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ATTORNEY GENERAL OF TEXAS

October 16, 2015

Mr. Bob Davis
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OR2015-21777

Dear Mr. Strickland:

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# 583377 (TDI# 164107).

The Texas Department of Insurance (the "department") received a request for filings for health insurance plans eligible to be sold on the Affordable Care Act exchange or plans a company indicated would be sold on the exchange. You state you do not have some information responsive to the request.¹ You state you will release 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"); Blue Cross Blue Shield of Texas ("BCBS"); Community Health Choice, Inc. ("CHC"); Freedom Life Insurance Company of America ("Freedom"); Humana Health Plan of Texas ("Humana"); Molina Healthcare of Texas, Inc. ("Molina"); SHA, L.L.C. ("SHA"); Superior HealthPlan ("Superior"); and United Healthcare Insurance Company and UnitedHealthcare Life

¹The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Insurance Company (collectively, “UnitedHealthcare”).² Accordingly, you state 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 on behalf of Allegian, BCBS, CHC, Humana, Molina, and UnitedHealthcare. Although we received comments from Superior, Superior did not raise any exceptions to disclosure or assert a proprietary interest in the information at issue in the present request. We have considered the submitted arguments and reviewed the submitted information.

Initially, BCBS and UnitedHealthcare argue some of the 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 to this office 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 the submitted arguments to withhold the information at issue.

UnitedHealthcare argues its information is subject to a previous request for information, as a result of which this office issued Open Records Letter No. 2014-19324 (2014) and 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). However, none of the submitted information was at issue in either of those two rulings. Accordingly, the department may not withhold any of the submitted information in accordance with Open Records Letter No. 2014-19324 or Open Records Letter No. 2014-20419. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You state some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter No. 2015-16920 (2015) and Open Records Letter No. 2015-20032 (2015). In those rulings, we determined the department must withhold certain information under sections 552.104, 552.110, and 552.137 of the Government Code and must release the remaining information. There

²The 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, notwithstanding the department’s violation of section 552.301 in requesting this decision. *See id.* §§ 552.007, .302, .352.

is no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, the department must continue to rely on Open Records Letter Nos. 2015-16920 and 2015-20032 as previous determinations and withhold and release that information in accordance with those rulings. *See id.* However, the information you have submitted was not at issue in the previous rulings. Accordingly, we will address the public availability of this information.

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 Aetna, Freedom, or SHA explaining why the submitted information should not be released. Therefore, we have no basis to conclude these third parties 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 department may not withhold the information at issue on the basis of any proprietary interests these third parties may have in the information.

Molina has submitted to this office information it asserts is excepted from release under section 552.110 of the Government Code. However, the department did not submit this information for our review. This ruling does not address information beyond what the department has submitted to us for review. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information. *See id.*

We note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 requested information falls within an exception to disclosure, the department must release it, notwithstanding any expectations or agreement specifying otherwise.

Next, UnitedHealthcare asserts portions of the submitted information are protected by section 552(b)(4) of title 5 of the United States Code, the Freedom of Information Act (“FOIA”). We note FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue is held by a Texas agency, which is

subject to the laws of the State of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also Davidson v. Georgia*, 622 F.2d 895, 897 (5th Cir. 1980) (state governments are not subject to FOIA); Open Records Decision No. 561 at 7 n.3 (1990) (noting federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). This office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. *See, e.g.*, Attorney General Opinion MW-95 (neither FOIA nor federal Privacy Act of 1974 applies to records held by state or local governmental bodies in Texas); ORD 124 (fact that information held by federal agency is excepted by FOIA does not necessarily mean that same information is excepted under Act when held by Texas governmental body). Thus, the department may not withhold any of the information at issue on the basis of FOIA.

Humana claims portions of its information are confidential under section 552.101 of the Government Code in conjunction with section 38.003 of the Insurance Code. 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.

(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 contends 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*, 466 S.W.3d 831 (Tex. 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 841. 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 BCBS marked under section 552.104(a).³

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.* 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

³As our ruling is dispositive, we need not address BCBS's remaining arguments against disclosure of this 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).*

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).

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.

Allegian, CHC, Humana, Molina, and UnitedHealthcare argue some of their information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find Allegian, CHC, Humana, Molina, and UnitedHealthcare have demonstrated portions of their information, which we have marked, consist of commercial or financial information, the release of which would cause the companies substantial competitive harm. Therefore, the department must withhold the information we marked under section 552.110(b) of the Government Code.⁵ However, we find Allegian, CHC, Humana, Molina, and UnitedHealthcare 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).

Allegian, CHC, Humana, Molina, and UnitedHealthcare assert some of their remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Allegian, CHC, Humana, Molina, and UnitedHealthcare 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.

The remaining information contains e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a

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

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).⁶ See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). The department does not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the department must withhold the e-mail addresses of members of the public in the remaining information under section 552.137 of the Government Code.

In summary, the department may withhold the information BCBS 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 of members of the public in the remaining information under section 552.137 of the Government Code. The department must release the remaining 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,



Mili Gosar
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MG/akg

⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. See Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987).

Ref: ID# 583377

Enc. Submitted documents

c: Requestor
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