



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 7, 2009

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

OR2009-04609

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# 339089.

The Texas Health and Human Services Commission (the "commission") received a request for six categories of information regarding the Star and Star+Plus Medicaid managed-care programs for specified state fiscal years. You state you have released information responsive to categories two and six. You inform us that information responsive to categories three and four does not exist.¹ You believe that the submitted information is subject to required public disclosure.² Nevertheless, you have notified Amerigroup, Inc. ("Amerigroup"), Community First Health Plan ("Community"), Cook Children's Health Plan ("Cook"), Evercare Health Plan ("Evercare"), Seton, and Superior Health Plan ("Superior") of the request and of their right to submit arguments to this office as to why the information should not be released. 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

¹We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²We note that this ruling does not address the information you originally submitted to our office with a letter dated January 30, 2009, which you later informed us is non-responsive.

third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received correspondence from an attorney for Amerigroup, Evercare, and Superior.³ We have considered the submitted arguments and reviewed the submitted representative sample of information.⁴ We have also considered comments submitted by the requestor. Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).⁵

You also indicate that some of the requested information may have been the subject of previous requests for information, in response to which this office issued previous open records letter rulings.⁶ In the previous rulings, we ruled, in part, that the commission must withhold certain Financial Statistical Reports ("FSRs") of Evercare, Amerigroup, and Superior under section 552.110 of the Government Code. However, you inform us that the circumstances have changed since the issuance of our previous rulings and the passage of time has rendered the FSRs as outdated. Therefore, the commission may not rely upon the previous rulings as previous determinations, and we will address the submitted arguments for the submitted information. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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).

Next, we note, and you acknowledge, that the commission failed to comply with section 552.301 of the Government Code in requesting this decision. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex.

³We note that Amerigroup, Evercare, and Superior's correspondence with this office includes copies of information that the companies submitted to the commission. This decision addresses only the information that the commission submitted to this office in requesting this decision. *See* Gov't Code § 552.301(e)(1)(D).

⁴We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

⁵Although the requestor asserts that Amerigroup, Evercare, and Superior failed to comply with section 552.305(e), we note that a violation of section 552.305 does not result in the legal presumption that the requested information is public under section 552.302 of the Government Code.

⁶*See* Open Records Letter Nos. 2003-9055 (2003), 2004-7802 (2004), 2004-7833 (2004), 2005-10395 (2005), 2008-09887 (2008), and 2008-13225A (2008).

App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake, we will address whether the submitted information must be withheld to protect the interests of the third parties.

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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Community, Cook, and Seton have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of Community, Cook, and Seton, and the commission may not withhold any portion of the submitted information on the basis of any proprietary interests those parties may have. *See* 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.

Now we turn to the arguments submitted on behalf of Amerigroup, Evercare, and Superior for their requested information. Amerigroup argues that a submitted settlement agreement is not responsive to category one of the request for information, which seeks information regarding experience rebates for state fiscal years 2002 through 2006. Amerigroup states that the settlement agreement, which was entered into in 2008, is not responsive. We note a governmental body must make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at (1990) (construing statutory predecessor). The commission has submitted the settlement agreement as information that the commission deems to be responsive to this request for information. We also note that category five of the request seeks documents showing adjustments to the requested FSRs as a result of audits performed by the commission for state fiscal years 1997 through 2006. The submitted settlement agreement discusses modifications to calculations within audit reports relating to FSRs for state fiscal years 2000 through 2005. Accordingly, we conclude the commission has made a good-faith effort to relate this request to responsive information. Therefore, we will determine whether information in the settlement agreement relating to state fiscal years 2000 through 2005 must be released to the requestor. However, we agree that any other information in the settlement agreement is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

Amerigroup, Evercare, and Superior state that they submitted the information at issue to the commission with the expectation that it would remain confidential. However, we note that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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). Consequently, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Amerigroup raises section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code for the submitted settlement agreement. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 154.073 of the Civil Practice and Remedies Code provides in part:

(a) Except as provided by Subsections (c), (d), (e), and (f) a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

(d) A final written agreement to which a governmental body, as defined by Section 552.003, Government Code, is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with Chapter 552, Government Code.

Civ. Prac. & Rem. Code § 154.073(a), (b), (d). The commission informs us that the settlement agreement concerns the calculation of Amerigroup experience rebates owed to the commission, the basis of which was derived from audit reports concerning Amerigroup’s

FSRs. The commission states that it has “confirmed that the settlement agreement at issue in fact was not reached as the result of an alternative dispute resolutions procedure as contemplated under chapter 154.” Thus, Amerigroup has not demonstrated that the settlement agreement constitutes either a communication relating to the subject matter of the dispute made by a participant in an alternative dispute resolution procedure or a record made at such a procedure. *See* Civ. Prac. & Rem. Code § 154.073(a)-(b). Further, we note that section 154.073(d) provides the following: “[a] final written agreement to which a governmental body . . . is a signatory that is reached as a result of a dispute resolution procedure conducted under this chapter is subject to or excepted from required disclosure in accordance with [the Act].” Thus, the submitted settlement agreement is not confidential under section 154.073 of the of the Civil Practice and Remedies Code, and may not be withheld under section 552.101 the Government Code on that ground.

Next, Amerigroup, Evercare, and Superior argue their 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* 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 . . . [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).

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); ORD 661.

Amerigroup, Evercare, and Superior claim that their FSRs reveal the companies’ revenues, certain administrative expenses, and medical expenses. They state that releasing this information would enable a competitor to determine how much they are paying a certain group of physicians on a per-member or fee-for-service basis, to review historic trends, and to analyze expense ratios. Amerigroup further argues that release of its settlement agreement would reveal internal processes, strategy, and performance level goals. However, the commission contends that FSRs include aggregate administrative and medical cost data rather than itemized medical fees, thereby rendering the information at issue of little competitive value during the procurement process. Furthermore, the commission asserts that the information contained in the FSRs is outdated and has no competitive value. The requestor contends that the data within the requested FSRs is stale, making the information less relevant to the current marketplace and less competitively significant. Upon review of the submitted arguments and information at issue, we conclude that Amerigroup, Evercare, and Superior have failed to demonstrate that any of their information meets the definition of

a trade secret. Therefore, the commission may not withhold any of the responsive information under section 552.110(a). In addition, we conclude that Amerigroup, Evercare, and Superior have not demonstrated that release of the FSRs or the settlement agreement would cause substantial competitive injury to the companies; therefore, this information may not be withheld under section 552.110(b). As no further arguments against disclosure are raised, the responsive information must be released.

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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 339089

Enc. Requestor
(w/o enclosures)