



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 26, 2006

Ms. Cynthia Villarreal-Reyna
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OR2006-11190

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# 260324.

The Texas Department of Insurance (the "department") received a request for the names and specialties of the medical providers located in El Paso County for workers' compensation health care networks, for certified networks and any networks that have been submitted for certification. You state that, pursuant to Open Records Letter No. 2006-04182 (2006), the department has released some of the requested information.¹ You also state that responsive information pertaining to Concentra Integrated Services, Inc. ("Concentra") was the subject of a previous request for information. You claim that the requested information may contain the proprietary information of third parties. Although you take no position on the proprietary nature of the information, you claim that the release of the submitted information may implicate the proprietary interests of Aetna Workers' Compensation Access ("Aetna"), Argus Provider Network ("Argus"), Bunch & Associates, Inc. TX HCN ("Bunch"), Forte Inc. dba CompKey/First Health ("Forte"), Concentra, CorVel Healthcare Corporation ("CorVel"), First Health/St. Paul Travelers HCN ("St. Paul"), First Health TX HCN ("First Health"), First Health/AIGCS TX HCN ("AIGCS"), GENEX Services, Inc. ("GENEX"), International Rehabilitation Associates, Inc. ("International"), Liberty Mutual Managed Care, Inc. ("Liberty"), National ChoiceCare, NCC Choice Net ("National"), PC Texas Partners, L.P.

¹In Open Records Letter No. 2006-04182 we held, in part, that the department must release certain provider information pertaining to Concentra, First Health, and Liberty. We also held, however, that in releasing the information, the department must comply with applicable copyright law for any information subject to copyright protections.

("PC Texas"), Select Network Care, Ltd. ("Select"), Southwest Medical Provider Network ("Southwest"), Specialty Risk Services Texas Workers' Compensation Health Care Network (FH) ("Specialty Risk FH"), Specialty Risk Services Texas Workers' Compensation Health Care Network (AWCA) ("Specialty Risk AWCA"), Hartford Workers' Compensation Health Care Network (FH) ("Hartford FH"), and Hartford Workers' Compensation Health Care Network (AWCA) ("Hartford AWCA"). Accordingly, you inform us, and provide documentation showing, that you notified these companies of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 to disclosure in certain circumstances). We have reviewed the submitted information.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you inform us that the responsive information pertaining to Concentra was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2006-10421 (2006).³ 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 must continue to rely on our decision in Open Records Letter No. 2006-10421 and withhold or release the information that was previously ruled upon in that decision.⁴

²We 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.

³In Open Records Letter No. 2006-10421 we held that the department, pursuant to section 552.101 of the Government Code, must withhold information that was confidential under sections 1305.102(k), 1305.152(a), and 1305.154(a) of the Insurance Code and the doctrine of common-law privacy. We also held that the department must withhold information that was excepted from disclosure under sections 552.110, 552.136, and 552.137 of the Government Code. We found that the remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.

⁴The 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 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).

Next, we note and you acknowledge that the department has not complied with the procedural requirements of section 552.301 of the Governmental Code in requesting this ruling. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Because third party interests at issue here can provide compelling reasons to withhold information, we will address the submitted arguments.

Next, 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Aetna, Argus, Bunch, CorVel, St. Paul, First Health, AIGCS, GENEX, International, Liberty, National, PC Texas, Select, and Southwest for withholding any of the submitted information. Therefore, we have no basis to conclude that the release of any of the submitted information would harm the proprietary interests of these companies. *See id.* § 551.110(b); Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, we conclude that the department may not withhold any portion of the submitted information on the basis of any proprietary interest that Aetna, Argus, Bunch, CorVel, St. Paul, First Health, AIGCS, GENEX, International, Liberty, National, PC Texas, Select, and Southwest may have in it.

Forte asserts that its information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Forte does not cite to any specific law that makes any portion of its information confidential under section 552.101. *See generally* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, we conclude that the department may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Forte also asserts that its information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if

released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the department does not seek to withhold any information pursuant to this exception, the department may not withhold any of the information at issue pursuant to section 552.104 of the Government Code. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).

Specialty Risk FH, Specialty Risk AWCA, Hartford FH, Hartford AWCA, and Forte assert that their information is excepted from disclosure under section 552.110 of the Government Code. 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 id.* § 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. 1958); Open Records Decision Nos. 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 No. 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. *See id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the submitted information and arguments submitted by Specialty Risk FH, Specialty Risk AWCA, Hartford FH, Hartford AWCA, and Forte, we find that Specialty Risk FH, Specialty Risk AWCA, Hartford FH, Hartford AWCA, and Forte have not established by specific factual evidence that any of the submitted information is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the companies substantial competitive harm under section 552.110(b). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”); ORD 661 at 5-6 (section 552.110(b) requires specific factual or evidentiary showing, not conclusory or generalized allegations,

that substantial competitive injury would likely result from release of information). As such, none of the submitted information may be withheld under section 552.110 of the Government Code. As the department raises no exceptions to disclosure and Specialty Risk FH, Specialty Risk AWCA, Hartford FH, Hartford AWCA, and Forte make no other arguments against disclosure, the submitted information 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, 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).

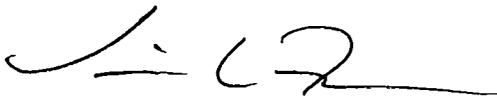
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Office of the Attorney General 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,



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JLF/krl

Ref: ID# 260324

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