



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 18, 2014

Ms. Danielle Folsom  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2014-14483

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# 532983 (GC No. 21454).

The City of Houston (the "city") received a request for information pertaining to request for proposals for pharmacy benefit services, RFP No. S37-T24702. You state the city will release some of the requested information. Although you do not take any position as to whether the submitted information is excepted from disclosure under the Act, you state, and provide documentation showing, you notified United HealthCare Services, Inc. ("UHC"); Blue Cross Blue Shield of Texas ("BCBS"); Memorial Hermann Health Solutions ("Memorial"); MedImpact Healthcare Systems, Inc. ("MedImpact"); PharmPix Corporation ("PharmPix"); and Cigna Health & Life Insurance Company ("Cigna") of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from UHC, BCBS, MedImpact, and PharmPix. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us some of the requested information is the subject of litigation pending against the Office of the Attorney General. *See Blue Cross and Blue Shield v. Abbott*, No. D-1-GN-14-001110 (353rd Dist. Ct., Travis County, Tex.). Accordingly, we will allow the trial court to resolve the issue of whether the information at issue in the pending litigation must be released to the public.

Next, you and UHC state a portion of the remaining information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2014-05323 (2014). In that ruling, we determined: (1) the city must withhold the pricing information we marked under section 552.110(b) of the Government Code and (2) the remaining information must be released; however, any information protected by copyright may only be released in accordance with copyright law. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the remaining information is identical to the information previously requested and ruled upon by this office, we conclude the city may rely on Open Records Letter No. 2014-05323 as a previous determination and withhold or release the identical information in accordance with that ruling. *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 note 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 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 Memorial or Cigna explaining why the submitted information should not be released. Therefore, we have no basis to conclude Memorial or Cigna have 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 Memorial or Cigna may have in the information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. MedImpact asserts some of its information is confidential by judicial decision because an Orange County Superior Court in the State of California granted an injunction prohibiting the release of certain information contained in a separate bid proposal submitted to the Orange County Healthcare Agency. However, MedImpact does not inform

us any of the information submitted by the city in response to the instant request for information has been declared confidential by judicial decision. Therefore, MedImpact has not established any of the submitted information is confidential by judicial decision and the city may not withhold it from release under section 552.101 on that ground.

MedImpact raises section 552.102 of the Government Code for portions of its information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See* Open Records Decision No. 345 (1982). In this instance, the information at issue relates to a private entity. Therefore, the city may not withhold any portion of MedImpact's information under section 552.102(a) of the Government Code.

MedImpact and BCBS raise section 552.104 of the Government Code as an exception to disclosure for portions of its information. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the city does not seek to withhold any information pursuant to section 552.104, no portion of the submitted information may be withheld on this basis.

BCBS, MedImpact, PharmPix, and UHC all claim some of the information at issue is excepted from public disclosure under section 552.110 of the Government Code. 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 Restatement's list of six trade secret factors.<sup>1</sup> 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).

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<sup>1</sup>The 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).

BCBS, MedImpact, PharmPix and UHC assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find MedImpact has demonstrated some of its information constitutes a trade secret. Further, we find BCBS and UHC have demonstrated their client information constitutes a trade secret. Accordingly, the city must withhold the information we have marked in MedImpact's information and the client information we have marked in BCBS's and UHC's information under section 552.110(a); however, the city may only withhold the client information at issue to the extent this information is not publicly available on BCBS's or UHC's websites.<sup>2</sup> However, we conclude BCBS, MedImpact, PharmPix and UHC have failed to establish a *prima facie* case any portion of the remaining information meets the definition of a trade secret. We further find BCBS, MedImpact, PharmPix and UHC have not demonstrated the necessary factors to establish a trade secret claim for their remaining information. *See* ORD 402. Therefore, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

BCBS, MedImpact, PharmPix and UHC further argue portions of their information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. 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 information we marked under section 552.110(b) of the Government Code. However, we find BCBS, MedImpact, PharmPix and UHC have failed to demonstrate release of any of the remaining information would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence substantial competitive injury would result from release of particular information at issue), 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 is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Therefore, the city may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

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<sup>2</sup>As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

assembled, or maintained by or for a governmental body is confidential.”<sup>3</sup> Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Upon review, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note some of the materials at issue 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, we will not address whether the information at issue in the lawsuit pending against this office is excepted from required public disclosure under the Act, but will instead allow the trial court to determine whether this information must be released to the public. The city must continue to rely on Open Records Letter No. 2014-05323 and withhold or release the remaining identical information in accordance with that ruling. The city must withhold the information we have marked in MedImpact’s information and the client information we have marked in BCBS’s and UHC’s information under section 552.110(a); however, the city may only withhold the client information at issue to the extent this information is not publicly available on BCBS’s or UHC’s websites. The city must withhold the information we have marked under section 552.110(b) of the Government Code. The city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released; however, any information that is subject to copyright may be released only 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](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

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Megan G. Holloway  
Assistant Attorney General  
Open Records Division

MGH/akg

Ref: ID# 532983

Enc. Submitted documents

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