



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division, MC 110-1A
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR2004-10558

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 215077.

The Texas Department of Insurance (the "department") received a request for the utilization review agent application filed by Texas Medical Foundation ("TMF") and Maximus, Inc. ("Maximus"). You state that some of the requested information will be provided to the requestor. You claim that some of the remaining requested information is excepted from disclosure under sections 552.101, 552.111, and 552.137 of the Government Code. Additionally, you state that some of the requested information may implicate the proprietary or property interests of TMF and Maximus. Accordingly, you state, and provide documentation showing, that you have notified TMF and Maximus of this request pursuant to section 552.305 of the Government Code. *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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act ("Act") in certain circumstances). We have received correspondence from representatives of both TMF and Maximus. We have considered all of the submitted arguments and reviewed the information submitted by the department.

Initially, you state that some of the submitted documents related to TMF have previously been ruled upon by this office. In Open Records Decision No. 98-0366 (1998) we ruled, in part, that some of the information related to TMF was excepted from disclosure pursuant to section 552.110 of the Government Code. Therefore, assuming that the four criteria for a

“previous determination” established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the department may continue to rely on our decision in Open Records Letter No. 2004-9276 with respect to the information requested in this instance that was previously ruled upon in that decision.¹ See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001).

Section 552.101 of the Government Code excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This exception encompasses information that other statutes makes confidential. The department claims that some of the submitted information is confidential under article 21.58A of the Insurance Code. Article 21.58A relates to Health Care Utilization Review Agents and provides in part:

(i) Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, dentists, and other health care providers Such written screening criteria and review procedures shall be available for review and inspection to determine appropriateness and compliance as deemed necessary by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.

Ins. Code art. 21.58A § 4(i). You explain that the submitted screening criteria and review procedures are part of the utilization review plan, and are the types of information that are confidential under section 4(i) of article 21.58A. Based on your representations, we agree

¹The four criteria for this type of “previous determination” are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general’s prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Public Information Act (the “Act”); and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

that the information you have marked is excepted from disclosure under section 552.101 of the Government Code in conjunction with article 21.58A of the Insurance Code.²

You also claim that some of the submitted information is confidential pursuant to article 21.58C of the Insurance Code. Section 2(a) of article 21.58C provides that “[t]he commissioner shall . . . promulgate standards and rules for . . . (A) the certification, selection, and operation of independent review organizations to perform independent review described by Section 6, Article 21.58A of this code; and (B) the suspension and revocation of the certification[.]” Section 2(h) of article 21.58C provides as follows:

(h) Information that reveals the identity of a physician or individual health care provider who makes a review determination for an independent review organization is confidential.

You state that some of the submitted information constitutes a list of the identity of the physicians “that will be part of the panel providing review determinations.” Based on your representations and our review, we agree that this information is confidential pursuant to section 2(h) of article 21.58C of the Insurance Code, and therefore must be withheld under section 552.101 of the Government Code.

Next, you argue that a social security number within the submitted documents is excepted under section 552.101 in conjunction with section 58.001 of the Occupations Code. Section 58.001 provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 58.001. You explain that the submitted biographical affidavit must be filed as part of the application to be licensed as a utilization review agent. Based on your representation, we agree that the social security number contained in the affidavit is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 58.001 of the Occupations Code.

As you acknowledge, in Open Records Decision No. 2001-4777 (2001) this office ruled that information that identifies an enrollee in a health plan must be withheld under

²As we are able to make this determination, we need not address TMF’s or Maximus’s arguments regarding this particular information.

section 552.101 in conjunction with the doctrine of common-law privacy.³ In that decision, we authorized the department to withhold information that identifies an enrollee in a health plan, including the enrollee's name, address, telephone number, birth date, social security number, and claim number, without the necessity of again requesting a decision under section 552.301 of the Government Code, as long as the elements of law, fact, and circumstances on which the prior ruling is based do not change. In this case you state that the case numbers you have marked are unique identification numbers that relate to a specific patient. You state that the release of these case numbers could enable identification of the patient. Accordingly, based on your representation and our review, we find that this particular information is encompassed by the previous determination. The department does not inform us of any change in the law, facts, or circumstances on which the prior ruling is based. Accordingly, the department must withhold this information, which you have marked, in accordance with Open Records Letter No. 2001-4777 (2001). See Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001).

You also assert that some of the submitted information is excepted pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990).

You represent that the information you have marked consists of advice, recommendations, and opinions reflecting the department's policymaking. Having reviewed the information in question, we agree that some of this consists of advice, recommendations, and opinions reflecting the policymaking processes of the department. Therefore, the department may withhold the information we have marked under section 552.111 of the Government Code. The remainder of this information does not consist of advice, recommendations, or opinions

³Section 552.101 also encompasses the doctrine of common-law privacy.

reflecting the department's policymaking, and therefore may not be withheld under section 552.111. Because you claim no other exception to the disclosure of this information, it must be released.

Finally, you assert that the e-mail addresses you have marked are excepted pursuant to section 552.137 of the Government Code. Section 552.137 provides in part:

(a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137(a), (b). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. You state that no consent has been given for the release of any of the e-mail addresses at issue. Thus, we agree that the e-mail addresses you have marked are excepted from disclosure under section 552.137(a).

We now turn to Maximus's arguments for the remaining information at issue. Maximus raises section 552.110 of the Government Code for portions of its information. 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it

relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 763, 776 (Tex.); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others 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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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).

Section 552.110(b) protects “[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 would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

Having reviewed the submitted brief, we conclude that Maximus has not demonstrated that the remainder of the information at issue qualifies as a trade secret of Maximus for purposes of section 552.110(a) of the Government Code. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, qualifications and experience, and pricing). We also find that Maximus has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of the remainder of its information would likely result in substantial competitive harm to it. Accordingly, the department may not withhold any of the remaining information pursuant to section 552.110.

To summarize, we conclude that the department must withhold any information that was ruled upon in Open Records Letter No. 98-0366 (1998) or that is encompassed by Open Records Letter No. 2001-4777 (2001). The department must also withhold the following information under section 552.101 of the Government Code: (1) the information you have marked under section 4(i) of article 21.58A of the Insurance Code, (2) the information you have marked under section 2(h) of article 21.58C of the Insurance Code, and (3) the social security number you have marked pursuant to section 58.001 of the Occupations Code. The marked e-mail addresses are excepted under section 552.137 of the Government Code. The department may withhold the information we have marked pursuant to section 552.111 of the Government Code. The remaining information must be released.

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 Dep't of Pub. 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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/krl

Ref: ID# 215077

Enc. Submitted documents

c: Mr. Michael W. Sandel
The Kirby Mansion
2000 Smith Street
Houston, Texas 77002
(w/o enclosures)

Ms. Lisa K. Maguire, Esq.
Maximus, Inc.
1 Fishers Road, Second Fl.
Pittford, NY 14534
(w/o enclosures)

Mr. Walter J. Batla
Dodd & Batla
800 Brazos, Suite 1400
Austin, Texas 78701
(w/o enclosures)