



ATTORNEY GENERAL OF TEXAS
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April 17, 2009

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

OR2009-05110

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# 340267 (TDI # 87288).

The Texas Department of Insurance (the "department") received a request for the most recent version of several types of agreements in the department's records for United Health Plan, Humana, or Arcadian Health Plan. You state you have released the responsive information that was not marked either proprietary or confidential. You claim that a portion of the submitted information is 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 United Health Plan ("United"). Accordingly, you state, and have provided documentation showing, you notified United 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 United. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to this request because it is not the "most recent version" of the document. This ruling does not address the public

availability of any information that is not responsive to the request, and the department is not required to release this information, which we have marked as non-responsive, in response to this request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed).

Section 552.101 of the Government Code exempts 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 claims a portion of the information is confidential under section 843.156(d). We understand these documents were provided to the department at the department’s request, and we understand that the documents titled “Amendment to the Provider Agreement” and “Texas Regulatory Requirements Appendix” are a part of an agreement between United and a provider. Thus, we agree these documents, which we have marked, are confidential pursuant to section 843.156(d) of the Insurance Code and must be withheld pursuant to section 552.101 of the Government Code. The department has failed to demonstrate, however, that any of the remaining documents it claims are confidential under section 843.156 are contracts, agreements, or other arrangements between a health maintenance organization and a physician or provider. Thus, because the department has not established the applicability of section 843.156(d) to these documents, none of the remaining information may 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 id.* § 843.078. The department claims portions of the remaining information consist of compensation arrangements that are subject to section 843.078. Upon review, we find the department has failed to demonstrate that any of the remaining information the department claims is confidential under section 843.078 constitutes compensation arrangements provided to the department as part of an application for a certificate of authority. We therefore conclude the department may not withhold any of the remaining information under section 552.101 in conjunction with section 843.078 of the Insurance Code.

United claims the remaining 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: (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." 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.¹ 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, substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also* 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).

United contends the remaining information qualifies as trade secret information under section 552.110(a). Upon review of United’s submitted arguments and information at issue, we find United has not demonstrated how any of the remaining information meets the definition of a trade secret. Thus, none of United’s remaining information may be withheld under section 552.110(a). United also claims its remaining information is excepted under section 552.110(b). Based on United’s arguments and our review, we find United has provided no specific factual or evidentiary showing release of the remaining information it seeks to withhold would cause the company substantial competitive injury. Therefore, the department may not withhold United’s remaining information under section 552.110(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. The remaining information must be released.

¹The 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).

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,



Greg Henderson
Assistant Attorney General
Open Records Division

GH/jb

Ref: ID#340267

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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