeks to withhold portions of its proposal which are not responsive to the request and which the city did not submit for our review. This ruling does not address nonresponsive information and is limited to the information submitted as responsive by the city. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Restatement's list of six trade secret factors.⁵ RESTATEMENT OF TORTS § 757 cmt. b. 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 section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because 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; see also *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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 ORD 661 at 5 (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).

BCBS, Cigna, Express Scripts, MedImpact, and UHC argue the release of their pricing information would cause them substantial competitive harm. BCBS, Cigna, Express Scripts, MedImpact, and UHC also argue the release of some or all of the remaining submitted information would cause substantial competitive harm. Upon review, we find the pricing information we have marked consists of commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the city must withhold the

⁵The Restatement of Torts lists the following six factors 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 other 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; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information we marked under section 552.110(b) of the Government Code.⁶ However, BCBS, Cigna, Express Scripts, MedImpact, and UHC have made only conclusory allegations that release of any of the remaining information would cause them substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Therefore, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

BCBS, Cigna, and UHC argue some of the remaining information consists of trade secrets protected under section 552.110(a). Upon review, we find these companies have failed to establish a *prima facie* case that any portion of the information at issue meets the definition of a trade secret. We further find BCBS, Cigna, and UHC have failed to demonstrate the necessary factors to establish a trade secret claim for the information at issue. *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). Accordingly, the city may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁷ Gov’t Code § 552.101. This section encompasses information protected by other statutes. We understand UHC to claim its remaining information is excepted under section 552.101 in conjunction with section 31.05 of the Penal Code. Section 552.101 encompasses section 31.05, which provides in pertinent part:

(b) A person commits an offense if, without the owner’s effective consent, he knowingly:

- (1) steals a trade secret;
- (2) makes a copy of an article representing a trade secret; or
- (3) communicates or transmits a trade secret.

(c) An offense under this section is a felony of the third degree.

⁶As we make this determination, we need not address the remaining claims for this information.

⁷Although MedImpact raises section 552.101 of the Government Code, it makes no arguments to support this exception. Therefore, we assume MedImpact has withdrawn its claim this section applies to the information at issue. *See* Gov’t Code §§ 552.301, .302.

Penal Code § 31.05(b), (c). We note section 31.05 does not expressly make information confidential. Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *Id.* Accordingly, the district may not withhold any portion of the submitted information under section 552.101 of the Government Code on the basis of section 31.05 of the Penal Code.

We note some of the submitted information may 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 copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, 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.

In summary, the city must withhold the pricing information we marked under section 552.110(b) of the Government Code. The remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Open Records Division

CN/dls

Ref: ID# 518400

Enc. Submitted documents

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