



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2010

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

OR2010-06903

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# 379326 (TDI# 101497).

The Texas Department of Insurance (the "department") received a request for a few previously approved filings, including those of Humana Insurance Company ("Humana"), related to non-insurance benefits. You state the department has provided some of the requested information to the requestor. Although you state the department takes no position with respect to the public availability of the submitted performance standards guarantee information, you state its release may implicate the proprietary interests of Humana. Accordingly, you state, and provide documentation showing, the department notified Humana of the request and of its 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 claims its submitted information is excepted from disclosure under section 552.110 of the Government Code. This section 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). 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) 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. Gov't Code § 552.110(b); *Open Records Decision No. 661 at 5-6* (1999).

Humana claims its submitted performance guarantee information constitutes a trade secret under section 552.110(a). Humana informs us it continually offers certain types of customers

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.

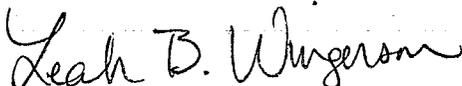
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

a guarantee that specific performance standards will be met during the administration of Humana's health insurance policies. Humana explains the submitted information constitutes the details of that performance guarantee. Based on Humana's representations and our review, we find Humana has established its submitted performance guarantee information meets the definition of a trade secret. Furthermore, we find Humana has demonstrated the necessary trade secret factors. Therefore, we conclude the submitted information constitutes Humana's trade secret information, and the department must withhold this information under section 552.110(a) of the Government Code. As our ruling is dispositive, we need not address Humana's remaining argument against disclosure.

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, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 379326

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Rachael K. Padgett
McGinnis, Lochridge & Kilgore, L.L.P.
For Humana Insurance Company
600 Congress Avenue, Suite 2100
Austin, Texas 78701
(w/o enclosures)