



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 19, 2009

Ms. Cynthia Villarreal-Reyna
Section Chief
Agency Counsel Section
Legal Services Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2009-02192

Dear Ms. Villarreal-Reyna:

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# 335324.

The Texas Department of Insurance (the "department") received a request for all information regarding complaint number 840853. You state the department has provided some of the requested information to the requestor. You claim portions of the submitted letters, physician participation agreements and amendments, provider manual excerpts, and other complaint investigation documents are excepted from disclosure under section 552.101 of the Government Code. You also claim releasing some of the submitted information may implicate the proprietary interests of Humana Health Plans of Texas ("Humana"). Accordingly, you state, and have provided documentation showing, you notified Humana of the request and of the company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining 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 received comments from Humana. We have considered the submitted arguments and reviewed the submitted information.

Humana asserts its information is confidential because it marked the information as "proprietary and confidential" before submitting it to the department. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110 of the Government Code). Consequently, unless the submitted information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 843.156 of the Insurance Code, which provides in relevant part:

On request of the commissioner, a health maintenance organization shall provide to the commissioner a copy of any contract, agreement, or other arrangement between the health maintenance organization and a physician or provider. Documentation provided to the commissioner under this subsection is confidential and is not subject to the public information law, Chapter 552, Government Code.

Ins. Code § 843.156(d). The department and Humana both claim the submitted physician participation agreements and amendments, as well as several letters pertaining to the complaint at issue, are confidential under section 843.156(d). We understand the physician participation agreements and amendments were provided to the department at the department's request; thus, we agree these documents are confidential pursuant to section 843.156(d) of the Insurance Code. We have marked the physician participation agreements and amendments that must be withheld pursuant to section 552.101 of the Government Code in conjunction with section 843.156(d) of the Insurance Code.¹ The letters the department and Humana seek to withhold under section 843.156(d), however, are correspondence between the department, Humana, and the complainant regarding the complaint at issue. Neither the department nor Humana has explained how these letters constitute contracts, agreements, or other arrangements between a health maintenance organization and a physician or provider. Thus, the department and Humana have not established the applicability of section 843.156(d) to the submitted letters. Consequently,

¹As our ruling for this information is dispositive, we need not address the department's or Humana's other arguments against disclosure for this information.

these letters may not be withheld under section 552.101 of the Government Code in conjunction with section 843.156(d) of the Insurance Code.

Section 552.101 also encompasses section 843.078 of the Insurance Code, which provides, in relevant part:

(1) An application for a certificate of authority must include a written description of the types of compensation arrangements, such as compensation based on fee-for-service arrangements, risk-sharing arrangements, or capitated risk arrangements, made or to be made with physicians and providers in exchange for the provision of or an arrangement to provide health care services to enrollees, including any financial incentives for physicians and providers. The compensation arrangements are confidential and are not subject to the public information law, Chapter 552, Government Code.

Id. § 843.078(1). Section 843.078(1) pertains to information required to be filed as part of a health maintenance organization's application for a certificate of authority. *See* Ins. Code § 843.078. The department and Humana claim portions of the remaining information consist of compensation arrangements that are subject to section 843.078. The compensation arrangement information, however, was provided to the department as part of the department's inquiry into the complaint at issue, not as part of an application for a certificate of authority. Accordingly, because the compensation arrangement information was not submitted to the department as part of an application for a certificate of authority, section 843.078(1) does not apply to this information. Therefore, the department may not withhold the compensation arrangement information under section 552.101 in conjunction with section 843.078 of the Insurance Code.

Humana claims the portions of its information pertaining to provider fee arrangements and methods of fee calculation are excepted 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: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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." *See* Gov't Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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 exception as valid under section 552.110(a) if that 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 Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² *Open Records Decision No. 402 (1983)*.

²The Restatement of Torts lists the following six factors 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)*.

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *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).

Humana contends the provider fee arrangements and methods of fee calculation portions of its information qualify as trade secret information under section 552.110(a). Upon review of Humana's submitted arguments and information at issue, we find Humana has established the portions of its information pertaining to methods of fee calculation, which we have marked, constitute trade secrets and must be withheld under section 552.110(a). Humana, however, has not demonstrated how the provider fee arrangement information meets the definition of a trade secret. Thus, Humana's provider fee arrangement information may not be withheld under section 552.110(a).

Humana also claims its provider fee arrangement information is excepted under section 552.110(b). Based on Humana's arguments and our review, we find Humana has established release of its provider rates and specific procedures paid for by Humana would cause it substantial competitive injury. Therefore, the department must withhold this information, which we have marked, under section 552.110(b). We find, however, Humana has provided no specific factual or evidentiary showing release of the remaining general information it seeks to withhold would cause the company substantial competitive injury. Therefore, the department may not withhold Humana's remaining information under section 552.110(b).

We note the remaining information includes an e-mail address subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c).³ *See* Gov't Code § 552.137(a)-(c). The e-mail address in the remaining information is not specifically excluded by section 552.137(c). As such, this e-mail address, which we have marked, must be withheld under section 552.137, unless the owner of the address has affirmatively consented to its release. *See id.* § 552.137(b).

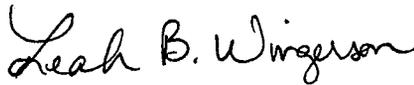
In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 843.156(d) of the Insurance Code; sections 552.110(a) and 552.110(b) of the Government Code; and section 552.137 of the Government Code. The remaining information must be released.

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).

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/cc

Ref: ID# 335324

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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