



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2012

Mr. Stanton Strickland
Associate Commissioner
General Counsel Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2012-09494

Dear Mr. Strickland:

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# 456649 (TDI# 126509).

The Texas Department of Insurance (the "department") received a request for the narratives and stock purchase agreements related to two specified Form A applications. You state the department will release some of the information. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of two third parties might be implicated. Accordingly, you notified United Health Care Services ("United") and Cigna Corporation ("Cigna") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 applicability of exception in certain circumstances). We have received arguments from an attorney for United and Cigna. Thus, we have considered the arguments and reviewed the submitted information.

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. Section 552.101 encompasses the doctrine of common-law privacy, which

protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681–82. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 600 (1992) (finding personal financial information to include designation of beneficiary of employee's retirement benefits and optional insurance coverage; choice of particular insurance carrier; direct deposit authorization; and forms allowing employee to allocate pretax compensation to group insurance, health care, or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Upon review, we find the information we have marked is highly intimate or embarrassing and of no legitimate public interest. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information is highly intimate or embarrassing, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two inter-related types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. See *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); Open Records Decision Nos. 600 at 3–5 (1992), 478 at 4 (1987), 455 at 3–7 (1987). The first type protects an individual's autonomy within "zones of privacy," which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. ORD 455 at 4. The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* at 7. The scope of information protected by constitutional privacy is narrower than that under the common-law doctrine of privacy; constitutional privacy under section 552.101 is reserved for "the most intimate aspects of human affairs." *Id.* at 5 (quoting *Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5th Cir. 1985)). Upon review, we find no portion of the remaining information falls within the zones of privacy or otherwise implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the department may not withhold any of the remaining information under section 552.101 in conjunction with constitutional privacy.

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. See 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 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.¹ 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 Open Records Decision No. 552 at 5* (1990). However, we cannot conclude that 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. *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

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 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 Open Records Decision Nos. 319 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

§ 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. *See id.*; *see also* Open Records Decision No. 661 at 5 (1999).

Upon review, we find the information we have marked, if released, would cause substantial competitive harm to United. Accordingly, the department must withhold the information we have marked under section 552.110(b) of the Government Code. As to the remaining information, we find United has not demonstrated its release would cause substantial competitive harm, and the department may not withhold it under section 552.110(b). Upon further review, we find United has not demonstrated any of the remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b, ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Accordingly, the department may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Section 552.137 provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c). Gov’t Code § 552.137(a)–(c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have affirmatively consented to their release.

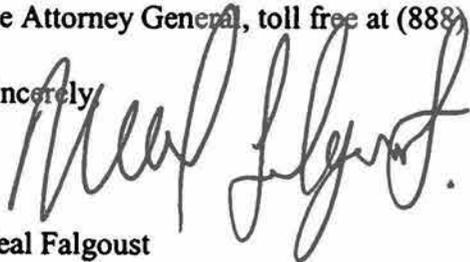
In summary, the department must withhold the following: the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; the information we have marked under section 552.110(b) of the Government Code; and the information we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have consented to their release. The remaining 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, toll free at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/ag

Ref: ID# 456649

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Bruce McCandless, III
For United Healthcare Services and Cigna Corporation
Mitchell Williams
106 East Sixth Street, Suite 300
Austin, Texas 78701
(w/o enclosures)

Filed in The District Court
of Travis County, Texas
MAY 22 2015
At 4:35 PM.
Velva L. Price, District Clerk

Cause No. D-1-GN-12-002016

UNITED HEALTHCARE	§	IN THE DISTRICT COURT
SERVICES, INC.,	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	250th JUDICIAL DISTRICT
	§	
GREG ABBOTT, ATTORNEY GENERAL	§	
FOR THE STATE OF TEXAS,	§	
<i>Defendant.</i>	§	TRAVIS COUNTY, TEXAS

AGREED ORDER OF DISMISSAL

This cause is an action under the Public Information Act (PIA), Texas Government Code Chapter 552. Plaintiff United Healthcare Services, Inc. (United) and Defendant Ken Paxton¹, Attorney General of Texas, agree that this matter should be dismissed pursuant to PIA section 552.327. A court may dismiss a PIA suit under section 552.327 when all the parties agree to dismissal and the Attorney General determines and represents to the Court that the requestor has voluntarily withdrawn the request or has abandoned the request. Tex. Gov't Code § 552.327.

The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the requestor, SNL Financial, has in writing voluntarily withdrawn the request for information, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

¹ Because this lawsuit was brought against Greg Abbott in his official capacity as Attorney General of Texas, Ken Paxton is now the proper Defendant.

IT IS THEREFORE ORDERED that:

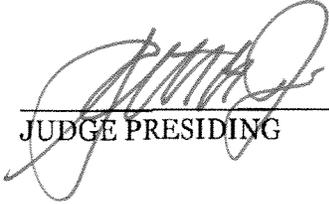
1. Because the request was withdrawn, no information should be released in reliance on Letter Ruling OR2012-09494. Letter Ruling OR2012-09494 should not be cited for any purpose as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the signing of this Final Judgment, the Office of the Attorney General shall notify the Texas Department of Insurance in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct the Texas Department of Insurance that pursuant to Tex. Gov't Code § 552.301(g), it shall not rely upon Letter Ruling OR2012-09494 as a prior determination under Tex. Gov't Code § 552.301(f) with regard to United's information, nor shall it release any of United's information in reliance on said Ruling, and if the Texas Department of Insurance receives any future requests for the same or similar United information, it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2012-09494.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby DISMISSED without prejudice.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that Plaintiff's cause of action against Defendant is dismissed in all respects;

All relief not expressly granted is denied; and

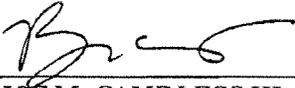
This Order disposes of all claims between the parties as final.

Signed this 22nd day of May, 2015.



JUDGE PRESIDING

AGREED:



BRUCE McCANDLESS III
STATE BAR # 00794254
MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.
106 EAST SIXTH STREET, SUITE 300
AUSTIN, TEXAS 78701
TELEPHONE: (512) 480-5100
FACSIMILE: (512) 322-0301
ATTORNEY FOR PLAINTIFF



KIMBERLY L. FUCHS
STATE BAR #24044140
ASSISTANT ATTORNEY GENERAL
OPEN RECORDS LITIGATION
ADMINISTRATIVE LAW DIVISION
P. O. BOX 12548, CAPITOL STATION
AUSTIN, TEXAS 78711 2548
TELEPHONE: (512) 475 4151
FACSIMILE: (512) 320 0167
ATTORNEY FOR DEFENDANT