



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2008

Mr. Scott A. Kelly
Deputy General Counsel
Texas A&M University System
Office of General Counsel
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2008-10975

Dear Mr. Kelly:

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# 319082.

The Texas A&M University System (the "system") received a request for "all bids for the Administrative Health Services Only Health Insurance from 2003 to the present" as well as the current contract for the "Administrative Services Only Health Insurance."¹ You state that you will release the requested contract. Although you take no position as to the disclosure of the remaining requested information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the system notified: Benefit Planners; Blue Cross Blue Shield Association; Great West Healthcare; Humana, Inc.; The JI Companies; Memorial Hermann Health Network Providers; Principal Financial Group; and Scott & White Health Plan of the request for information and of their right to submit arguments to this office as to why the requested

¹In correspondence you have submitted to this office, you inform us that the requestor revised his request to exclude the proposals submitted by United Health Care, CIGNA, and Aetna. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). Accordingly, these proposals are not responsive to the instant request for information. The system need not release non-responsive information in response to this request, and this ruling will not address that information.

information should not be released. *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 correspondence from a representative for Humana. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that the system has submitted proposals that do not pertain to the present request for "Administrative Services Only Health Insurance." Thus, these proposals, which we have marked, are not responsive to this request. In addition, the system has submitted information it has marked as non-responsive to the present request for information. We note that some of the information the system has marked as non-responsive consists of information that Humana seeks to withhold from disclosure. Based on the system's representation, we find that this information is not responsive to the instant request for information. The system need not release the marked information and this ruling will not address it.

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 decision, this office has received no correspondence from Benefit Planners; Blue Cross Blue Shield Association; Great West Healthcare; The JI Companies; Memorial Hermann Health Network Providers; Principal Financial Group; and Scott & White Health Plan. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, the system may not withhold any of the submitted information on the basis of any proprietary interest that Benefit Planners; Blue Cross Blue Shield Association; Great West Healthcare; The JI Companies; Memorial Hermann Health Network Providers; Principal Financial Group; and Scott & White Health Plan may have in the information at issue.

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* ORD 552 at 2. 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.² 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. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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. *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." Gov't Code § 552.110(b). 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

²The 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).

After reviewing Humana's arguments and the information at issue, we conclude that Humana has established a *prima facie* case that portions of the information at issue, including their client information, constitute trade secrets. Therefore, the system must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, Humana has failed to demonstrate that the remaining information at issue constitutes a trade secret and, thus, the remaining information may not be withheld under section 552.110(a) of the Government Code.

We also find that release of Humana's pricing information would cause it substantial competitive harm. Accordingly, the system must withhold the information we have marked under section 552.110(b). However, we find that Humana has failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to the company. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, we determine that none of the remaining information is excepted from disclosure under section 552.110(b).

We note that a portion of the remaining responsive information is subject to section 552.136 of the Government Code.³ Section 552.136 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." Gov't Code § 552.136. Accordingly, we find that the system must withhold the insurance policy numbers we have marked in The JI Companies's proposal under section 552.136 of the Government Code.

We also note that portions 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 protected by copyright. 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 materials protected by copyright, 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

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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

In summary, the system must withhold the information we have marked in Humana's proposal under sections 552.110(a) and 552.110(b) of the Government Code. The system must withhold the insurance policy numbers we have marked in The JI Companies's proposal under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only 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 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 319082

Enc. Submitted documents

c: Mr. Tony Hernandez
P.O. Box 685087
Austin, Texas 78768
(w/o enclosures)

Mr. Jeff Burdick
Benefit Planners
194 South Main
Boerne, Texas 78006
(w/o enclosures)

Ms. Sandra Sadler
Blue Cross Blue Shield of Texas
901 South Central Expressway
Richardson, Texas 75080
(w/o enclosures)

Mr. Oland Ruff
Great West Healthcare
10111 Richmond Avenue, Suite 400
Houston, Texas 77042
(w/o enclosures)

Mr. James R. Bulls
Humana, Inc.
8111 LBJ Freeway, Suite 1400
Dallas, Texas 78229
(w/o enclosures)

Ms. Nelia J. Robbi
McGinnis, Lochridge & Kilgore
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(w/o enclosures)

Mr. Paul Saper
The JI Companies
105 Boyer Boulevard, Suite 100
Austin, Texas 78758
(w/o enclosures)

Ms. Laura Flynn
Principal Financial Group
5080 Spectrum Drive, Suite 700E
Addison, Texas 75001
(w/o enclosures)

Mr. Ron Gay
Scott & White Health Plan
3000 Briarcrest, Suite 422
Bryan, Texas 77802
(w/o enclosures)