

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  
GREG ABBOTT

June 13, 2007

Mr. Carey E. Smith  
General Counsel  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711

OR2007-07463

Dear Ms. Smith:

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# 281021.

The Texas Health and Human Services Commission (the "commission") received two requests for specified information pertaining to STAR+PLUS Medicaid coverage expansion, including analyses from the Lewin Group to the commission. You state that some of the requested information has been released, but claim that some of the submitted information is exempted from disclosure under section 552.111 of the Government Code. Evercare Texas ("Evercare"), Superior HealthPlan, Inc. ("Superior"), and Amerigroup Texas, Inc. ("Amerigroup"), in correspondence to this office, assert that some of the requested information is exempted from release under the Act. *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). We have considered the submitted arguments and reviewed the submitted information.<sup>1</sup>

Section 552.111 of the Government Code 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.” This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 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, opinions, and other material reflecting 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. 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).

Further, 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).

The commission asserts that the documents it has marked under section 552.111 “are pre-decisional documents that contain advice, opinion, and recommendations regarding policy matters of a broad scope that will affect one of the Commission’s policy missions—to provide STAR+PLUS Medicaid coverage to eligible persons throughout the State of Texas.” Based

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<sup>1</sup>We note that the commission submitted eleven CDs of information; however, you now inform us that much of this information is not responsive to the requests for information. This ruling does not address the public availability of any information that is not responsive to the request, and the commission is not required to release this information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.–San Antonio 1978, writ dismissed).

upon these representations and our review of the information at issue, we agree that the commission may withhold the information it has marked under section 552.111.

Superior claims that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8, may except the submitted information from disclosure. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. See HIPAA, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); see also Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. See 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, excepted as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. Open Records Decision No. 681 (2004). In that decision, we noted that section 164.512 of title 45 of the Code of Federal Regulations provides that a covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. See 45 C.F.R. § 164.512(a)(1). We further noted that the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." See ORD 681 at 8; see also Gov't Code §§ 552.002, 552.003, 552.021. We therefore held that the disclosures under the Act come within section 164.512(a). The Third Court of Appeals has also held that disclosures under the Act come within section 164.512(a). *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex.App.—Austin 2006, no pet.). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. ORD 681 at 9; see also Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Because the Privacy Rule does not make confidential information that is subject to disclosure under the Act, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Superior and Amerigroup assert that the information at issue 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." This section encompasses information protected by other statutes. Pursuant to section 401.052 of the Insurance Code, the Texas Department of Insurance (the "department") or an examiner appointed by the department is required to visit each insurance carrier at least once every three years and examine its financial condition, ability to meet liabilities, and compliance with laws affecting the conduct of its business. Ins. Code

§ 401.052. In connection with this examination process, section 401.058 of the Insurance Code<sup>2</sup> provides the following:

(a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

*Id.* § 401.058. The commission has not informed this office that the requested information was obtained during the course of an examination under chapter 401 of the Insurance Code; therefore, we conclude that the commission may not withhold any of the submitted information under section 552.101 of the Government Code on the basis of section 401.058 of the Insurance Code.

Superior asserts its information is confidential under section 843.156 of the Insurance Code, which provides in relevant part as follows:

On request of the commissioner, a health maintenance organization shall provide to the commissioner a copy of any contract, agreement, or other arrangement between the health maintenance organization and a physician or provider. Documentation provided to the commissioner under this subsection is confidential and is not subject to the public information law, Chapter 552, Government Code.

Ins. Code § 843.156(d). This section makes confidential a contract, agreement, or other arrangement between a health maintenance organization and a physician or other health care provider that is requested by and provided to the department. Upon review of the submitted arguments and the information at issue, however, we find Superior has not established that the information at issue consists of contracts, agreements, or other arrangements between a health maintenance organization and a physician or other health care provider. Thus, we find Superior has failed to establish that the information at issue is confidential under section 843.156, and the commission may not withhold any portion of the submitted information under section 552.101 of the Government Code on that ground.

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<sup>2</sup>Although Superior and Amerigroup assert that the information at issue is confidential under section 9 of article 1.15 of the Insurance Code, we note that article 1.15 was codified as section 401.058 in 2005. Acts 2005, 79th Leg., ch. 727, § 1, eff. April 1, 2007.

Superior, Amerigroup, and Evercare assert that the information at issue 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 52.110(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.

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.<sup>3</sup> 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

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<sup>3</sup>The 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).

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).

We find Evercare has established that the release of some of the information at issue would cause it substantial competitive injury; therefore, the commission must withhold this information, which we have marked, under section 552.110(b). However, we find that Superior, Amerigroup, and Evercare have failed to establish a *prima facie* case that any of the remaining information is a trade secret. *See Open Records Decision No. 402 (1983).* In addition, we conclude that Superior, Amerigroup, and Evercare have made only conclusory allegations that release of the remaining information at issue would cause these companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See Open Records Decision No. 319 at 2 (1982)* (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Thus, the commission may not withhold any of the remaining information under section 52.110.

Superior and Amerigroup assert that some of the remaining information is excepted under section 552.116 of the Government Code. We note that section 552.116 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See Gov’t Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000)* (discretionary exceptions generally), 473 at 2 (1987) (discretionary exceptions under the Act can be waived). As the commission does not seek to withhold any information pursuant to section 552.116, we find this section does not apply to the submitted information. *See Open Records Decision No. 592 (1991)* (governmental body may waive section 552.104). Therefore, the commission may not withhold any of the information at issue pursuant to section 552.116.

Superior asserts that some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136(b) states 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.” The submitted information does not contain any access device numbers; therefore, the commission may not withhold any of the submitted information under section 552.136.

Finally, Superior asserts that social security numbers in the submitted information are excepted under section 552.147 of the Government Code, which 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. See Gov't Code § 552.147(b). The submitted information does not contain any social security numbers; therefore, the commission may not withhold any of the submitted information under section 552.147.

To conclude, the commission may withhold the information it has marked under section 552.111 of the Government Code. The commission must withhold the information we have marked under section 552.110 of the Government Code. The commission must release the remaining information.

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).

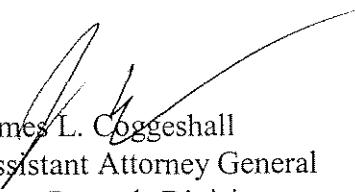
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/eb

Ref: ID# 281021

Enc. Submitted documents

c: Ms. Corrie MacLaggan  
Austin American-Statesman  
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(w/o enclosures)

Ms. Amanda McCloskey  
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Ms. Diane Schimmelbursch  
Evercare Health Plan  
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Houston, Texas 77036  
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Ms. Janet Farrer  
Akin Gump  
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Austin, Texas 78701-3911  
(w/o enclosures)

APR 14 2008

At 2:03 P.M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-07-001929

EVERCARE OF TEXAS,  
Plaintiff,

§ IN THE DISTRICT COURT OF  
§

V.

§  
§ TRAVIS COUNTY, TEXAS  
§

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

§  
§  
§ 345<sup>TH</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Evercare of Texas, LLC, 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 parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestors, Corrie MacLaggan and Amanda McCloskey (collectively, "Requestors"), were sent reasonable notice of this setting and of the parties' agreement that the Texas Health and Human Services Commission ("HHSC") must withhold some of the information at issue; that the Requestors were also informed of their right to intervene in the suit to contest the withholding of this information; and that neither of the Requestors has informed the parties of the intention to intervene. Neither has either of the Requestors filed a notice or 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. Documents numbered 1 through 62 identified on the index of documents at issue, which is attached as Exhibit A, and all duplicate copies of these documents, are excepted from disclosure by Tex. Gov't Code § 552.110(b). In addition the home addresses and telephone numbers

of the subject individuals on the resumes, documents 63 through 76 identified on Exhibit A, are not responsive to the requests for information.

2. HHSC must withhold from the Requestors the information described in Paragraph 1 of this Agreed Final Judgment.

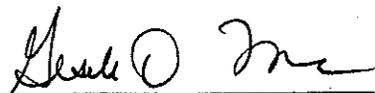
3. Evercare no longer contests the disclosure of the remaining information at issue in this lawsuit, specifically documents 63 through 94 (except for home telephone numbers and addresses of the subject individuals on documents 63 through 76 identified on Exhibit A). HHSC must release to the Requestors all information pertaining to Evercare that is responsive to the request for information and that was not held excepted from disclosure in Letter Ruling 2007-07463 or by Paragraph 1 of this Agreed Final Judgment.

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

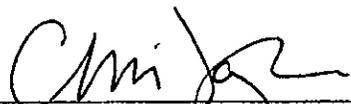
5. All relief not expressly granted is denied; and

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

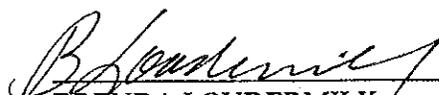
SIGNED this the 14 day of April, 2008.

  
\_\_\_\_\_  
PRESIDING JUDGE

APPROVED:

  
\_\_\_\_\_  
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ATTORNEY FOR PLAINTIFF

  
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