



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



February 24, 2015

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Mr. Ronald J. Bounds
Associate General Counsel of Open Records
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR2015-03649

Dear Mr. Bounds:

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# 554565 (TRS ID# Levatino 15-2).

The Teacher Retirement System of Texas (the "system") received a request for information pertaining to the winning bidder of a specified request for proposals, excluding information subject to a previous request made by the requestor.¹ You state the system will redact information under section 552.136(c) of the Government Code, as well as personal e-mail addresses pursuant to Open Records Decision No. 684 (2009).² Although you take no position as to the public availability of the submitted information, you state its release may implicate the proprietary interests of third parties. You state you notified the third parties of

¹You state the system sought and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²Section 552.136 of the Government Code permits a governmental body to withhold the information described in section 552.136(b) without the necessity of seeking a decision from this office. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e). Open Records Decision No. 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.

the request and of their right to submit arguments to this office as to why their information should not be released.³ *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 received comments from Aetna, Baylor, and Seton. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have marked some of the submitted information as not responsive to the instant request. This ruling does not address the public availability of non-responsive information, and the system 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 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). As of the date of this letter, we have only received arguments from Aetna, Baylor, and Seton. Thus, the remaining third parties have not demonstrated they have any 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 system may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Aetna and Seton contend some of the information at issue is confidential because it is "bound by a confidentiality agreement." However, information that is subject to disclosure under the Act may not be withheld simply because the party submitting it anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement specifying otherwise.

³The third parties notified pursuant to section 552.305 are: Aetna Life Insurance Company ("Aetna"), Baylor Healthcare System ("Baylor"), Health Texas Medical Group of San Antonio, Memorial Hermann, and Seton Healthcare Family ("Seton").

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. *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.⁴ 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

⁴The 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).

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.

Seton asserts portions of its information, including pricing information, constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Seton has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find Seton has not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. We note 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 Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Consequently, the system may not withhold any of Seton’s information under section 552.110(a).

Aetna, Baylor, and Seton assert some of the remaining information is commercial or financial information, the release of which would cause substantial competitive harm to each third party. Upon review of the submitted arguments under section 552.110(b), we conclude Aetna has demonstrated its customer information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, to the extent Aetna’s customer information is not publicly available on Aetna’s website, the system must withhold the customer information at issue under section 552.110(b). However, we find Aetna, Baylor, and Seton have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause any of the companies substantial competitive harm. *See* ORD 319 at 3. Further, we note the contract at issue was awarded to Aetna, with Baylor and Seton participating in the contract. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, the

terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). We therefore conclude the system may not withhold the remaining information under section 552.110(b).

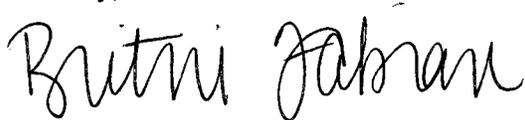
We note that some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* 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, to the extent Aetna's customer information is not publicly available on the company's website, the system must withhold Aetna's customer information under section 552.110(b) of the Government Code. The system must release the remaining responsive information, but 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/bhf

Ref: ID# 554565

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Exhibit A and incorporated by reference.

Tex. Gov't Code § 552.325(d) requires the Court to allow the requestor of information a reasonable period of time to intervene after receiving notice of the proposed settlement. The Attorney General represents to the Court, and the Court hereby takes judicial notice, that in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent notice to the requestors responsible for each of the letter rulings identified above on August 4, 2016, providing reasonable notice of this setting. The requestors were informed of the Parties' agreement that TRS must withhold portions of the information at issue in this suit. The requestors were also informed of their right to intervene in the suit to contest the withholding of the information. The requestors have neither informed the parties of their intention to intervene, nor has a plea in intervention been filed.

Aetna has demonstrated that release of certain portions of the information at issue in this suit (the "Excepted Information") would give advantage to a competitor or bidder. The Excepted Information is excepted from required public disclosure pursuant to Tex. Gov't Code § 552.104. Pursuant to the Agreed Protective Order entered in this case, Aetna provided the Attorney General with a marked copy of the documents at issue (the "Marked Copy"), which accurately indicates in red the Excepted Information, which the Attorney General and Aetna have agreed is protected from required public disclosure pursuant to Tex. Gov't Code § 552.104.

The Excepted Information is described in Exhibit A and includes the following:

- a. Network information, which describes the composition of Aetna's provider and hospital networks (including the number of primary care physicians, specialists, and hospitals within Aetna's networks in each geographical area in Texas, the aggregate allowed charges for each type of provider in each area, the number of

lives covered by each network in each area, and the total dollar of hospital utilization in each area); the rates paid to hospitals in Aetna's networks (including reimbursement amounts for various inpatient and outpatient procedures at specific hospitals); and rates paid to physicians in Aetna's networks (including a breakdown of allowed charges for specific physician procedures by Zip code, and the mean, median, and mode rates paid for each Zip code).

- b. Performance guarantees, which consist of performance metrics Aetna agreed to meet and penalties imposed if the metrics are not met. The performance guarantees cover basic program administration (such as customer service and claim payment accuracy) and Aetna's disease and case management programs.
- c. Claim target guarantees, which consist of a performance metric (projected claim savings), an amount at risk if the metric is not met, and proprietary factors used to calculate the guarantee (including a discount relativities factor, medical management and integration savings factor, and trend factor).
- d. Medical discount guarantee, which reflects rate discounts negotiated by Aetna with providers and the level of discounts Aetna intended to provide TRS.
- e. Administrative service fees charged for the contracts per employee per month (PEPM) and PEPM unit fees for related services (including subrogation, enhanced clinical review, hospital bill audit, and other claim wire standard programs).
- f. Additional discount improvements, which are additional discounts Aetna was able to secure from certain hospitals and provider groups for TRS.
- g. Information about subcontracted services, including subcontractor performance guarantees, subcontractor references, and subcontractor's audit report.

- h. Risk share agreements, which reflect the terms of Accountable Care Network (ACN) contracts between TRS and four provider groups, including Seton.
- i. Customer references, which include Aetna's customer contact information.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment in accordance with the Settlement Agreement is appropriate, disposing of all claims between the Parties in this suit.

IT IS THEREFORE ADJUDGED, ORDERED, AND DECLARED THAT:

1. The Parties have agreed that, in accordance with the PIA and under the facts presented, the Excepted Information is excepted from disclosure pursuant to Tex. Gov't Code § 552.104.

2. The Attorney General shall instruct TRS that it must withhold the Excepted Information from disclosure. The Attorney General will provide TRS with a copy of the Excepted Information and Marked Copy.

3. The Letter Rulings shall remain valid to the extent they determined that certain information is excepted from public disclosure. Pursuant to Tex. Gov't Code § 552.301(a), TRS may withhold such information in response to future PIA requests without requesting an Attorney General decision.

4. The Letter Rulings shall be null and void, and of no binding effect, with respect to the Excepted Information. For purposes of Tex. Gov't Code § 552.301(f), the Letter Rulings shall not constitute previous determinations that require disclosure of the Excepted Information in response to future PIA requests. This Agreed Final Judgment shall constitute a previous determination for purposes of Tex. Gov't Code § 552.301(a), and TRS may withhold the Excepted Information in response to future PIA requests without requesting an Attorney General decision.

5. All court costs and attorney fees are taxed against the Party incurring the same.
6. All relief not expressly granted is denied.
7. This Agreed Final Judgment fully and finally disposes of all claims between all Parties in this cause and is a final judgment.

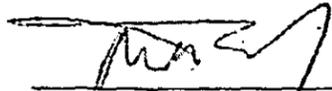
SIGNED this 27th day of September, 2016.



JUDGE PRESIDING

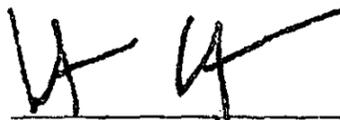
AMY CLARK MEACHUM

AGREED:



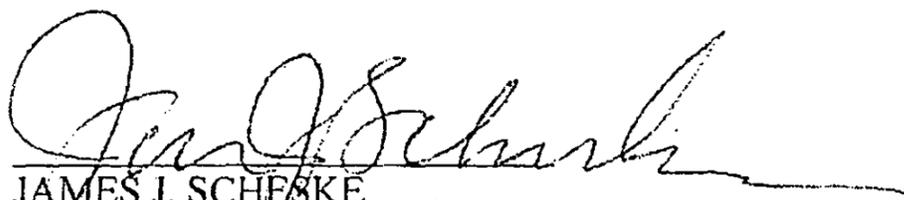
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ATTORNEYS FOR INTERVENOR
SETON HEALTHCARE FAMILY

explaining why any portion of the requested information pertaining to Aetna should be withheld from public disclosure. In each instance, Aetna submitted briefing to the Attorney General asserting that portions of the requested information consisted of commercial or financial information excepted from disclosure under Tex. Gov't Code § 552.110(b). The Attorney General issued open records letter rulings OR2015-07293 (2015), OR2015-10191 (2015), and OR2015-03649 (2015) (the "Letter Rulings") in response to TRS's requests. The Letter Rulings concluded that portions of the information for which Aetna sought protection were not excepted from required disclosure and must be released by TRS.

Aetna disputed the Letter Rulings and filed three lawsuits, later consolidated into a single action styled *Aetna Life Insurance Company v. Ken Paxton, Attorney General of Texas*, Cause No. D-1-GN-15-001648, filed in the 53rd Judicial District Court of Travis County, Texas (the instant suit), in order to preserve its rights under the PIA. Aetna provided notice of this lawsuit to the requestors, as required by Tex. Gov't Code § 552.325(b). Following commencement of this lawsuit, Seton intervened to contest the release of a portion of the requested information for which Aetna sought protection. TRS later received three additional PIA requests covering information at issue in this action, and in response the Attorney General issued rulings deferring to the outcome of this lawsuit. See OR2015-14440 (2015); OR2015-25686 (2015); OR2016-04302 (2016).

Tex. Gov't Code § 552.325(c) allows the parties to enter into a settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without the cost and uncertainty of further litigation.

TERMS

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Aetna has demonstrated that release of certain portions of the information at issue in this suit (the “Excepted Information”) would give advantage to a competitor or bidder. The Excepted Information is excepted from required public disclosure pursuant to Tex. Gov’t Code § 552.104. By correspondence dated September 2, 2015, Aetna provided the Attorney General with a marked copy of the documents at issue (the “Marked Copy”), which accurately indicates in red the Excepted Information, which the Attorney General and Aetna have agreed is protected from required public disclosure pursuant to Tex. Gov’t Code § 552.104. Any information released by TRS to the requestors shall not include the Excepted Information and must be redacted consistent with the Marked Copy.

2. The Excepted Information includes the following:

- a. Network information, which describes the composition of Aetna’s provider and hospital networks (including the number of primary care physicians, specialists, and hospitals within Aetna’s networks in each geographical area in Texas, the aggregate allowed charges for each type of provider in each area, the number of lives covered by each network in each area, and the total dollar of hospital utilization in each area); the rates paid to hospitals in Aetna’s networks (including reimbursement amounts for various inpatient and outpatient procedures at specific hospitals); and rates paid to physicians in Aetna’s networks (including a breakdown of allowed charges for specific physician procedures by Zip code, and the mean, median, and mode rates paid for each Zip code).

- b. Performance guarantees, which consist of performance metrics Aetna agreed to meet and penalties imposed if the metrics are not met. The performance guarantees cover basic program administration (such as customer service and claim payment accuracy) and Aetna's disease and case management programs.
- c. Claim target guarantees, which consist of a performance metric (projected claim savings), an amount at risk if the metric is not met, and proprietary factors used to calculate the guarantee (including a discount relativities factor, medical management and integration savings factor, and trend factor).
- d. Medical discount guarantee, which reflects rate discounts negotiated by Aetna with providers and the level of discounts Aetna intended to provide TRS.
- e. Administrative service fees charged for the contracts per employee per month (PEPM) and PEPM unit fees for related services (including subrogation, enhanced clinical review, hospital bill audit, and other claim wire standard programs).
- f. Additional discount improvements, which are additional discounts Aetna was able to secure from certain hospitals and provider groups for TRS.
- g. Information about subcontracted services, including subcontractor performance guarantees, subcontractor references, and subcontractor's audit report.

5. The Attorney General agrees to notify the requestors, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of each requestor's right to intervene in this lawsuit, should any requestor contest the withholding of the Excepted Information, as described in Paragraph 1 of this Agreement.

6. Should a requestor intervene in this lawsuit, a final judgment entered in this lawsuit will prevail over this Agreement, to the extent of any conflict.

7. Each party to this Agreement will bear its own costs, including attorneys' fees relating to this litigation.

8. The terms of this Agreement are contractual and not mere recitals. The agreements contained herein and the mutual consideration exchanged shall compromise disputed claims fully. Nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

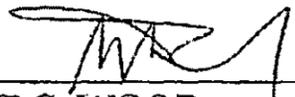
9. Aetna warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims the parties had, have, or could have against each other arising out of the PIA requests described in this Agreement.

10. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims the parties had, have, or could have against each other arising out of the PIA requests described in this Agreement.

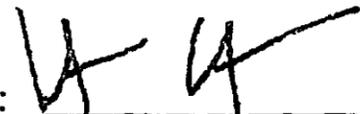
11. Seton warrants that its undersigned representative is duly authorized to execute this Agreement on behalf of Seton and its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims the parties had, have, or could have against each other arising out of the PIA requests described in this Agreement.

12. This Agreement may be executed in several parts. This Agreement shall become effective, and be deemed to have been executed, on the date upon which the last of the undersigned parties signs this Agreement.

AETNA LIFE INSURANCE COMPANY

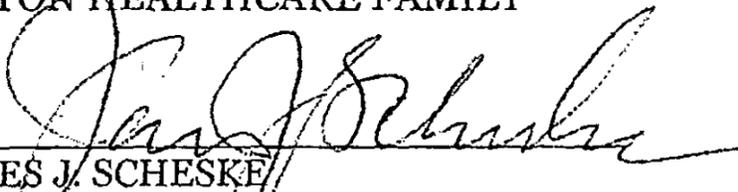
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Date: July 20, 2016

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