

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS  
G R E G A B B O T T

March 30, 2007

Ms. Sara Shiplet Waitt  
Texas Department of Insurance  
Senior Associate Commissioner  
Legal and Compliance Division  
P.O. Box 149104  
Austin, Texas 78711-2548

OR2007-03555

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# 274699.

The Texas Department of Insurance (the "department") received a request for "Form A which was filed in regards to the United-Pacificare merger." You state that some of the requested information has been released to the requestor. As to the remaining requested information, you make no arguments and take no position as to whether it is excepted from disclosure. You, instead, indicate that the submitted information may be subject to third party proprietary interests. Pursuant to section 552.305 of the Government Code, you have notified UnitedHealth Group Incorporated ("UnitedHealth") and PacifiCare of the request and of each company's right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *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 under the Act in certain circumstances). We have received correspondence from counsel for UnitedHealth.<sup>1</sup> We have reviewed the submitted information.

Initially, 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

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<sup>1</sup>Counsel for UnitedHealth indicates that PacifiCare is one of UnitedHealth's wholly owned subsidiaries and the brief is submitted for both.

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 section 552.302 of the Government Code); 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 are at stake here, we will consider whether the submitted information is excepted under the Act.

Next, we note that while UnitedHealth claims exceptions to the disclosure of information entitled "Specific Biographical Information," "Business Plan for Pacific Life Assurance Company," and the "Civil Investigative Demand," the department did not submit these documents to this office. This ruling does not address the applicability of UnitedHealth's claimed exceptions for information that has not been submitted for our review by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body seeking attorney general's opinion under the Act must submit a copy or representative samples of the specific information requested).

We now turn to UnitedHealth's arguments for the submitted information. UnitedHealth claims that the submitted information is excepted from public disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information that is made confidential by statute. UnitedHealth claims that the submitted information is confidential under section 823.011 of the Insurance Code, section 9 of article 1.15 of the Insurance Code, and section 7.209(e)(2) of chapter 28 of the Administrative Code.

Section 823.011 makes information confidential that was "obtained by or disclosed to the commissioner or another person in the course of an examination or investigation under Subchapter H [of chapter 823]." Ins. Code § 823.011. Section 9 of article 1.15 makes information confidential that was "obtained during the course of an examination [under article 1.15]." Ins. Code Art. 1.15 § 9. Section 7.209(e)(2) of chapter 28 is a rule that states "if the applicant wishes the identity [of the commercial lender] to remain confidential, he must specifically request that the identity be kept confidential." 28 Adm. Code § 7.209(e)(2).

The department informs us that the none of the submitted information was "obtained by [the department] pursuant to an examination." Further, the department has informed us that the claimed statutes and rule are not applicable in this instance. Thus, we find that the department may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of the claimed statutes or rule. *See* Gov't Code § 552.303

(providing that attorney general may request additional information necessary to render decision).

UnitedHealth claims that specific documents are excepted from public 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 proprietary 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. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

UnitedHealth claims that its financial information, compliance service score cards, economist’s report, lender information, and payment of claims information should be generally withheld under section 552.110(a) as trade secrets. However, we find that UnitedHealth has not demonstrated that the information at issue meets the definition of a trade secret. Since UnitedHealth has not met its burden under section 552.110(a), the department may not withhold any of the information at issue under section 552.110(a) of the Government Code.

UnitedHealth also claims that its financial information, compliance service score cards, economist’s report, lender information, payment of claims information, and specific filing are excepted from public disclosure under section 552.110(b) because release would cause the company substantial competitive harm. UnitedHealth states that disclosure of the information at issue would allow a competitor to duplicate processes, analyze the company’s strategic market position, avoid business risks associated with acquisition, and understand UnitedHealth’s financial relationships with lenders. Thus, UnitedHealth states that release of the information at issue would give an opportunity for “competitors within the insurance industry to review, dissect and utilize the information to their advantage.” Therefore, UnitedHealth states that the release of this information would cause the company substantial

competitive harm. Upon review, we find that UnitedHealth has demonstrated that release of the information at issue would cause the company substantial competitive harm. Accordingly, the department must withhold UnitedHealth's financial information, compliance service scorecards, economist's report, lender commitment letters, payment of claims information, and specific filing under section 552.110(b) of the Government Code<sup>2</sup>.

In summary, the department must withhold UnitedHealth's financial information, compliance service scorecards, economist's report, lender commitment letters, payment of claims information, and specific filing under section 552.110(b) of the Government Code. As no other exceptions are raised against disclosure, the remaining submitted 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, 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

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<sup>2</sup>Because this ruling is dispositive, we need not address your remaining argument.

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,



Jaelyn N. Thompson  
Assistant Attorney General  
Open Records Division

JNT/jb

Ref: ID# 274460

Enc. Submitted documents

c: Mr. David Weber  
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(w/o enclosures)

Mr. Barry Senterfitt  
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(w/o enclosures)

AUG 24 2007

At 8:59A. M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-07-001107

UNITEDHEALTH GROUP  
INCORPORATED, PACIFICARE OF  
TEXAS, INC., PACIFICARE LIFE  
ASSURANCE CO.,  
Plaintiffs,

§ IN THE DISTRICT COURT OF  
§  
§  
§  
§ TRAVIS COUNTY, TEXAS

V.

GREG ABBOTT, ATTORNEY GENERAL  
FOR THE STATE OF TEXAS,  
Defendant.

§  
§  
§  
§ 201<sup>st</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiffs UnitedHealth Group Incorporated, Pacificare of Texas, Inc., and Pacificare Life Assurance Co. collectively referred to as "UnitedHealth") and Defendant Greg Abbott, 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 Ann. ch. 552. The Office of the Attorney General represents to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, David Weber, was sent reasonable notice of this setting and of the parties' agreement that the Texas Department of Insurance must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his 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, UnitedHealth's Process Improvement Plan, dated 9/21/2005, is excepted from disclosure by Tex. Gov't Code Ann. § 552.110(b).

2. The TDI must withhold from the requestor the information described in Paragraph 1 of this Agreement.

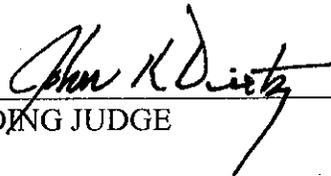
3. UnitedHealth no longer contests the disclosure of the remaining information that the Attorney General ruled open in OR2007-03555. TDI must release to the requestor all information that is responsive to the request for information and that was not held excepted from disclosure in Letter Ruling 2007-03555 or by Paragraph 1 of this Judgment, which is limited to the letter dated August 18, 2005, from Cindy Thurman with TDI to B. Senterfitt regarding the Acquisition of Control of PacifiCare of Texas, Inc., (HMO) and PacifiCare Life Assurance Company (PLAC) by UnitedHealth Group Incorporated (Applicant).

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

5. All relief not expressly granted is denied; and

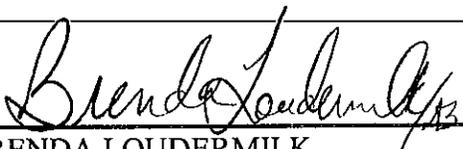
6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the 24<sup>th</sup> day of August, 2007.

  
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PRESIDING JUDGE

APPROVED AS TO FORM AND CONTENT:

  
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