



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2008

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal & Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2008-15628A

Dear Ms. Villarreal-Reyna:

You have submitted to this office a request to clarify Open Records Letter No. 2008-15628 (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. 2008-15628 and serves as the correct ruling. Your request was assigned ID# 334225.

The Texas Department of Insurance (the "department") received a request for three categories of information pertaining to Blue Cross Blue Shield of Texas' ("Blue Cross") "proposed new methodology for [its] payment of certain categories of claims by uncontracted facilities." You claim that some of the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code, and privileged under Texas Rule of Civil Procedure 192.5 and Texas Rule of Evidence 503.¹ In addition, you state that release of some of the requested information may implicate the proprietary interests of Blue Cross. Accordingly, you state 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

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

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 received comments from Blue Cross. We have considered all of the submitted arguments and reviewed the submitted information.

Initially, we note that Blue Cross has submitted information to this office that it seeks to withhold from disclosure, including a map entitled "SB 1731 Reporting Areas"; however, the department did not submit this information. This ruling does not address information that was not submitted by the department and is limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we note, and you acknowledge, that a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-14904A (2008). In that ruling, we determined that the department must withhold the specific portions of Blue Cross's information that we marked under section 552.110 of the Government Code, and release the remaining information at issue. We presume that the facts and circumstances have not changed since the issuance of this prior ruling. Thus, we determine that the department must continue to rely on our ruling in Open Records Letter No. 2008-14904A as a previous determination and withhold or release the information at issue in accordance with that decision. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

The department acknowledges that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). A portion of the submitted information consists of a completed investigation. Although you seek to withhold the information at issue under section 552.111 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 677 at 10 (attorney work product privilege may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.111 does not qualify as "other law" that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold any portion of the submitted information under section 552.111 of the Government Code. However, the Texas Supreme Court has held that the Texas Rules of Civil Procedure are other laws within the meaning of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). We will therefore consider your argument

under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022.

For the purpose of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. *See* TEX. R. CIV. P. 192.5(a), (b)(1). A governmental body seeking to withhold information under this privilege bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

The department explains that the information at issue pertains to a litigation file that was originally opened to pursue administrative actions against an insurance company for violations of the Texas Insurance Code. You state that the case to which this information pertains is closed, and explain that the information at issue was prepared by a department enforcement attorney and reveals his mental processes, conclusions, and legal theories. Based on your representations and our review of the information at issue, we agree that the information the department has marked is protected core work product. Accordingly, we find that the department may withhold the marked information under Texas Rule of Civil Procedure 192.5.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel,

such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert that the information you have marked under section 552.107 consists of confidential communications between attorneys for and employees of the department that were made for the purpose of rendering professional legal advice. Based on this representation and our review of the information at issue, we agree that the information at issue consists of privileged attorney-client communications. Therefore, the department may withhold the information you have marked under section 552.107 of the Government Code.²

We now turn to Blue Cross’s arguments for the remaining submitted information. Section 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. Blue Cross claims that the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. §§ 1320d-1320d-8, excepts some of its 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* Health Insurance Portability and Accountability Act of 1996, 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

²As our ruling on this information is dispositive, we need not address your remaining argument against disclosure of this information.

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, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a). This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), 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, .003, .021. We therefore held that the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep’t of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, 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.

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

(b) The department may address a reasonable inquiry to an 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 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 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.

Blue Cross contends that a portion of its information is confidential under section 36.159 of the Insurance Code. Section 36.159 provides, in relevant part:

(c) Specific information relating to a particular policy or claim is privileged and confidential *while in the possession of an insurance company, organization, association, or other entity holding a certificate of authority from the department* and may not be disclosed by the entity to another person, except as specifically provided by law.

Id. § 36.159(c) (emphasis added). We note that section 36.159(c) pertains to the confidentiality of certain information while in the possession of an insurance company. In this instance, the information at issue is in the possession of the department. Accordingly, we find that Blue Cross has failed to demonstrate that the information at issue is confidential under section 36.159(c) of the Insurance Code, and the department may not withhold any of portion of Blue Cross's information under section 552.101 on that basis.

Section 552.101 also encompasses the common-law right of privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the

publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540S.W.2d 668 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy.

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 its information, 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 current and proposed reimbursement rates, as well as certain amounts in the submitted "Claim Pricing" document, 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).

In summary, with regard to the requested information that is identical to the information previously requested and ruled upon by this office in a prior ruling, we conclude that the department must continue to rely on Open Records Letter No. 2008-14904A as a previous determination. The department may withhold the information it has marked under Texas Rule of Civil Procedure 192.5 and section 552.107 of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy, as well as the current and proposed reimbursement rates and information in the submitted "Claim Pricing" document we have marked under section 552.110 of the Government Code. The remaining information 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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 334225

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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