



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2008

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel Section
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714

OR2008-14904A

Dear Ms. Villarreal-Reyna:

You have submitted to this office a request to clarify Open Records Letter No. 2008-14904 (2008). After review, we have determined that the prior ruling should be corrected. *See* Gov't Code §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2008-14904 (2008) and serves as the correct ruling. Your request was assigned ID# 332701.

The Texas Department of Insurance (the "department") received a request for Blue Cross Blue Shield of Texas' ("Blue Cross") "proposed new methodology for its payment of certain categories of claims by uncontracted facilities going forward." Although you take no position with respect to the requested information, you state that it may contain proprietary information. You state, and provide documentation showing, that you have notified Blue Cross of the request and of its opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *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 the applicability of exception to disclose under Act in certain circumstances). We have considered comments submitted by Blue Cross and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Blue Cross contends that its information is confidential under section 552.101 of the Government Code in conjunction with section 38.001(d) of the Insurance Code.¹ Section 38.001 provides in part:

(b) The department may address a reasonable inquiry to any insurance company, including a Lloyd's plan or reciprocal or interinsurance exchange, or an agent or other holder of an authorization relating to:

(1) the person's business condition; or

(2) any matter connected with the person's transactions that the department considers necessary for the public good or for the proper discharge of the department's duties.

...

(d) A response made under this section that is otherwise privileged or confidential by law remains privileged or confidential until introduced into evidence at an administrative hearing or in a court.

Ins. Code § 38.001(b), (d). We note that section 38.001(d) does not itself make any information privileged or confidential. Rather, section 38.001(d) provides that information furnished to the department that is otherwise privileged or confidential remains privileged or confidential until introduced into evidence at an administrative hearing or in a court. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the department may not withhold any portion of Blue Cross's information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 38.001 of the Insurance Code.

Next, Blue Cross claims that its information is confidential under section 552.101 of the Government Code in conjunction with section 38.356 of the Insurance Code. Section 38.351 of the Insurance Code authorizes the department to "collect data concerning health benefit plan reimbursement rates in a uniform format," and to "disseminate, on an aggregate basis for geographical regions in this state, information concerning health care reimbursement rates derived from the data." Ins. Code § 38.351; *see also id.* § 38.355. Section 38.356 of the Insurance Code provides that "[e]xcept as provided by section 38.357, data collected under [subchapter H of Chapter 38 of the Insurance Code] is confidential and not subject to disclosure under Chapter 552, Government Code." *Id.* § 38.356. In comments submitted to this office, however, the department states that the submitted information "was not

¹Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential.

collected by [the department] pursuant to subchapter H of Chapter 38 of the Insurance Code.” The department explains that the submitted information was collected “in regards to [Blue Cross’s] Insurance Code violations and in advance of the Consent Order.” We therefore find that none of the submitted information is subject to section 38.356 of the Insurance Code. Accordingly, the department may not withhold any portion of Blue Cross’s information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 38.356 of the Insurance Code.

Next, Blue Cross claims that its information is excepted from disclosure under section 552.110 of the Government Code, which 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 . . . 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. RESTATEMENT OF TORTS § 757 cmt. b (1939). 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; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id.; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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 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).

After reviewing its arguments and the information at issue, we find that Blue Cross has established that some of the information in the submitted presentation and fee schedules, which we have marked, constitutes commercial and financial information, the release of which would cause the company substantial competitive harm. Accordingly, the department must withhold the information we have marked under section 552.110(b). However, we determine that no portion of the remaining submitted information is excepted from disclosure under section 552.110(b). We also conclude that Blue Cross has failed to establish that any of the remaining information meets the definition of a trade secret. Thus, no portion of the remaining information may be withheld under section 552.110(a). As no other exceptions to disclosure have been submitted for the remaining information, it 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 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).

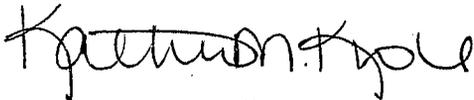
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/jh

Ref: ID# 332701

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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