



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

June 29, 2016

Mr. David Wheelus  
Open Records Attorney  
Office of Agency Counsel  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714

OR2016-14850

Dear Mr. Wheelus:

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# 616536 (TDI# 171674).

The Texas Department of Insurance (the "department") received a request for a list of specified filings. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of eighteen third parties. Accordingly, you state, and provide documentation showing, you notified Blue Cross Blue Shield of Texas ("BCBS"); Guarantee Trust Life Insurance Company ("Guarantee"); Humana Insurance Company ("Humana"); Insurance Company of Scott and White ("Scott and White"); Memorial Hermann Health Plan ("Memorial"); Molina Healthcare of Texas, Inc. ("Molina"); New York Life Insurance Company ("New York"); Regal Life of America Insurance Company ("Regal"); Transamerica Life Insurance Company ("Transamerica"); Vista Health Plan, Inc. ("Vista"); Aetna Life Insurance Company ("Aetna"); Children's Medical Center Health Plan ("Children's"); Sender Health Plans ("Sender"); Cigna Dental Health of Texas ("Cigna"); Unitedhealthcare of Texas ("United"); Seton Health Plan, Inc. ("Seton"); Eyemed Vision Care HMO of Texas ("Eyemed"); and Celtic Insurance Company ("Celtic") of the request for information and of their right to submit arguments to this office as to why the submitted information 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 BCBS, Guarantee, Humana, Scott and White, Memorial, Molina, New York, Regal, Aetna, Children's, Cigna, and United. We have reviewed the submitted information and considered the submitted arguments.

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 Transamerica, Vista, Sender, Seton, Eyemed, or Celtic explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of these third parties has 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 the submitted information on the basis of any proprietary interest Transamerica, Vista, Sender, Seton, Eyemed, or Celtic may have in the information.

Initially, we note some of the requested information may have been the subject of a previous ruling from this office. In Open Records Letter No. 2016-05873 (2016), this office ruled the department (1) must continue to rely on Open Records Letter No. 2015-16920 (2015) and 2015-21777 (2015) as previous determinations and withhold or release the identical information in accordance with those rulings, (2) may withhold the information we indicated under section 552.104(a) of the Government Code, (3) 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, and (4) must release the remaining information. We have no indication the law, facts, or circumstances upon which the prior ruling was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon, the department must continue to rely on Open Records Letter No. 2016-05873 as a previous determination, and withhold or release the previously ruled upon information in accordance with it. *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). To the extent the information in the current request is not encompassed by the prior ruling, we will consider the submitted arguments.

Cigna asserts its information is not subject to the Act. The Act is applicable only to “public information.” *See id.* §§ 552.002, .021. Section 552.002(a) defines “public information” as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

*Id.* § 552.002. Thus, virtually all the information in a governmental body’s physical possession constitutes public information and is subject to the Act. *See id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Cigna argues its information does not constitute public information under the Act because it consists of information that “was withdrawn prior to completion and final submission[.]” Upon review, however, we find Cigna’s information was collected and is maintained in connection with the transaction of official business by the department. Thus, Cigna’s information is subject to the Act and the department must release it unless it falls within an exception to public disclosure under the Act.

We note Children’s and Guarantee both assert portions of the submitted information are marked confidential. However, information is not confidential under the Act simply because the party submitting the information 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 (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 information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

New York raises section 552.101 of the Government Code for portions of its submitted information. Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992), 545 (1990). However, the doctrine of common-law privacy protects the privacy interests of individuals, not of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev’d on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find New York has failed to demonstrate any of its submitted information is highly intimate or embarrassing and not of legitimate public concern. Thus, none of New York’s submitted information may be withheld under section 552.101 in conjunction with common-law privacy.

Aetna, BCBS, Guarantee, Humana, Memorial, Regal, Scott and White, and United claim section 552.104 of the Government Code for some of their respective information. Section 552.104(a) 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, 839 (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. Aetna, BCBS, Guarantee, Humana, Memorial, Regal, Scott and White, and United all state they have competitors. Aetna, BCBS, Guarantee, Humana, Regal, and United state release of their information at issue would give an advantage to their competitors. Memorial and Scott and White state release of their information at issue would cause them substantial competitive harm. After review of the information at issue and consideration of the arguments, we find Aetna, BCBS, Guarantee, Humana, Memorial, Regal, Scott and White,

and United 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, BCBS, Guarantee, Humana, Memorial, Regal, Scott and White, and United have indicated under section 552.104(a).<sup>1</sup>

Children's, Cigna, Molina, and New York claim some of their information is excepted from disclosure under section 552.110 of the Government Code.<sup>2</sup> Section 552.110 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.<sup>3</sup> RESTATEMENT OF TORTS § 757 cmt. b. This

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<sup>1</sup>As our ruling is dispositive, we need not address the remaining arguments against release of this information.

<sup>2</sup>Molina does not object to the release of filing MOTX-130403611.

<sup>3</sup>The 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;

office must accept a claim 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 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 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Molina and New York assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude New York has established a *prima facie* case that portions of its information constitute trade secret information. However, to the extent any of the customer information New York seeks to withhold has been published on the company’s website, any such information is not confidential under section 552.110(a). Further, we conclude Molina has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret.

Additionally, we find New York has not demonstrated the necessary factors to establish a trade secret claim for the portions of its information we have indicated. We further find Molina has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110(a)). Therefore, none of New York’s remaining information or any of Molina’s portion of the submitted information may be withheld under section 552.110(a).

Children’s, Cigna, Molina, and New York further argue portions of their information consist of commercial information the release of which would cause substantial competitive harm

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- (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).

under section 552.110(b) of the Government Code. Upon review, we find Children's and Molina have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold the information Children's and Molina indicated under section 552.110(b) of the Government Code. However, we find Cigna and New York have made only conclusory allegations the release of the information at issue would result in substantial damage to their competitive positions. *See* Open Records Decision Nos. 661 at 5-6 (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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, the department may not withhold any of Cigna's or New York's information under section 552.110(b) 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).<sup>4</sup> *See* Gov't Code § 552.137(a)-(c). Section 552.137 does not apply to an institutional e-mail address, the 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 information under section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon, the department must continue to rely on Open Records Letter No. 2016-05873 as a previous determination, and withhold or release the previously ruled upon information in accordance with it. The department may withhold the information Aetna, Regal, Guarantee, United, Scott and White, Memorial, BCBS, and Humana have indicated under section 552.104(a). The department must withhold New York's customer information, to the extent it has not been published on the company's website, under section 552.110(a) of the Government Code. The department must withhold the information Children's and Molina indicated under section 552.110(b) of the Government Code. The department must withhold the e-mail addresses in the remaining information under

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<sup>4</sup>The 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).

section 552.137 of the Government Code, unless their owners affirmatively consent to their public disclosure or subsection (c) applies. The remaining information must be released.

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](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,



Ian Lancaster  
Assistant Attorney General  
Open Records Division

IML/akg

Ref: ID# 616536

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

18 Third Parties  
(w/o enclosures)