

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 16, 2005

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

OR2005-04215

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224557.

The Texas Department of Insurance (the "department") received a request for the current rate filings and supplements or amendment from the corporate filings of six companies.¹ You claim that some of the submitted information is excepted from disclosure under section 552.137 of the Government Code. You indicate that the submitted information may also be excepted under section 552.110, but take no position as to whether this information is excepted under that section. You state, and provide documentation showing, that you notified UniCare Health Plans of Texas, Inc. ("UniCare") and PacifiCare of Texas ("PacifiCare") of the department's receipt of the request for information and of each company's right to submit arguments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). UniCare, in its response to the notice, asserts

¹The department sought and received a clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

that its information is excepted under sections 552.101 and 552.110. We have considered the claimed exceptions and reviewed the submitted information.²

The department asserts that some of the submitted information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, we agree that the department must withhold the e-mail addresses you have marked under section 552.137.

UniCare asserts that its rate filing information in the submitted documents is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret 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. 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.

²We assume that, to the extent any additional responsive information existed when the department received the request for information, you have released it to the requestor. If not, then you must do so immediately. *See* Gov’t Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental 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). However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) 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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having considered UniCare's arguments and reviewed the information at issue, we find UniCare has established that its rate filings in the submitted information constitute trade secrets for purposes of section 552.110(a). We thus determine that UniCare has made a *prima facie* case under section 552.110(a) for that information and we have received no arguments to rebut this claim. Accordingly, the department must withhold UniCare's underwriting guidelines and rules in the information at issue pursuant to section 552.110(a) of the Government Code.⁴

Finally, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See*

³The following are the six factors that the Restatement gives 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 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 [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).

⁴As we are able to resolve this under section 552.110, we do not address UniCare's other argument for exception of this information.

Gov't Code § 552.305(d)(2)(B). As of the date of this letter, PacifiCare has not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of PacifiCare, and the department may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

To conclude, the department must withhold the marked e-mail addresses under section 552.137 of the Government Code and UniCare's underwriting guidelines and rules in the submitted information under section 552.110 of the Government Code. It must release the remaining information at issue.

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).

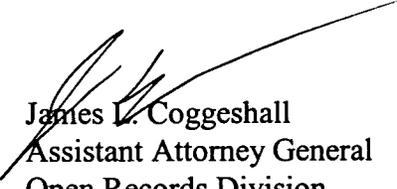
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/seg

Ref: ID# 224557

Enc. Submitted documents

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ORIGINAL

CAUSE NO. GN501889

PACIFICARE OF TEXAS, INC.,
Plaintiff,

V.

GREG ABBOTT, IN HIS OFFICIAL
CAPACITY AS THE ATTORNEY
GENERAL OF THE STATE OF TEXAS,
THE TEXAS DEPARTMENT OF
INSURANCE, and JOSE MONTEMAYOR,
COMMISSIONER, IN HIS OFFICIAL
CAPACITY,
Defendants.

§ IN THE DISTRICT COURT OF
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§ TRAVIS COUNTY, TEXAS
§
§
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§
§
§ 126TH JUDICIAL DISTRICT

Filed in The District
of Travis County, Texas
on 1-28-06
at 1:49 P.M.
Amalia Rodriguez-Mendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff, PacifiCare of Texas, Inc. (PacifiCare), and Defendants, Texas Department of Insurance, and Jose Montemayor, Commissioner of the Texas Department of Insurance (collectively TDI) and Greg Abbott, in his official capacity as Attorney General of Texas, appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), TEX. GOV'T CODE ch. 552. The parties represent to the Court that, in compliance with TEX. GOV'T CODE § 552.325(c), the requestor, Blue Cross Blue Shield of Texas, was sent reasonable notice of this setting and of the parties' agreement that TDI may withhold some of the information at issue; that the requestor was also informed of its right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of its intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of

an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, PacifiCare's rating methodology, which includes the actual rates and the assumptions and formulas for developing its rates, as marked by the Office of the Attorney General, is excepted from disclosure by TEX. GOV'T CODE § 552.110(a) and (b).

2. TDI may redact the PacifiCare's rating methodology, which includes the actual rates and the assumptions and formulas for developing its rates, enumerated in ¶ 1 of this Judgment.

3. If it has not already done so, TDI shall release the requested information, with the information described in ¶¶ 1 and 2 of this Agreement redacted, along with any other information that the Attorney General held excepted from disclosure in OR2005-04215 to the requestor promptly upon receipt by TDI of an agreed final judgment signed by the Court.

4. All costs of court are taxed against the parties incurring the same;

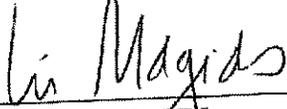
5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

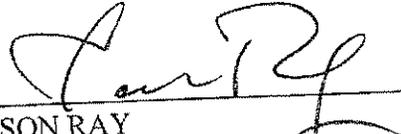
SIGNED this the 25 day of January, 2006.

S. L. L.
PRESIDING JUDGE

APPROVED:



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OF INSURANCE, and JOSE
MONTEMAYOR, COMMISSIONER, IN
HIS OFFICIAL CAPACITY