



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2008

Ms. Sara Shiplet Waitt
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714

OR2008-05617

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# 308403.

The Texas Department of Insurance (the "department") received a request for the 2007 small and large group Health Maintenance Organization ("HMO") and Preferred Provider Organization ("PPO") rate filings for three named health care companies. Although you raise no exceptions to disclosure on behalf of the department, you state that release of the requested information may implicate the proprietary interests of United Healthcare of Texas ("United"), Blue Cross Blue Shield of Texas ("Blue Cross"), and Aetna Health, Inc. ("Aetna"). Accordingly, you have notified these companies of the request and of their opportunity to submit arguments to this office as to why their information should be excepted from public disclosure. *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 received comments from Aetna and have reviewed the submitted arguments and information.

Initially, 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 United or Blue Cross explaining why their requested information should not be released. Therefore, United and Blue Cross have not provided us with any basis to conclude that they have protected proprietary interests in any of the submitted information.

See, e.g., id. § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3(1990). Accordingly, the department may not withhold any portion of the submitted information on the basis of any proprietary interest that United or Blue Cross may have in the information.

Next, Aetna asserts that portions of the submitted information were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-14405 (2007). In this letter, we ruled that the department must withhold certain pricing and rate factor information under section 552.110(b). We presume that the pertinent facts and circumstances have not changed since the issuance of this prior ruling. However, because neither Aetna nor the department has identified which records were previously ruled upon, we must rule conditionally. Thus, we determine that the department must continue to rely on Open Records Letter No. 2007-14405 with respect to any information requested in that instance that is also at issue here. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the submitted information was not addressed in Open Records Letter No. 2007-14405, we will address Aetna's submitted arguments.

Aetna asserts that portions of its small and large group HMO and PPO rate filings are subject to section 552.110(b) of the Government Code. 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. *Id.* § 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).

In this instance, Aetna argues that several categories of rate and factor tables, which it lists in its brief, should be withheld from public disclosure under section 552.110(b). However, Aetna has not identified any of the supposedly corresponding information within the submitted documents themselves. Accordingly, based on our review of Aetna's brief and the submitted documents, we have marked the rate factor information, as well as pricing data within the submitted base rate tables, that we can clearly identify using Aetna's brief. The department must withhold this information under section 552.110(b) on behalf of Aetna, as its release would cause Aetna substantial competitive harm. However, we find that Aetna has failed to demonstrate that any of the remaining information is subject to section 552.110(b). Accordingly, none of the remaining information may be withheld on this basis.

In summary, to the extent the submitted information was ruled upon in Open Records Letter No. 2007-14405, the department must continue to rely on this previous ruling with respect to this information. To the extent the submitted information was not ruled upon previously, the department must withhold the information we have marked under section 552.110(b) on behalf of Aetna. As Aetna raises no other exceptions to disclosure, the remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 308403

Enc. Submitted documents

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