ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 22, 2010

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

OR2010-10990

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# 387605 (TDI No. 104244).

The Texas Department of Insurance (the "department") received a request for specified rate filings for Blue Cross Blue Shield of Texas ("Blue Cross").[1] Although you take no position on the public availability of the submitted information, you state that the information at issue may implicate the interests of Blue Cross. Accordingly, you state, and submit documentation showing, that you notified Blue Cross of the request for information and of the company's right to submit arguments to this office as to why their submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Blue Cross. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

[1]As you have not submitted a copy of the request for information, we take our description from your brief.

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b) of the Government Code, the governmental body must request a ruling from this office and state the exceptions to disclosure that apply within ten business days after receiving the request. Gov't Code § 552.301(b). Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The department requested a ruling from this office on May 19, 2010. However, as of the date of this letter, you have not submitted to this office the written request for information. Thus, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where 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 interest of the third party.

Blue Cross argues that portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial financial information, the disclosure of which 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 the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privilege or confidential by statute or judicial decision. *Id.* § 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. 1957); *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.[2] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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); *see also* Open Records Decision No. 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Blue Cross argues that portions of its submitted information are trade secrets. In addition, Blue Cross contends that release of the same portions would cause the company substantial competitive harm. Blue Cross argues that with knowledge of the information at issue, "competitors will be able to undercut future rate filings [Blue Cross] might submit." The

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[2]The 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 other 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).

information Blue Cross seeks to withhold consists of six categories of information that the company argues reveals the company's rating methodology, rating process and strategy. The requestor, however, has submitted evidence to this office demonstrating that the department released from previous rate filings the same type of information that Blue Cross now seeks to withhold. According to the requestor, the department made this information available to the requestor for inspection on the basis that Blue Cross did not designate this information as confidential.[3] Conversely, the information that was designated by Blue Cross as confidential was submitted to this office for a ruling.[4] Accordingly, because Blue Cross did not designate the same type of information currently at issue as confidential in previous rate filings, we find Blue Cross has not demonstrated that it has taken the necessary measures to protect the information it considers a trade secret in order for this office to conclude that any portion of this information now either qualifies as a trade secret or contains commercial or financial information, the release of which would cause Blue Cross substantial harm. *See* Gov't Code § 552.110, RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude that the department may not withhold any of Blue Cross's submitted information under section 552.110 of the Government Code.

We note the submitted information contains an e-mail address subject to section 552.137 of the Government Code.[5] Section 552.137 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). *See id.* § 552.137(a)–(c). The e-mail address at issue is not a type specifically excluded by section 552.137(c). Therefore, the department must withhold this e-mail address under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its disclosure.[6] As no further exceptions to disclosure are raised, the remaining information must be released.

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[3]We note that Blue Cross was copied on the requestor's comments to this office. As of the date of this letter, we have received no correspondence from Blue Cross in response to the requestor's comments.

[4]For example, the requestor has submitted a copy of the "Renewal Business Rate Filing Summary of Information" for "PPO Select Choice Policy Form No. IND-CMM-1," with renewal rates effective March 1, 2007, that it obtained from the department and which was not designated as confidential by Blue Cross; Blue Cross now seeks to withhold information within the same document for the same policy form with renewal rates effective date of March 1, 2008, which it did designate as confidential.

[5]The 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).

[6]We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

Ref: ID# 387605

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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