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September 24, 2015

Mr. Bob Davis
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Legal Section MC 110-1C
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OR2015-20032

Dear Mr. Davis:

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# 580517 (TDI# 163220).

The Texas Department of Insurance (the "department") received a request for the 2016 Texas individual rate filings for all insurance companies. You state the department is releasing some information. 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 Aetna Life Insurance Company ("Aetna"); Allegian Insurance Company ("Allegian"); All Savers Insurance Company ("All Savers"); Blue Cross Blue Shield of Texas ("BCBS"); Celtic Insurance Company ("Celtic"); CIGNA Healthcare of Texas; Community First Health Plans, Inc.; Community Health Choice, Inc. ("CHC"); Enterprise Life Insurance Company; Freedom Life Insurance Company of America; Humana Health Plan of Texas and Humana Insurance Company (collectively, "Humana"); Insurance Company of Scott and White and Scott and White Health Plan (collectively, "SWHP"); Molina Healthcare of Texas, Inc. ("Molina"); National Foundation Life Insurance; Oscar Insurance Company of Texas ("Oscar"); SHA, L.L.C. d/b/a FirstCare ("FirstCare"); Superior HealthPlan ("Superior"); Time Insurance Company; UnitedHealthcare Insurance Company, UnitedHealthcare Life Insurance, and UnitedHealthcare Insurance Company (collectively, "UnitedHealthcare"); Vista Health Plan, Inc. ("VHP").¹ Accordingly, you state you notified

¹We note, and the department acknowledges, it did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See* Gov't Code § 552.301(b), (e). Nonetheless, because third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider the submitted arguments against disclosure of the submitted information. *See id.* §§ 552.007, .302, .352.

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 on behalf of Aetna, Allegian, BCBS, Celtic, CHC, FirstCare, Humana, Molina, Oscar, Superior, SWHP, and VHP. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note in a letter dated August 6, 2015, you state the department wishes to withdraw its request for an open records decision for the portions of the submitted information pertaining to All Savers and UnitedHealthcare because you state, and provide documentation demonstrating, the requestor withdrew those portions of her request. Accordingly, this 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 such information in response to this request.²

Next, Celtic, FirstCare, Oscar, and Superior argue some of their information submitted by the department is not responsive to the instant request. A governmental body must make a good-faith effort to relate to a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the department has reviewed its records and determined the documents it has submitted for Celtic, FirstCare, Oscar, and Superior are responsive to the request. Thus, we find the department has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we find the information at issue is responsive to the request and will consider Celtic's, FirstCare's, Oscar's, and Superior's arguments to withhold the information at issue.

Next, Molina argues its information is subject to a previous request for information, in response to which this office issued Open Records Letter No. 2014-20419 (2014). In Open Records Letter No. 2014-20419, we determined the department must withhold the information we marked under section 552.110(b) of the Government Code and release the remaining information. However, the information at issue in the prior ruling was the rate filings submitted for the 2015 health insurance exchange; the current requestor seeks the 2016 rate filings. Thus, the information addressed in Open Records Letter No. 2014-20419 is not the same information that is at issue in the present request. Accordingly, the department may not rely on Open Records Letter No. 2014-20419 as a previous determination and may not withhold any of the submitted information in accordance with that ruling.

However, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-16920 (2015). In Open Records Letter No. 2015-16920, we concluded the department must

²As our ruling is dispositive, we need not address the argument against disclosure of this information.

withhold certain information under sections 552.110(b) and 552.137 of the Government Code and must release the remaining information. BCBS now seeks to withhold some of its information previously ordered released in Open Records Letter No. 2015-16920 under section 552.104 of the Government Code. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although BCBS now raises section 552.104 of the Government Code for the information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the department may not now withhold any of the previously released information under section 552.104 of the Government Code on behalf of BCBS. Furthermore, we understand the law, facts, and circumstances on which Open Records Letter No. 2015-16920 was based have not changed. Accordingly, we conclude the department must continue to rely on Open Records Letter No. 2015-16920 as a previous determination and withhold or release the identical information in accordance with that ruling.³ *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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). Next, we address the arguments against the disclosure of the submitted responsive information that is not subject to this prior ruling.

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 some of the third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the remaining responsive 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

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

is trade secret), 542 at 3. Accordingly, the department may not withhold the information at issue on the basis of any proprietary interest the remaining third parties may have in the information.

Humana, SWHP, and Vista claim portions of their information are confidential under section 552.101 of the Government Code in conjunction with section 38.003 of the Insurance Code.⁴ Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 38.003, which provides the following:

(a) This section applies to all underwriting guidelines that are not subject to Section 38.002.

(b) For purposes of this section, “insurer” means a reciprocal or interinsurance exchange, mutual insurance company, capital stock company, county mutual insurance company, Lloyd’s plan, life, accident, or health or casualty insurance company, health maintenance organization, mutual life insurance company, mutual insurance company other than life, mutual, or natural premium life insurance company, general casualty company, fraternal benefit society, group hospital service company, or other legal entity engaged in the business of insurance in this state. The term includes an affiliate as described by Section 823.003(a) if that affiliate is authorized to write and is writing insurance in this state.

(c) The department or the office of public insurance counsel may obtain a copy of an insurer’s underwriting guidelines.

(d) Underwriting guidelines are confidential, and the department or the office of public insurance counsel may not make the guidelines available to the public.

(e) The department or the office of public insurance counsel may disclose to the public a summary of an insurer’s underwriting guidelines in a manner that does not directly or indirectly identify the insurer.

(f) When underwriting guidelines are furnished to the department or the office of public insurance counsel, only a person within the department or the office of public insurance counsel with a need to know may have access to the guidelines. The department and the office of public insurance counsel shall establish internal control systems to limit access to the guidelines and shall keep records of the access provided.

⁴Although SWHP and Vista do not explicitly raise section 552.101 of the Government Code, we understand them to raise this exception based on the substance of their arguments.

(g) This section does not preclude the use of underwriting guidelines as evidence in prosecuting a violation of this code. Each copy of an insurer's underwriting guidelines that is used in prosecuting a violation is presumed to be confidential and is subject to a protective order until all appeals of the case have been exhausted. If an insurer is found, after the exhaustion of all appeals, to have violated this code, a copy of the underwriting guidelines used as evidence of the violation is no longer presumed to be confidential.

(h) A violation of this section is a violation of Chapter 552, Government Code.

Ins. Code § 38.003. Section 38.003(a) makes section 38.003 applicable to all insurance underwriting guidelines not subject to section 38.002. *Id.* § 38.003(a). Section 38.002 is applicable only to automobile and residential property insurance underwriting guidelines. *See id.* § 38.002(a)(1) (defining "insurer" for purposes of section 38.002 as certain types of entities "engaged in the business of personal automobile insurance or residential property insurance"). Humana, SWHP, and Vista contend the requestor seeks underwriting guidelines, which are confidential under section 38.003. *Cf. id.* § 38.002(a)(4) (defining "underwriting guidelines" for purposes of section 38.002 as "a rule, standard, guideline, or practice, whether written, oral, or electronic, that is used by an insurer or its agent to decide whether to accept or reject an application for coverage under a personal automobile insurance policy or residential property insurance policy or to determine how to classify those risks that are accepted for the purpose of determining a rate"). Upon review, we find the information at issue does not consist of underwriting guidelines. Thus, the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 38.003 of the Insurance Code.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at *7 (Tex. June 19, 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at *9. BCBS states it has competitors. In addition, BCBS argues release of its information would cause it substantial competitive harm. After review of the information at issue and consideration of the arguments, we find BCBS has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we marked under section 552.104(a).⁵

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

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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.⁶ 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).

⁶The 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).

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.

Aetna, Celtic, CHC, FirstCare, Humana, Molina, Oscar, Superior, SWHP, and Vista argue some of their information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find Aetna, Celtic, CHC, FirstCare, Molina, Oscar, Superior, SWHP, and Vista have demonstrated portions of their information consist of commercial or financial information, the release of which would cause substantial competitive harm. Therefore, the department must withhold the information we marked under section 552.110(b) of the Government Code.⁷ However, we find Aetna, Celtic, CHC, FirstCare, Humana, Oscar, Superior, SWHP, and Vista have failed to demonstrate the release of the remaining information at issue would result in substantial harm to their competitive positions. *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); *see also* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the department may not withhold any of the remaining information under section 552.110(b).

Celtic, FirstCare, Humana, Oscar, Superior, SWHP, and Vista assert some of their remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Celtic, FirstCare, Humana, Oscar, Superior, SWHP, and Vista have failed to demonstrate any portion of the remaining information at issue meets the definition of a trade secret. *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). Consequently, the department may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).⁸ *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the

⁷As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

⁸The 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).

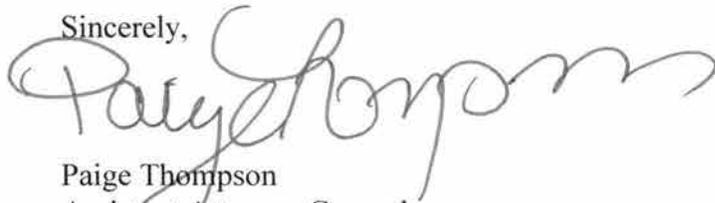
general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address of a vendor who seeks to contract with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or an e-mail address provided to a governmental body on a letterhead. *See id.* § 552.137(c). Upon review, we find the department must withhold the e-mail addresses in the remaining responsive information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

In summary, the department must continue to rely on Open Records Letter No. 2015-16920 as a previous determination and withhold or release the identical information in accordance with that ruling. The department may withhold the information we marked under section 552.104(a) of the Government Code. The department must withhold the information we marked under section 552.110(b) of the Government Code. The department must withhold the e-mail addresses in the remaining information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies. The department must release the remaining responsive information.

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,

A handwritten signature in black ink, appearing to read "Paige Thompson", written over a faint, larger version of the same signature.

Paige Thompson
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PT/dls

Ref: ID# 580517

Enc. Submitted documents

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