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ATTORNEY GENERAL OF TEXAS

December 30, 2014

Mr. Bob Davis
Attorney
Office of General Counsel
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2015-27260

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# 592633 (TDI# 166191).

The Texas Department of Insurance (the "department") received a request for individual health filings with an effective date of January 1, 2016. The department states it is releasing or withholding some of the requested information in accordance with Open Records Letter Nos. 2015-16920 (2015) and 2015-20032 (2015).¹ The department also states it will withhold personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² The department does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the department states, and provides documentation showing, it notified the following third parties of the department's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released: Aetna Life Insurance Company ("Aetna"); All Savers Insurance Company ("All Savers"); Blue Cross Blue Shield of Texas ("Blue Cross"); Celtic Insurance Company ("Celtic"); Cigna Life

¹See Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001).

²Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of seeking a decision from this office.

and Health Insurance Company and Cigna Healthcare of Texas (collectively, “Cigna”); Community First Health Plans, Inc.; Community Health Choice, Inc.; Enterprise Life Insurance Company; Freedom Life Insurance Company of America; Molina Healthcare of Texas, Inc. (“Molina”); National Foundation Life Insurance Company; Standard Life and Casualty Insurance Company; Superior Health Plan, Inc. (“Superior”); and Vista Health Plan, Inc. *See* Gov’t Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 correspondence from Aetna, All Savers, Blue Cross, Celtic, Cigna, Molina, and Superior objecting to the release of some of the information at issue under the Act. We have considered the submitted arguments and reviewed the submitted information.³

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 requested information relating to it should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, none of the remaining interested third parties has submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of these third parties, and the department may not withhold any portion of it on that basis. *See* 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, 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.

Celtic and Superior argue some of the submitted documents are not responsive to the request for information. 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). The department has reviewed its records and determined the documents it has submitted for these third parties 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 arguments to withhold it.

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, 841 (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

³We note the department did not comply with the requirements of section 552.301(e) of the Government Code regarding some of the submitted information. *See* Gov’t Code § 552.301(e). Nevertheless, third-party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider whether the submitted information must be withheld under the Act on that ground.

advantage.” *Id.* Aetna, All Savers, Blue Cross, Celtic, and Superior state they have competitors. In addition, these third parties argue release of the information at issue would cause them substantial competitive harm. Upon review, we find these third parties have 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 Aetna, All Savers, Blue Cross, Celtic, and Superior have marked or indicated under section 552.104(a) of the Government Code.⁴

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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.⁵ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private

⁴As our ruling is dispositive, we do not address the remaining arguments against disclosure of this information.

⁵The following are the six factors that the Restatement gives 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 others 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

person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

Upon review, we find Cigna and Molina have established the release of some of the information at issue would cause substantial competitive injury. Therefore, the department must withhold the information Molina has marked, as well as the Cigna information we have marked, under section 552.110(b).⁶ However, we find Cigna has failed to establish release of any of the remaining information would cause it substantial competitive injury. *See id.* § 552.110(b). In addition, we conclude Cigna has failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See id.* § 552.110(a); ORD 402. Therefore, the department may not withhold any of the remaining information under section 552.110.

We note some of the materials at issue 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* 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.

To conclude, the department may withhold the information Aetna, All Savers, Blue Cross, Celtic, and Superior have marked or indicated under section 552.104(a) of the Government Code. The department must withhold the information Molina has marked, as well as the Cigna information we have marked, under section 552.110(b) of the Government Code. The department must release the remaining information, but may only release any copyrighted information in accordance with copyright law.

2 (1982), 255 at 2 (1980).

⁶As our ruling is dispositive, we do not address the other arguments to withhold this 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,


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JLC/bhf

Ref: ID# 592633

Enc. Submitted documents

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