

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

July 21, 2008

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

OR2008-09887

Dear Mr. 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# 316348.

The Texas Health and Human Services Commission (the "commission") received two requests for financial statistical reports of four specific companies issued before state fiscal year 2008. You claim that the submitted information is subject to required public disclosure. You state that you have released some of the requested information. You further inform us that the submitted information may implicate the proprietary interests of Amerigroup Texas, Inc. ("Amerigroup"), Molina Healthcare of Texas ("Molina"), and United Healthcare - Texas ("United"). Accordingly, you have notified these companies of the request and of their right to submit arguments to this office. *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 Amerigroup. We have considered the submitted arguments and reviewed the submitted information.

Initially, we address your assertion that the Health Maintenance Organization financial statistical reports (the "reports") at issue are subject to required public disclosure pursuant to section 533.0051 of the Government Code. Section 533.0051(e) of the Government Code provides, "[t]he commission shall post the financial statistical report on the commission's web page in a comprehensive and understandable format." Gov't Code § 533.0051(e).

Section 533.0051 became effective September 1, 2007.¹ Act of June 14, 2007, 80th Leg., R.S., ch. 268, § 10, 2007 Tex. Gen Laws 511-12 (codified as section 522.0051 of the Government Code). You state that because the Legislature requires the commission to publish all reports to its website as of state fiscal year 2008, you believe that the Legislature intended this statute to have the same effect on reports issued prior to the date section 533.0051 came into effect.

When interpreting a statute, like a court, we must “ascertain and effectuate the Legislat[ure’s] intent.” *In re M.C.C.*, 187 S.W.3d 383, 384 (Tex. 2006) (quoting *Tex. Dep’t of Protective & Regulatory Servs. v. Mega Child Care, Inc.* 145 S.W.3d 170, 176 (Tex. 2004)). The Code Construction Act provides that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” Gov’t Code § 311.022. The Supreme Court of Texas stated that “[s]tatutes are only applied retroactively if the statutory language indicates that the Legislature intended that the statute be retroactive.” *In re M.C.C.*, 187 S.W.3d at 384 (citing *Merch. Fast Motor Lines, Inc. v. R.R. Comm’n*, 573 S.W.2d 502, 504 (Tex. 1978), *State v. Humble Oil & Ref. Co.*, 169 S.W.2d 707, 708-09 (Tex. 1943)). Furthermore, “[t]he general rule is that there exists a presumption that an act is intended to operate prospectively and not retroactively. If there is any doubt, the intention will be resolved against retrospective operation of a statute.” *Ex parte Abell*, 613 S.W.2d 255, 258 (Tex. 1981).

Section 533.0051 does not indicate an intention by the Legislature to make the statute retroactive. See Gov’t Code § 533.0051; see also *In re M.C.C.*, 187 S.W.3d at 384-85 (stating that statutes are applied retroactively only if the language indicates such legislative intent). The statute does not expressly state that it applies to reports issued before its adoption. See Gov’t Code § 533.0051; see also *id.* § 311.022 (stating that statute is presumed prospective unless expressly made retrospective); *Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219 (Tex. 2002) (“A retroactive law literally means a law that acts on things which are past.”) (citing *Decordova v. City of Galveston*, 4 Tex. 470, 475 (1849)); Attorney General Opinion GA-0596 (2008). The statute only provides that the commission shall post reports on its website effective September 1, 2007 and it does not attempt to reach past reports created before this effective date. We therefore conclude that section 533.0051 does not apply to reports issued before state fiscal year 2008. Accordingly, we will address whether the submitted information is excepted from disclosure.

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 requested information relating to that party should be withheld from disclosure. See Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, neither Molina nor United have submitted any comments to this office explaining how release of the information at issue would affect their proprietary interests. Therefore, Molina and United

¹ We note that September 1, 2007, is the start of the state’s 2008 fiscal year.

have not provided us with any basis to conclude that they have a protected proprietary interest in any of the submitted information. *See* Gov't Code § 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. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the commission may not withhold any portion of the submitted information related to Molina or United on the basis of any proprietary interest these parties may have in the information.

Amerigroup argues its information is excepted from disclosure 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 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). 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 . . . [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.

Restatements of Torts § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776.

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;
- (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). 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. 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). If the governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exemption as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5 (1990).

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 Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

Amerigroup claims that its information reveals the company's revenues, certain administrative expenses, and medical expenses. It states that releasing this information would enable a competitor to determine how much it is paying a certain group of physicians on a per-member or fee-for-service basis. Upon review of the submitted arguments and information at issue, we find that Amerigroup has established that release of the financial statistical reports, which we have marked, would cause substantial competitive injury to the company; therefore, the commission must withhold this information, which we have marked, under section 552.110(b). We find, however, that Amerigroup has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. In addition, we conclude that Amerigroup has failed to demonstrate that any portions of its information meets the definition of a trade secret.

Therefore, the commission may not withhold any portion of the remaining information under section 552.110(a).

In summary, the commission must withhold the portion of Amerigroup's information that we have marked under section 552.110(b). The remaining information must be released.

Finally, we note that the commission asks this office to issue a previous determination allowing the commission to release all previous Health Maintenance Organization financial statistical reports without the necessity of requesting an attorney general opinion. We decline to issue a previous determination to the commission at this time. Accordingly, this letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us and may 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). If the governmental body does not file suit over 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).

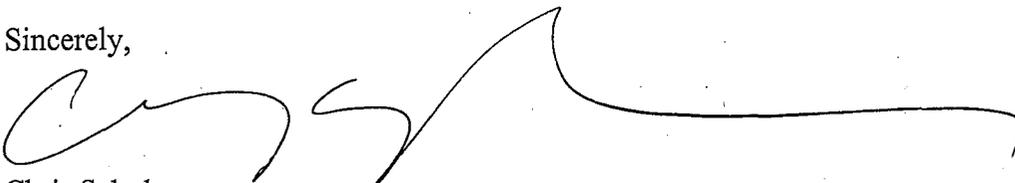
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/mcf

Ref: ID# 316348

Enc. Submitted documents

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EVERCARE OF TEXAS, LLC,
Plaintiff,

V.

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

§ IN THE DISTRICT COURT OF
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 53rd JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

OCT 21 2008 TH

At 8:54 A.M.
Amalia Rodriguez-Mendoza, Clerk

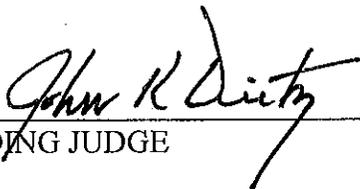
AGREED FINAL JUDGMENT

On this date, the Court considered 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, Anna Mateja and John Petrosino (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 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:

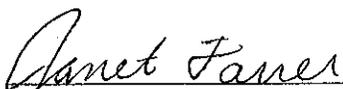
1. The information at issue, specifically, Evercare's 2007 CHIP and STAR Financial Statistical Reports, is excepted from disclosure by Tex. Gov't Code § 552.110(b).
2. HHSC must withhold from the requestor the information described in Paragraph 1 of this Agreement.
3. All costs of court are taxed against the parties incurring the same;
4. All relief not expressly granted is denied; and
5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 21st day of October, 2008.



PRESIDING JUDGE

APPROVED:



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