



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2014

Mr. Clay Harris
Staff Attorney
Office of Agency Counsel
Legal Section, General Counsel Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2014-14953

Dear Mr. Harris:

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# 534144 (TDI No. 151344).

The Texas Department of Insurance (the "department") received a request for all health insurance rate filings submitted for plans offered on the Federally Facilitated Marketplace for the calendar year 2014. You state you will release some responsive information pursuant to the previous determinations issued to the department in Open Records Letter Nos. 2013-21959 (2013), 2013-17242 (2013), 2013-18238 (2013), and 2014-08540 (2014). You state the department will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ Although you take no position with respect to the public availability of the remaining responsive information, you state the proprietary interests of certain third parties might be implicated by the request. Accordingly, you notified BlueCross BlueShield of Texas ("BlueCross") and Molina HealthCare, Inc. ("Molina") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305

¹ORD 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

(permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 representatives of BlueCross. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). Although we received a letter dated June 25, 2014, from Molina indicating it would send arguments against disclosure of its information, as of the date of this letter, we have not received such arguments. Thus, Molina has failed to demonstrate it has a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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 not withhold the remaining requested information on the basis of any proprietary interest Molina may have in the information.

We note BlueCross seeks to withhold certain information the department did not submit 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 department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, BlueCross asserts portions of the remaining requested information were the subject of previous requests for information, in response to which this office issued Open Records Letter No. 2013-17242. In that ruling, we concluded the department must withhold the information we marked under section 552.110(b) of the Government Code and must release the remaining information. Upon review, we find the portions of information we have marked are subject to the ruling at issue. There is no indication the law, facts, and circumstances on which the prior ruling was based have changed with regard to the information we have marked. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, which we have marked, we conclude the department must continue to rely on Open Records Letter No. 2013-17242 as a previous determination and withhold or release the information at issue 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 information is or is not excepted from disclosure). We will address the submitted arguments against the disclosure of the remaining requested information that is not subject to the prior ruling.

BlueCross argues portions of its information are excepted from 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.² RESTATEMENT OF TORTS § 757 cmt. b. This

²The 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).*

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).

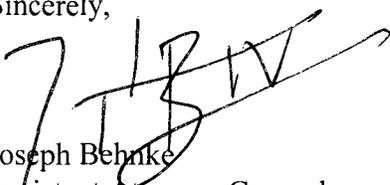
Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires 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.

BlueCross asserts portions of its information are excepted from disclosure under section 552.110(b) of the Government Code. BlueCross explains the release of the information at issue would cause it substantial competitive harm because it reveals the key assumptions made in setting the insurance prices for the year 2014, and the release of the information would allow competitors to use this information to underprice BlueCross and create their own business methodologies. Upon review, we find BlueCross has made the specific factual or evidentiary showing required by section 552.110(b) that release of portions of their information would cause substantial competitive harm. *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). Accordingly, the department must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find BlueCross has not demonstrated the release of the remaining information it marked would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661, 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). Additionally, we conclude BlueCross has not established any portion of the remaining information constitutes trade secrets for purposes of section 552.110(a). Accordingly, none of the remaining information at issue may be withheld under section 552.110. As there have been no further exceptions to disclosure raised for the remaining information, it must be released at this time.

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,


Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 534144

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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