ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 10, 2011

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

OR2011-08303

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# 420188 (TDI# 114096).

The Texas Department of Insurance (the "department") received a request for copies of specified complaints. You state the department will release some of the requested information. Although the department takes no position with respect to the remaining requested information, you state that the proprietary interests of a third parties might be implicated. Accordingly, you state, and provide documentation demonstrating, you notified American Medical Security Life Insurance Company ("American"), Golden Rule Insurance Company ("Golden Rule"), MedicalEdge Healthcare Group ("MedicalEdge"), Pacificare, Doctor Sumant Krishnan ("Dr. Krishnan") and UnitedHealthcare of the request for information and of their 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) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have reviewed the submitted information and arguments submitted collectively by American, Golden Rule, and UnitedHealthcare (collectively "United").

Initially, we note portions of the submitted information are subject to a previous determination issued by this office in Open Records Letter No. 2001-4777 (2001). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001) (listing elements of second type of previous determination under section 552.301(a)). In Open Records Letter

No. 2001-4777, we authorized the department to withhold, under section 552.101 of the Government Code in conjunction with common-law privacy, information that identifies an enrollee in a health plan, including the enrollee's name, address, telephone number, date of birth, social security number, and claim number. We note a post office box is not an address that identifies an enrollee. Accordingly, the department must withhold such information in accordance with Open Records Letter No. 2001-4777.

We note the remaining information includes information subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code.[1] 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 the MPA, subtitle B of title 3 of the Occupations Code, which provides in pertinent part:

> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b)-(c). Information that is subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004; Open Records Decision No. 598 (1991). This office has determined that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). We have also found that when a file is created as the result of a hospital stay, all the documents in the file relating to diagnosis and treatment constitute physician-patient communications or "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." Open Records Decision No. 546 (1990). Upon review, we find the submitted health insurance claim forms constitute confidential medical records under the MPA and the department must withhold this information, which we have marked, under section 552.101 of the Government Code.

Next we address any interests a third party may have. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under

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[1]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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, this office has not received comments from MedicalEdge, Pacificare, or Dr. Krishnan explaining why their information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the requested information would implicate these third parties' interests. *See id.* § 552.110; 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 (1990). Accordingly, the department may not withhold any of the submitted information on the basis of any interest MedicalEdge, Pacificare, or Dr. Krishnan may have in the information.

United submits arguments against disclosure of its information under section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information, the disclosure of which 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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret" has been defined as the following:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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's] business;
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> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (4) the value of the information to [the company] and to [its] competitors;
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> (5) the amount of effort or money expended by [the company] in developing the information; and
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> (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* ORD 232. This office must accept a claim that information subject to the Act is excepted 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. Open Records Decision No. 552 at 2 (1990). 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.

United argues its contracted rate information in the submitted information constitutes trade secrets. Upon review, we find that United has failed to demonstrate that the information for which it asserts section 552.110(a) meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the department may not withhold any of the information at issue on the basis of section 552.110(a) of the Government Code.

United also contends portions of the remaining information are commercial or financial information, release of which would cause substantial competitive harm to United. Upon review of United's arguments under section 552.110(b), we conclude United has established the release of its contracted rate information, which we have marked, would cause it substantial competitive injury. Accordingly, the department must withhold the information we have marked under section 552.110(b).

We note portions of the remaining information are subject to section 552.136 of the Government Code. Section 552.136 states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device for the purposes of section 552.136. Upon review, we find the department must withhold the bank account and bank routing numbers, insurance policy number, and insurance account numbers we have marked under section 552.136 of the Government Code.

The remaining information also contains a public e-mail address. Section 552.137 of the Government Code 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). Gov't Code § 552.137(a)-(c). The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail address we have marked under section 552.137 of the Government Code unless the owner of the address has affirmatively consented to its release under section 552.137(b).

In summary, the department must withhold information that identifies an enrollee in a health plan, including the enrollee's name, address, telephone number, date of birth, social security number, and claim number in accordance with Open Records Letter No. 2001-4777. Additionally, the department must withhold: (1) the health insurance claim forms we have marked under section 552.101 of the Government Code in conjunction with the MPA; (2) the information we have marked under section 552.110(b) of the Government Code; (3) the bank account and bank routing numbers, insurance policy number, and insurance account numbers we have marked under section 552.136 of the Government Code; and (4) the e-mail address we have marked under section 552.137 of the Government Code, unless the owner has consented to its release.[2] The department must release the remaining information.

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

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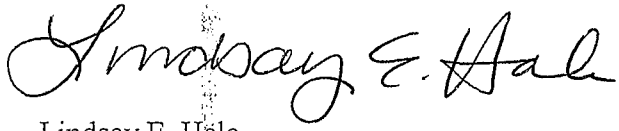
[2]We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including: an insurance policy number, bank account number, and bank routing number under section 552.136 of the Government Code; and an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

(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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/em

Ref: ID# 420188

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Patrick Carr
American Medical Security Life Insurance Co.
3100 Ams Boulevard
Green Bay, Wisconsin 54307-9032
(w/o enclosures)

CT Corporation System
For American Medical Security Life Insurance Co.
350 North Saint Paul Street
Dallas, Texas 75201
(w/o enclosures)

Mr. Steven Pollack
Golden Rule Insurance Company
7440 Woodland Drive
Indianapolis, Indiana 46278-1719
(w/o enclosures)

CT Corporation
For Golden Rule Insurance Company
350 North Saint Paul Street
Dallas, Texas 75201
(w/o enclosures)

Mr. Clay Heighten
MedicalEdge Healthcare Group
9229 LBJ Freeway
Dallas, Texas 75243
(w/o enclosures)

CT Corporation
For Pacificare
350 North Saint Paul Street
Dallas, Texas 75201
(w/o enclosures)

Dr. Sumant Krishan
9301 North Central Expressway #400
Dallas, Texas 75321
(w/o enclosures)

CT Corporation
For UnitedHealthcare
350 North Saint Paul Street
Dallas, Texas 75201
(w/o enclosures)

Mr. Bruce McCandless
Mitchell, Williams, Selig, Gates & Woodyard PLLC
106 East 6th Street, Suite 300
Austin, Texas 78701-3661
(w/o enclosures)