



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2014

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

OR2014-18420

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# 539251 (TDI# 153135).

The Texas Department of Insurance (the "department") received a request for a copy of the 2015 individual health insurance premium rate filings, to include the rejected filings of companies that did not refile. You state you will release some of the information to the requestor. You also state the department will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of multiple third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue 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 have received comments from Superior Health Plan, Inc. ("Superior"), Cigna Health and Life

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Insurance Company (“Cigna”), Valley Baptist Insurance Company (“VBIC”), Blue Cross Blue Shield of Texas (“Blue Cross”), SHA, LLC (“SHA”), and Aetena Life Insurance Company (“Aetena”). SHA states it does not object to the release of its information. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note a portion of Superior’s information is not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

Next, 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) 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 only received comments from Superior, Cigna, VBIC, and Aetena explaining why their submitted information should not be released. We did receive correspondence from counsel for Humana, Inc. (“Humana”), informing us it would send arguments to withhold Humana’s information at a later date. However, as of the date of this letter, Humana has not submitted to this office reasons explaining why the requested information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest 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 department may not withhold any of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

We also note Superior and VBIC object to disclosure of information the department has not submitted to this office for review. This ruling does not address information that was not submitted by the department 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).

Cigna contends its information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* 552.104(a). The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). As the department does not argue section 552.104 is applicable, we will not consider Cigna’s claims under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the department may not withhold any of the submitted information under section 552.104 of the Government Code

Superior, Cigna, VBIC, Blue Cross, and Aetna claim portions of their information are excepted under section 552.110 of the Government Code, which 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. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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 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.² 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

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).

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). 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 Record 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* Open Records Decision 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).

Superior, Cigna, VBIC, Blue Cross, and Aetna 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 Superior, Cigna, VBIC, Blue Cross, and Aetna have demonstrated portions of their information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold the information we have marked and the information Aetna has marked, under section 552.110(b) of the Government Code. However, we find Superior, Cigna, VBIC, and Blue Cross have not demonstrated the release of the remaining information would result in substantial harm to their competitive positions. *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). Therefore, none of the remaining information may be withheld under section 552.110(b) of the Government Code.³

Superior, Blue Cross, and VBIC also assert their remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Superior, Blue Cross and VBIC have failed to establish a *prima facie* case that any of their remaining information meets the definition of a trade secret, nor have the companies demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b; 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

³As our ruling is dispositive for this information, we need not address the remaining argument against its disclosure.

secret claim). Accordingly, the department may not withhold any of the remaining responsive information under section 552.110(a) of the Government Code.

In summary, the department must withhold the information we have marked and the information Aetna has marked under section 552.110(b). The remaining responsive information 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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/ac

Ref: ID# 539251

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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