



Office of the Attorney General

State of Texas

September 10, 1998

DAN MORALES

ATTORNEY GENERAL

Ms. Joan Carol Bates
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Texas Department of Health
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OR98-2139

Dear Ms. Bates:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117437.

The Texas Department of Health (the "department") received a request to review the bid proposals that the department received in response to its request for applications to provide Medicaid managed care services in the Harris County service area. We previously ruled on the release of the bid proposals of the successful applicants. Open Records Letter No. 98-1016 (1998). Thus, only the bid proposals of the unsuccessful applicants are at issue here. On behalf of the unsuccessful applicants, you ask whether their bid proposals are excepted from disclosure under section 552.110 of the Government Code. You state that "[t]he department takes no position regarding whether any or all of these documents are excepted from mandatory disclosure."

Since the proprietary interest of third parties may be implicated by the release of the bid proposals, we notified the following companies of the request for information and of their opportunity to claim that their bid proposals are excepted from disclosure: Managed Care Network of Texas, NYLCare Health Plans of the Gulf Coast, Inc. ("NYLCare"), Prudential Health Care Plan, Inc. ("Prudential"), Superior Health Plan, Inc., UNICARE of Texas Health Plans, Inc. ("Unicare"), Universal Health Plan, Inc., and Well Choice Comprehensive Health Services of Texas. 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). We received responses from NYLCare, Prudential, and Unicare.

Managed Care Network of Texas, Superior Health Plan, Inc., Universal Health Plan, Inc., and Well Choice Comprehensive Health Services of Texas did not respond to our notice. Because these companies did not respond to our notice, we have no basis to conclude that their bid proposals are excepted from disclosure. See Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). The bid proposals of these four companies must, therefore, be released to the requestor.

Unicare contends that several sections of its bid proposal are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of third 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 section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides that 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) (emphasis added). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental

¹The 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 others involved in

body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. 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. In *National Parks & Conservation Ass'n 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. *Id.* at 770. 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 at 4 (1996). 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.*

We note that documents that have been widely distributed, such as brochures and educational materials, cannot generally be withheld under section 552.110. Likewise, publicly available information, such as articles of incorporation, corporate by-laws, and information collected by the Texas Ethics Commission on lobbyists, cannot be withheld under section 552.110.

Unicare asserts that the following sections of its bid proposal are trade secrets: attachments 11.0.8, 11.0.10, 11.0.14, 11.7.1, 11.9.2, and 11.11.9. Having reviewed Unicare's arguments, we conclude that Unicare has demonstrated that attachments 11.0.8, 11.0.10, 11.7.1, and 11.11.9 are trade secrets. The department must, therefore, withhold these four attachments from disclosure. We find that attachment 11.0.14 is not a trade secret and must be released to the requestor. The department did not submit attachment 11.9.2 to this office for review. Thus, we are unable to determine whether attachment 11.9.2 is

[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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

excepted from disclosure.

NYLCare argues that certain sections of its bid proposal are excepted from disclosure under sections 552.110 and 552.112 of the Government Code. NYLCare also contends that portions of its bid proposal are excepted from disclosure under section 552.101 of the Government Code in conjunction with the following statutes: section 161.032 of the Health and Safety Code, articles 1.15 and 20A.17 of the Insurance Code, and section 5.06, article 4495b of Vernon's Texas Civil Statutes.

NYLCare contends that many sections of its bid proposal are excepted from disclosure under section 552.110. NYLCare argues that some of these same sections of its bid proposal are also deemed confidential by law. Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses confidentiality statutes into the Open Records Act.

Section 161.032(a) of the Health and Safety Code provides that "records and proceedings of a medical committee are confidential and are not subject to court subpoena." Section 161.031 of the Health and Safety Code defines medical committee as follows:

(a) In this subchapter, "medical committee" includes any committee, including a joint committee, of:

(1) a hospital;

(2) a medical organization;

(3) a university medical school or health science center;

(4) a health maintenance organization licensed under the Texas Health Maintenance Organization Act (Chapter 20A, Vernon's Texas Insurance Code), including an independent practice association or other physician association whose committee or joint committee is a condition of contract with the health maintenance organization; or

(5) an extended care facility.

(b) The term includes a committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution.

Section 5.06(g) of article 4495b of Vernon's Texas Civil Statutes makes confidential "all proceedings and records of a medical peer review committee," as well as "all communications made to a medical peer review committee." NYLCare's bid proposal

includes the minutes of medical committee meetings, as well as other documentation that appears to have been created at the committee's request.

Having reviewed NYLCare's arguments against disclosure, we conclude that the following sections of NYLCare's bid proposal are excepted from disclosure under section 552.110 of the Government Code and/or section 552.101 of the Government Code, in conjunction with section 161.032 of the Health and Safety Code and section 5.06, article 4495b of Vernon's Texas Civil Statutes:

Attachments 4.0.1-A, 4.1.1-A, 7.3.1-A, 7.3.1-B, 7.3.5-A, 7.6.14-A, 5.6.14-B, 7.9.6-A, 11.0-F, 11.0-H, 11.3.1-A, 11.4.1-A, 11.4.1-B, 11.4.3-A, 11.7.1-C, 11.7.3-A, 11.10.3-A, 11.11.3-A, 11.11.5D-A, 11.11.8.A-A, 11.11.8.A-B, 11.11.8.A-C, 12.3.1-A, 12.4.6.1-A, 12.4.6.4, 12.4.6.6-A, 7.6.1-A, 7.6.2-A, 7.6.4-A, 7.6.5-A, 7.6.7-A, 7.6.8-A, 7.6.9, 7.6.10-A, 7.6.12-A, 7.6.13.C-1, 7.6.13.C-2, 7.6.13.C-3, 7.6.13.C-4, 7.7.4.2-A, 7.7.5.1, 11.0-A, 11.0-B, 11.0-C, 11.0-D, 12.4.6.1-B, 12.4.6.1-C, 12.4.6.1-D, 12.4.6.1-E, 12.4.6.1-G, 12.4.6.2, 12.4.6.3-A, 12.4.6.5-A, 12.4.6.5-B, 12.4.6.5-C, 12.4.6.5-D, 7.2.4, 7.4.1-A, 7.5.1.A.1-A, 7.5.1.A.1-B, 7.5.1.A.1-C, 7.5.1.B.2-A, 7.5.1.D.1-A, 7.5.2.H.1-A, 7.5.2.H.2-A, 7.5.7.A.1-A, 7.5.7.A.2-A, 7.5.12.B.1-A, and 7.7.6.10.

Only portions of the following sections are excepted from disclosure: 11.7.1-A, 7.5.1.C.1-A. The portions of these sections that are not protected from disclosure have been marked accordingly and must be released. The department must withhold the unmarked portions of these sections from disclosure.

Several sections of NYLCare's bid proposal are not protected from disclosure under any of the exceptions to disclosure discussed above. The department must release these sections, which are listed below, to the requestor:

Attachments 4.1.1-A, 11.3.3-A, 12.4.2.7, 7.2.7-A, 7.2.7-B, 7.2.7-C, 7.7.6.1-A, 7.9.1, 7.9.11, and 12.5.1.

NYLCare also claims that several narrative sections of its bid proposal are excepted from disclosure (narratives from sections 7.2, 7.4, 7.5, and 11.0). The department did not submit the narrative sections of the proposal to this office for review. Thus, we are unable to determine whether these narrative sections are excepted from disclosure.

Finally, NYLCare contends that attachment 7.3.4-A of its bid proposal is confidential by statute. The Texas Department of Insurance ("TDI") regulates NYLCare. Attachment 7.3.4-A is TDI's 1994 examination report on NYLCare's condition and operations. NYLCare contends that this examination report is deemed confidential by articles 1.15 and 20A.17 of the Insurance Code.

Article 20A.17 provides in part:

(a) The commissioner may make an examination concerning the quality of health care services and of the affairs of any applicant for a certificate of authority and any health maintenance organization as often as the commissioner deems necessary, but not less frequently than once every three years.

...

(b)(4) The commissioner may examine and use the records of a health maintenance organization, including records of a quality care assurance program and records of a medical peer review committee . . . as necessary to carry out the purposes of [the Health Maintenance Organization Act], including an enforcement action under Section 20 of this Act. That information is confidential and privileged and is not subject to the open records law, Chapter 552, Government Code, or to subpoena except as necessary for the commissioner to enforce this Act.

...

(c) Articles 1.04A, 1.15, 1.16 and 1.19, as amended, of the Insurance Code shall be construed to apply to health maintenance organizations, except to the extent that the commissioner determines that the nature of the examination of a health maintenance organization renders such clearly inappropriate.

Ins. Code art. 20A.17. Section 9 of article 1.15 provides in part:

A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law . . . This section applies if the carrier examined is under supervision or conservation but does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

Ins. Code art. 1.15, § 9. We find that the examination report, included in NYLCare's bid proposal as attachment 7.3.4-A, is confidential under section 9 of article 1.15, and, therefore, must be withheld from disclosure under section 552.101 of the Government Code.²

²Because we have concluded that the examination report is excepted from disclosure under section 552.101 of the Government Code, we need not address your argument that the report is also excepted from

Prudential contends that many sections of its bid proposal are excepted from disclosure under section 552.110 of the Government Code. Prudential offers arguments under both prongs of section 552.110. Based on Prudential's arguments under the second prong of section 552.110, we find that the following sections of Prudential's bid proposal consist entirely of commercial or financial information that must be withheld from disclosure:

Sections 2.6, 3.1, 7.3, 7.5.2, 7.5.4, 7.5.5, 7.5.8, 7.5.9, 7.5.11, 7.5.12, 7.5.15, 7.5.16, 7.7.5, 7.7.7, 11.0, 11.2, 11.4, 11.5, 11.6, 11.7, 11.8, 11.10, and Volume 13.

Only portions of the following sections are excepted from disclosure pursuant to section 552.110:

Executive Summary and Sections 6.1.E, 7.1, 7.2, 7.4, 7.5, 7.5.1, 7.5.3, 7.5.7, 7.5.10, 7.5.13, 7.5.14, 7.6, 7.7.3, 7.7.4, 7.7.6, 7.8, 7.9, 7.10, 11.3, 11.9, 11.11, 11.12.

The portions of these sections that are not protected from disclosure have been marked accordingly and must be released. The department must withhold the unmarked portions of these sections from disclosure.

Two sections of Prudential's bid proposal, sections 6.1 and 7.5.6, are not protected from disclosure under any either prong of section 552.110. The department must release these sections to the requestor.

We note that Prudential's bid proposal contains medical and mental health records in sections 7.5.13 and 7.9. Section 5.08 of article 4495b of Vernon's Texas Civil Statutes governs the release of medical records. Chapter 611 of the Health and Safety Code governs the release of mental health records. The department may only release medical and mental health records in accordance with these provisions.

Finally, we note that some of the information in the bid proposals that is not excepted from required public disclosure is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must, however, allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

disclosure under section 552.112 of the Government Code.

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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Assistant Attorney General
Open Records Division

KEH/mjc

Ref: ID# 117437

Enclosures: Submitted documents

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