



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2006

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Texas Department of Insurance
Legal and Compliance Division, Mail Code 110-1A
P.O. Box 149104
Austin, Texas 78714-9104

OR2006-12385

Dear Ms. Waitt:

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# 262457.

The Texas Department of Insurance (the "department") received two requests for information pertaining to applications for the workers' compensation health care network. You state that, pursuant to Open Records Letter Nos. 2006-04182 (2006) and 2006-05643 (2006), the department has released some of the requested information.¹ You inform us that responsive information pertaining to Concentra Integrated Services, Inc. ("Concentra") was the subject

¹In Open Records Letter No. 2006-04182 we held that the department must release certain provider information pertaining to Concentra Integrated Services, Inc., Southwest Medical Provider Network, Memorial Hermann Health Network Providers, Select Network Care, Ltd., CorVel Healthcare Corporation, National ChoiceCare, First Health/St. Paul Traveler's HCN, First Health Group Corporation, First Health/American International Companies, Genex Services, Inc., CompKey/First Health, International Rehabilitation Associates, Inc., and Liberty Mutual Managed Care, Inc. We also held, however, that in releasing the information, the department must comply with applicable copyright law for any information subject to copyright protections.

In Open Records Letter No. 2006-05643 we held, in part, that the department must release certain provider information pertaining to Concentra Integrated Services, Inc., Southwest Medical Provider Network, Memorial Hermann Health Network Providers, Select Network Care, Ltd., CorVel Healthcare Corporation, National ChoiceCare, Liberty Mutual Managed Care, Inc., First Health/St. Paul Traveler's HCN, First Health TX HCN, First Health/AIGCS TX HCN, GENEX Services, Inc., CompKey/First Health, International Rehabilitation Associates, Inc., The Hartford Workers' Compensation Health Care Network (FH), The Hartford Workers' Compensation Health Care Network (AWCA), Specialty Risk Services Texas Workers' Compensation Health Care Network, Specialty Risk Services Texas Workers' Compensation Health Care Network AWCA, SHA, L.L.C., and Zurich Services Corporation Health Care Network (HCN).

of a previous request for information. You state that the department will withhold social security numbers from the submitted information pursuant to section 552.147(b) of the Government Code.² You claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.136, and 552.137 of the Government Code. You also claim that the release of the submitted information may implicate the proprietary interests of CorVel Healthcare Corporation (“CorVel”) and Memorial Hermann Health Network Providers (“Memorial”). 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 considered the submitted arguments and reviewed the submitted information.

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

Next, we address the submitted arguments against the disclosure of the submitted information. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

²Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act.

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).

Gov't Code § 552.101. You claim that the contracts you have marked are confidential under section 1305.102(k), section 1305.152(a), or section 1305.154(a) of the Insurance Code. Section 1305.102(k) of the Insurance Code provides “[a] management contract filed with the department under this section is confidential and is not subject to disclosure as public information under [the Act].” Ins. Code § 1305.102(k). Section 1305.152(a) of the Insurance Code provides “[a] network shall enter into a written contract with each provider or group of providers that participates in the network. A provider contract under this section is confidential and is not subject to disclosure as public information under [the Act].” *Id.* § 1305.152(a). Section 1305.154(a) of the Insurance Code provides “[e]xcept for emergencies and out-of network referrals, a network may provide health care service to employees only through a written contract with an insurance carrier. A network-carrier contract under this section is confidential and is not subject to disclosure as public information under [the Act].” *Id.* § 1305.154(a). You explain that the contracts you have marked are the types of contracts made confidential under sections 1305.102(k), 1305.152(a), and 1305.154(a) of the Insurance Code. Based on your representations and our review, we agree that the contracts at issue are confidential under these sections of the Insurance Code and must be withheld under section 552.101 of the Government Code.⁵

Next, you assert that some of the submitted information is confidential under section 162.159 of the Occupations Code, which is also encompassed by section 552.101 of the Government Code. Section 162.159 provides that “[t]he information collected, maintained, or stored by the [Texas Medical Board] under this subchapter is privileged and confidential and not subject to . . . disclosure under [the Act], except as otherwise provided by this subchapter.” Occ. Code § 162.159. This provision only protects information that is in the possession of the Texas Medical Board. In this instance, the submitted information is in the department’s possession, not the Texas Medical Board’s possession. Accordingly, we find that no portion of the submitted information is confidential under section 162.159 of the Occupations Code.

Memorial asserts that some of its information is confidential under section 171.206 of the Tax Code. Section 552.101 of the Government Code also encompasses information protected by section 171.206 of the Tax Code, which provides that:

Except as provided by Section 171.207 of this code, the following information is confidential and may not be made open to public inspection:

- (1) information that is obtained from a record or other instrument that is required by this chapter to be filed with the comptroller; or
- (2) information, including information about the business affairs, operations, profits, losses, or expenditures of a corporation, obtained by an examination

⁵As our ruling is dispositive for this information, we need not address Memorial’s arguments under section 1305.503 of the Insurance Code.

of the books and records, officers, or employees of a corporation on which a tax is imposed by this chapter.

Tax Code § 171.206. This provision protects information that is in the possession of the Comptroller of Public Accounts. As noted above, the submitted information is in the possession of the department. Therefore, no portion of the submitted information is confidential under section 171.206 of the Tax Code.

Section 552.101 of the Government Code also encompasses the doctrine of common law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked personal financial information that is confidential under the doctrine of common law privacy and that must be withheld under section 552.101.

Memorial contends that its information is excepted from disclosure under 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.” *See* Gov’t Code § 552.104. However, we note that 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 section 552.104, we find this section does not apply to the information at issue, and it may not be withheld on that basis. *See* Open Records Decision No. 592.

Next, Memorial and CorVel contend that portions of their information are 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 exempted 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 briefs and information at issue, we find that Memorial and CorVel have established a *prima facie* case that some of the information they seek to withhold, which we have marked, constitutes trade secret information or commercial and financial information, the release of which would cause the companies substantial competitive harm. The department must withhold the information we have marked under section 552.110 of the Government Code. However, we determine that neither Memorial nor CorVel has demonstrated that any portion of the remaining information constitutes trade secret information or commercial or financial information, the release of which would cause them substantial competitive harm. *See* Open Records Decision Nos. 552 at 5-6 (1990), 661 (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business”). Accordingly, pursuant to section 552.110, the department must withhold only those portions of the submitted information that we have marked under that section.

Next, we address your arguments under section 552.111 of the Government Code, which excepts from public disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990).

In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel

matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. See Open Records Decision No. 631 at 3 (1995). Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See Open Records Decision No. 615 at 5. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You state that the information you seek to withhold under section 552.111 consists of e-mails exchanged between department employees. You also state that these e-mails contain the employees' opinions on department policy matters such as investigation and enforcement strategy. After reviewing your arguments and the information at issue, we find that the department may withhold the information at issue under section 552.111 of the Government Code.

Section 552.136 of the Government Code provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Pursuant to section 552.136, the department must withhold the account numbers we have marked.

Section 552.137 of the Government Code 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). *Id.* § 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 you have marked do not appear to be of a type specifically excluded by section 552.137(c). You inform us that the relevant members of the public have not consented to the release of these e-mail addresses. Therefore, the department must withhold the e-mail addresses you have marked under section 552.137.

Finally, the department notes that some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the

copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department must withhold the contracts marked under section 552.101 of the Government Code in conjunction with chapter 1305 of the Insurance Code. The personal financial information we have marked is confidential under the doctrine of common law privacy and must be withheld under section 552.101. The department must also withhold the information we have marked under section 552.110 of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code. The account numbers we have marked must be withheld under section 552.136 of the Government Code, while the e-mail addresses you have marked must be withheld under section 552.137 of the Government Code. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.

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,



James A. Person III
Assistant Attorney General
Open Records Division

JAP/dh

Ref: ID# 262457

Enc. Submitted documents

cc: Ms. Patsy Sheldon
Flahive, Ogden & Latson
P.O. Box 13367
Austin, Texas 78711
(w/o enclosures)

Mr. Eddie McKibbin
President/CEO
Optimum Health Care
1809 Raydon Drive
Arlington, Texas 76013
(w/o enclosures)

Mr. James M. Loughlin
Stone, Loughlin & Swanson, L.L.P.
P.O. Box 30111
Austin, Texas 78755
(w/o enclosures)

Ms. Danielle Barrera
Memorial Hermann Health Network Providers
9301 Southwest Freeway, Suite 5050
Houston, Texas 77074
(w/enclosures)

Ms. Laurel Coover
CorVel Healthcare Corporation
15303 Dallas Parkway, Suite 300
Addison, Texas 75001
(w/o enclosures)