Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 4, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-2604

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# 119490.

The Texas Department of Health (the "department") received a request for the most recent Managed Care Financial-Statistical Reports of each managed care entity. 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.[1]

Since the property and privacy rights of third parties are implicated by the release of the requested information here, this office notified the 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; FirstCare Southwest Health Alliance; Harris Methodist Texas Health Plan; PCA Health Plans of Texas; MSCH Access Health Plan; Community Health Choice, Inc.; Methodist Care; Community First Health Plans; Foundation Health; Rio Grande HMO; and HMO Blue, West

[1]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.

Texas. Therefore, we have no basis to conclude that these companies' information is 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 Managed Care Financial-Statistical Reports submitted by the companies that did not respond must, therefore, be released to the requestor.

Birch & Davis Health Management Corporation ("Birch & Davis") explains that "no such Managed Care Financial-Statistical Report, either prepared by BDHMC or distributed to BDHMC by the Department, exists." The Open Records Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983). Because the requested information does not exist as to Birch & Davis, the department does not have to comply with the request for Birch & Davis' report.

Americaid Community Care ("Americaid"), AmeriHealth HMO of Texas, Inc. ("AmeriHealth"), and National Heritage Insurance Company ("NHIC") 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 at 5 (1990).[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 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.*

Americaid argues that release of the information would reveal its future strategies in the service of Medicaid member in Harris and Tarrant Counties, and that the information can be used to determine the status of its operations. Americaid further asserts that the information constitutes trade secret information excepted from disclosure under section 552.110. We do not believe that Americaid has made a prima facie showing that the information it seeks to withhold falls within the definition of trade secret that must be withheld under section 552.110. As for the commercial or financial prong of section 552.110, we do not believe that Americaid has shown that release of the requested information will cause substantial harm to its competitive position. Moreover, 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.

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[2]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.

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).

AmeriHealth argues that release of the information would undercut its position in the marketplace and undermine its financial stability. AmeriHealth further asserts that the information constitutes trade secret information excepted from disclosure under section 552.110. We do not believe that AmeriHealth has established that substantial competitive injury would likely result from disclosure of the financial report or made a prima facie showing that the information it seeks to withhold falls within the definition of trade secret that must be withheld under section 552.110. As discussed above, 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).

NHIC argues that release of the report would cause substantial economic harm to NHIC, and that its competitors will replicate and use the information against it. NHIC further asserts that the information constitutes trade secret information excepted from disclosure under section 552.110. We do not believe that NHIC has made a prima facie showing that the information it seeks to withhold falls within the definition of trade secret that must be withheld under section 552.110. As for the commercial or financial prong of section 552.110, we do not believe that NHIC has shown that release of the requested information will cause substantial harm to its competitive position. We refer you to the discussion above concerning the public interest in the disclosure of prices in government contract awards.

Next, AmeriHealth argues that sections 552.104 and 552.112 except its financial report from public disclosure. NHIC also asserts the protection of section 552.104. 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 at 4 (1989) (governmental body may decide not to raise permissive exceptions); Open Records Letter No. 97-0301 at 3-4 (1997). The requested information may not be withheld pursuant to section 552.112.

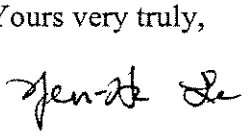
Finally, AmeriHealth contends that section 552.101 of the Government Code[3] in conjunction with article 20A.17(b)(2) of the Insurance Code makes the requested information confidential. Article 20A.17(b)(2) provides:

> A copy of any contract, agreement, or other arrangement between a health maintenance organization and a physician or provider shall be provided to the commissioner by the health maintenance organization on the request of the commissioner. Such documentation provided to the commissioner under this subsection shall be deemed confidential and not subject to the open records law, Chapter 552, Government Code.

We have reviewed the information at issue and conclude that article 20A.17(b)(2) of the Insurance Code does not apply to information given to the department.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref: ID# 119490

Enclosures: Submitted documents

cc: Director of HMO Financial Management
Government Programs/Managed Care
HMO Blue
P.O. Box 650017
Dallas, Texas 75265-0017
(w/o enclosures)

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[3]Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

Ms. Marie Lange
FirstCare Southwest Health Alliance
12940 Research Blvd.
Austin, Texas 78750
(w/o enclosures)

Mr. Stanley F. Baldwin
Senior Vice President
Americaid Community Care
4425 Corporation Lane
Virginia Beach, VA 23462
(w/o enclosures)

Mr. William S. Kneedler
Harris Methodist Texas Health Plan
611 Ryan Plaza Drive, Suite 920
Arlington, Texas 76011-4009
(w/o enclosures)

Ms. Cheryl Dietz
PCA Health Plan of Texas
8303 MoPac Blvd., Suite 450
Austin, Texas 78759
(w/o enclosures)

Mr. Richard Todd
MSCH Access Health Plan
9494 Southwest Freeway, Suite 300
Houston, Texas 77074
(w/o enclosures)

Ms. Susan Erickson Marin
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1900 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
(w/o enclosures)

Dr. Glenn Johnson
Community Health Choice, Inc.
2525 Holly Hall
Houston, Texas 77054
(w/o enclosures)