



September 18, 2000

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2000-3583

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 139135.

The Texas Department of Insurance (the "department") received a request for information that was filed with the department in connection with the proposed acquisition of AmeriHealth of Texas, Inc., by AmCareco, Inc. ("AmCareco"). The department takes no position as to whether any of the requested information is excepted from required public disclosure. The department believes, however, that the requested information may involve AmCareco's proprietary interests. Pursuant to section 552.305 of the Government Code, the department notified AmCareco of the information request and of AmCareco's right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); 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 to disclosure under Public Information Act in certain circumstances). The department also submitted to this office information that is responsive to the request. AmCareco has submitted comments in which it argues that Schedules 4.8, 4.17, and 4.26 and Exhibit "H" are excepted from disclosure under

section 552.110 of the Government Code. We have considered AmCareco's arguments and have reviewed the information that the department submitted.¹

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial 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. *See* Gov't Code § 552.110(a), (b). AmCareco contends that the contents of Schedule 4.26 constitute a trade secret that is excepted from disclosure under section 552.110(a). AmCareco also argues that the contents of Schedules 4.8 and 4.17 and Exhibit "H" constitute proprietary commercial or financial information and should be withheld under section 552.110(b). We will begin by addressing AmCareco's arguments under the trade secret component of section 552.110.

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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If, as is true here, a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to requested information, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the

¹AmCareco also addresses Schedules 4.13 and 4.14. The department informs us, however, that it is not in possession of those documents. AmCareco does not address the Stock Purchase Agreement between AmCareco, Independence Blue Cross, and AmeriHealth, Inc., which the department also has submitted.

exception and no one submits an argument that rebuts the claim as a matter of law.² See Open Records Decision No. 552 at 5 (1990).

AmCareco informs us that Schedule 4.26 lists enrollees in health plans, categorized by group name, effective date, and number of members. In support of its contention that Schedule 4.26 constitutes a trade secret, AmCareco explains:

The customer list that is included in Schedule 4.26 is not generally known to the public. The list would give our competitors instant access to the names of all of our groups, the number of members in each group, and the renewal dates for each group. Managed care organizations attempt to increase their business by building a customer base and maintaining the customers through renewals. Significant resources are used to develop the customer list. By making this [information] subject to public disclosure, the competitor would know the name and size of every group as well as the renewal date for the group.

Upon careful review of AmCareco's arguments and the information in question, we find that AmCareco has demonstrated that the contents of Schedule 4.26 constitute a trade secret. Therefore, we conclude that Schedule 4.26 is excepted from disclosure under section 552.110(a). See Open Records Decision No. 552 (1990) (discussing status of customer lists under statutory predecessor).

We turn now to AmCareco's arguments under section 552.110(b), which 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). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury likely would result from release of the information at issue. Gov't Code § 552.110(b); see also *National Parks &*

²The 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;
- (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).

Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). AmCareco argues that Schedules 4.8 and 4.17 and Exhibit "H" should be withheld under section 552.110(b).

AmCareco explains that Schedule 4.8 contains two types of information: (1) a list of employees' salaries, past bonuses and promotions, and the existence of a deferred compensation plan, and (2) the names of contracted providers who are terminating their contracts. With regard to the first set of information, AmCareco states that "if the employee's salaries, bonuses, promotion [sic], and deferred compensation structure were submitted to the public, our competitors would gain specific information which could be used to solicit our employees away from us." Regarding the names of providers that are terminating their contracts, AmCareco contends that "[i]f this information was released, competitors could utilize the information in a negative connotation in marketing against AmCareco." We have carefully considered AmCareco's arguments and reviewed the information in question. Having done so, we are not persuaded that AmCareco has made a sufficiently specific showing of any likely prospect of substantial competitive injury. We believe that AmCareco's concerns are simply generalized projections of possible harm. Therefore, we conclude that AmCareco has not demonstrated that Schedule 4.8 is excepted from disclosure under section 552.110(b). *See also* Open Records Decision No. 319 at 3 (1982) (stating that statutory predecessor ordinarily does not protect information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

AmCareco informs us that Schedule 4.17 provides a specific list of employees' positions, salaries, and benefit plans and states that "[s]imilar to Schedule 4.8, this information would cause substantial competitive harm if released to our competitors." In support of its contention that Schedule 4.17 should be withheld under section 552.110(b), AmCareco asserts that "permitting a competitor to know the salaries and positions of a company's personnel provides them with invaluable competitive pricing information concerning average staffing ratios, average cost per employee, and departmental organization." We have reviewed Schedule 4.17 and carefully considered AmCareco's contentions. Once again, however, we find that AmCareco has not demonstrated any specific likelihood that it will suffer substantial competitive injury if the information in question is released. Accordingly, we also conclude that Schedule 4.17 may not be withheld under section 552.110(b).

Lastly, we address Exhibit "H," which we are advised "provides financial projections for the health plan as well as the parent company AmCareco." AmCareco states that "[t]he financial projections are an internal budgeting plan which indicate [sic] the targeted growth pattern." AmCareco further explains that the financial projections in Exhibit "H" illustrate its cost structure, including brokerage commissions, management and administrative fees, and medical costs, and also indicate AmCareco's strategic objectives. Based on these representations and our review of the information in question, we find that in this instance AmCareco makes a sufficiently specific showing that Exhibit "H" constitutes proprietary financial information, the release of which likely would result in substantial competitive

harm. We therefore conclude that Exhibit "H" is excepted from disclosure under section 552.110(b).

In summary, Schedule 4.26 is excepted from disclosure under section 552.110(a). Exhibit "H" is excepted from disclosure under section 552.110(b). Schedules 4.8 and 4.17 are not excepted from disclosure under section 552.110 and must be released to the requestor.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

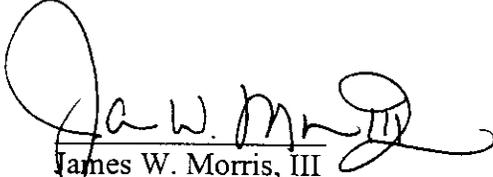
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', written over a horizontal line.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 139135

Encl. Submitted documents

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