



Office of the Attorney General  
State of Texas

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Ms. Linda Wiegman  
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Office of General Counsel  
Texas Department of Health  
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OR97-2596

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 110400.

The Texas Department of Health (the "department") received requests for the Managed Care Financial-Statistical Reports of several managed care entities in certain Texas areas. You claim that the requested information implicates the third-party proprietary right of the individual entities. You have submitted a representative sample of the requested information to this office for review.<sup>1</sup>

Since the property and privacy rights of third parties are implicated by the release of the requested information here, this office notified the eight companies that are the subject of the requests. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

The following companies failed to respond to the notice: HMO Blue, West Texas; Harris Methodist Texas Health Plan; PCA Health Plans of Texas; Rio Grande HMO; and Community First Health Plans. Therefore, we have no basis to conclude that these companies' information is excepted from disclosure. *See* Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. The Managed Care Financial-Statistical Reports submitted by the companies that did not respond must, therefore, be released to the requestors.

Firstcare Southwest Health Alliances ("Firstcare"); Americaid Texas, Inc. ("Americaid"); and Foundation Health, A Texas Health Plan, Inc. ("Foundation Health") each raise section 552.110 as an exception to disclosure of their respective financial reports. Section 552.110 protects the property interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 a single or ephemeral event 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 *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>2</sup>

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(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 (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.*

Firstcare argues that disclosure of the information would give another competitor an unfair advantage and "would be a breach of confidentiality of the contracted agreements between FIRSTCARE and its subcontractors." We do not believe that Firstcare has established that the information it seeks to withhold is either a trade secret or confidential commercial or financial information that must be withheld. Moreover, a contract cannot overrule the Open Records Act. Attorney General Opinion JM-672 (1987). Therefore, the department must release Firstcare's report to the requestors.

Americaid argues that release of the information would undercut its position in the marketplace and undermine its financial stability. Americaid further asserts that the information constitutes trade secret information excepted from disclosure under section 552.110. We do not believe that Americaid has established that substantial competitive injury would likely result from disclosure of the financial report or that the information it seeks to withhold falls within the definition of trade secret that must be withheld under section 552.110. In addition, we note that federal cases applying the analogous FOIA exemption to prices in awarded government contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 151-152. Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Consequently, the department may not withhold this information from public disclosure based on the commercial or financial information prong of section 552.110 of the Government Code. *See* Open Records Decision No. 319 (1982) (pricing proposals may only be withheld under the predecessor to section 552.110 during the bid submission process).

Next, Americaid argues that sections 552.104 and 552.112 except its financial report from public disclosure. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code

§ 552.104 may be waived by governmental body). Therefore, the requested information may not be withheld under section 552.104. Likewise, we do not believe that section 552.112 is applicable in this instance. The department does not seek to withhold the information at issue based on this section. *See* Open Records Decision No. 522 (1989) at 4 (governmental body may decide not to raise permissive exceptions); Open Records Letter No. 97-0301 (1997) at 3-4. The requested information may not be withheld pursuant to section 552.112.

Foundation Health contends that its "competitive position would be substantially harmed if this financial and statistical data is disclosed." Foundation Health has not shown specific factual or evidentiary material that substantial competitive injury would likely result from disclosure. Accordingly, the department may not withhold Foundation Health's financial report under section 552.110. In addition, we refer you to the discussion above regarding the public interest in disclosure of cost and pricing information. Lastly, Foundation Health argues that the requested information is protected by a confidential provision in its contract with the department. Governmental bodies are prohibited from entering into contracts to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 514 (1988), 479 (1987), 444 (1986).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Ref: ID# 110400

Enclosures: Submitted documents

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