



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

OR2012-09497

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# 456651 (TDI 126326).

The Texas Department of Insurance (the "department") received a request for twelve categories of information pertaining to Connecticut General Life Insurance Company, Cigna Health and Life Insurance Company, Cigna Healthcare of Texas, Inc., and/or any affiliates (collectively "Cigna") for a specified time period. You state the department will release some of the requested information. You state that, although the department takes no position with respect to the remaining requested information, it may implicate the interests of Cigna. Accordingly, you state, and provide documentation demonstrating, the department notified Cigna of the request for information and of its right to submit arguments stating why its 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); 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 reviewed the submitted information and the arguments submitted by Cigna.

Initially, we understand Cigna to argue that any information submitted relating to entities other than Cigna Health and Life Insurance Company and Connecticut General Life

Insurance Company is beyond the scope of the request. However, while portions of the request seek information specifically pertaining to Cigna Health and Life Insurance Company and Connecticut General Life Insurance Company, other portions of the request seek information pertaining to “Cigna,” which the requestor defines as “Connecticut General Life Insurance Company, Cigna Health and Life Insurance Company, Cigna Healthcare of Texas, Inc., and/or any affiliate of the same.” As such, the submitted information pertaining to these entities and “any affiliate” are responsive to this request and we will address Cigna’s arguments for the submitted information.

Cigna argues the request for information is vague and unduly burdensome because the requestor seeks documents over a nine-year time period. Cigna contends the department should seek clarification and narrowing of the request pursuant to section 552.222 of the Government Code. Section 552.222 permits a governmental body to communicate with a requestor for the purpose of clarifying or narrowing a request for information. Gov’t Code § 552.222. In this instance, the department does not inform us it sought clarification or narrowing from the requestor. Thus, we assume the department has made a good-faith effort to relate this request to information it holds. *See* Open Records Decision No. 561 (1990). Therefore, we will address Cigna’s remaining arguments for the submitted information.

Next, we must address the department’s obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is exempted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. *See* Gov’t Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of the receipt of the request: (1) written comments stating why the governmental body’s claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See id.* § 552.301(e)(1)(A)-(D). You state the department received the request for information on April 5, 2012; thus, the department’s fifteen-business-day deadline was May 7, 2012. Although you submitted some responsive information before the fifteen-business-day deadline, you submitted additional responsive documents on May 8, 2012. Consequently, we find the department failed to comply with the requirements of section 552.301 as to the information submitted on May 8, 2012.

Pursuant to section 552.302 of the Government Code, a governmental body’s failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless the governmental body overcomes this presumption by demonstrating a compelling reason to withhold the information. *Id.* § 552.302; *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, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 630 (1994). A compelling reason generally exists when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because a third party's interests are at stake, we will consider the third party's arguments against disclosure.

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. Thus, section 552.101 encompasses information other statutes make confidential. For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. Cigna contends some of the submitted information is protected under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164 ("Privacy Rule"); *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a).

This office has addressed the interplay of the Privacy Rule and the Act. In Open Records Decision No. 681 (2004), we noted section 164.512 of title 45 of the Code of Federal Regulations provides a covered entity may use or disclose protected health information to the extent such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law. *See id.* § 164.512(a)(1). We further noted the Act "is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." ORD 681 at 8; *see also* Gov't Code §§ 552.002, .003, .021. Therefore, we held the disclosures under the Act come within section 164.512(a). Consequently, the Privacy Rule does not make information confidential for the purpose of section 552.101 of the Government Code. *See Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App.—Austin 2006, no pet.); ORD 681 at 9; *see also* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Thus, because the Privacy Rule does not make information that is subject to disclosure under the Act confidential, the department may withhold protected health information from the public only if the information is confidential under other law or an exception in subchapter C of the Act applies.

Cigna asserts the submitted information relating to settlement negotiations with any state entity is excepted from disclosure by the litigation exception, section 552.103 of the Government Code. Because section 552.103 protects only the interests of a governmental body, as distinguished from exceptions intended to protect the interests of third parties, we do not address Cigna's argument under section 552.103. See Open Records Decision Nos. 542 (statutory predecessor to section 552.103 does not implicate rights of third party), 522 (1989) (discretionary exceptions in general). Furthermore, there is no explanation that the department is a party to any pending or reasonably anticipated litigation. The litigation exception only applies when the governmental body is a party to pending or reasonably anticipated litigation. See Gov't Code § 552.103(a); Open Records Decision No. 575 at 2 (1990). Accordingly, the department may not withhold any of the submitted information on this basis.

Cigna also 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. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny 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 *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.¹ See 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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); 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).

Cigna argues some of its information constitutes trade secrets. Upon review, we find that Cigna 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 submitted information on the basis of section 552.110(a) of the Government Code. Cigna also contends its information is commercial or financial information, release of which would cause substantial competitive harm to Cigna. Upon review, we find Cigna has made only conclusory allegations that release of its information would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. See Gov’t Code § 552.110(b). We therefore conclude that the department may not withhold any of the submitted information under section 552.110(b) of the Government Code.

¹There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (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).

Cigna also raises section 552.137 of the Government Code for the e-mail addresses within the submitted information. 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). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an e-mail address provided to a governmental body on a letterhead or an e-mail address maintained by a governmental entity for one of its officials or employees. The e-mail addresses we have marked are not of the types specifically excluded by section 552.137(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 addresses affirmatively consent to their release.² However, we note the remaining e-mail addresses are either provided to the department on a letterhead or are department e-mail addresses; thus, the remaining e-mail addresses may not be withheld under section 552.137.

Cigna argues some of the information is subject to section 552.147 of the Government Code. Section 552.147 excepts from disclosure the social security number of a living person. *Id.* § 552.147. Upon review, we find the remaining information does not include a social security number. As such, section 552.147 of the Government Code is not applicable to any of the remaining information.

We note some of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses affirmatively consent to their release. The department must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

²We 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 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.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 456651

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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