



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

July 27, 2012

Ms. Leena Chaphekar
Assistant General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

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

OR2012-11758

Dear Ms. Chaphekar:

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# 460220.

The Employees Retirement System of Texas (the "system") received a request for information pertaining to a request for proposals from third party administrators to provide specific services for HealthSelect of Texas.¹ You state you have released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. You also state the submitted documents may contain proprietary information of a third party subject to exception under the Act. Accordingly, the system notified UnitedHealthcare Services ("UHC") and Blue Cross Blue Shield of Texas ("BCBS") of the request 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) (determining that statutory predecessor to

¹You inform us the system sought and received clarification from the requestor regarding the request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received comments on behalf of UHC and BCBS. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state the requested information pertaining to UHC was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2012-07506 (2012). In that ruling, we determined the system must withhold portions of the information at issue under section 552.110 of the Government Code, and must release the remaining information at issue in accordance with copyright law. In response to our ruling, UHC filed a lawsuit styled *United Healthcare Servs., Inc. v. Greg Abbott*, Cause No. D-1-GN-12-07506 98th Dist. Ct., Travis County, Tex., challenging the ruling with respect to the information ordered released. Accordingly, we will allow the trial court to determine whether those portions of the information at issue in the pending lawsuit must be withheld from the public. The remaining information the subject of Open Records Letter No. 2012-07506 includes information that was previously ordered withheld. With respect to this remaining information not at issue in the pending litigation, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, for the requested information that is the subject of Open Records Letter No. 2012-07506 and is not at issue in the pending lawsuit, we conclude the system must rely on Open Records Letter No. 2012-07506 as a previous determination and withhold the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).²

Although the system argues the submitted information is excepted under section 552.110 of the Government Code, this exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the system's arguments under section 552.110. We will, however, address the arguments made under this section by BCBS. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957). Section 757 provides that a trade secret is:

²Accordingly, we need not address UHC's arguments against disclosure.

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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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)* (party must establish *prima facie* case that information is trade secret). 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. *See Open Records Decision No. 402 (1983)*.

Section 552.110(b) of the Government Code excepts from disclosure “[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). Section 552.110(b) requires a

³The 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)*.

specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* 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).

BCBS claims portions of the submitted information are trade secrets that should be protected by section 552.110(a). Upon review, we find BCBS has demonstrated its client information constitutes trade secrets. We have marked the client information the system must withhold under section 552.110(a) of the Government Code. We note pricing information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of business,” rather than “a process or device for continuous use in the operation of the business.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Upon review, we find BCBS has not demonstrated any of the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. Accordingly, the system may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

BCBS also claims its remaining information at issue constitutes commercial information that, if released, would cause the company substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find BCBS has established release of some of the remaining information at issue, including its pricing, rate, and performance guarantee information, would cause the company substantial competitive injury. Therefore, the system must withhold this information, which we have marked, under section 552.110(b) of the Government Code.⁴ We find, however, BCBS has not demonstrated how release of its remaining information at issue would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Consequently, the system may not withhold any of BCBS’s remaining information at issue under section 552.110(b) of the Government Code.

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

⁴As our ruling for this information is dispositive, we need not address BCBS’s remaining arguments against its disclosure.

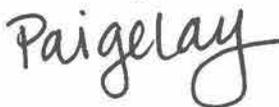
applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, we decline to render a decision regarding the specific portions of the UHC information at issue in the pending lawsuit, and will allow the trial court to determine the public availability of that information. With respect to any of UHC's remaining information that was the subject of Open Records Letter No. 2012-07506, the system must rely on Open Records Letter No. 2012-07506 as a previous determination and withhold the identical information in accordance with that ruling. The system must withhold the information we have marked under section 552.110 of the Government Code. The remaining submitted information must be released; however, any information protected by copyright may only be released in accordance with copyright law.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/tch

Ref: ID# 460220

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Filed in The District Court
of Travis County, Texas

AUG 24 2015

Cause No. D-1-GN-12-002432

At _____ M.
Valva L. Price, District Clerk

HEALTH CARE SERVICE
CORPORATION, A MUTUAL LEGAL
RESERVE COMPANY,
Plaintiff,

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IN THE DISTRICT COURT OF

v.

345th JUDICIAL DISTRICT

GREG ABBOTT, ATTORNEY
GENERAL OF TEXAS,
Defendant.

TRAVIS COUNTY, TEXAS

AGREED ORDER OF DISMISSAL

This cause was brought under the Public Information Act (PIA), Texas Government Code Chapter 552 to challenge an open records ruling. Plaintiff Health Care Service Corporation (HCSC) and Defendant Ken Paxton, Attorney General of Texas¹ (Attorney General) agree that this matter should be dismissed pursuant to PIA section 552.327 on the grounds that the requestor has abandoned his request for information. A court may dismiss a PIA suit under section 552.327 when all parties agree to dismissal and the Attorney General determines and represents to the Court that the requestor has abandoned the request. *See* Tex. Gov't Code § 552.327. The parties agree to the dismissal of the case and the Attorney General represents to the Court that the requestor, Mr. Chris Laflam, has abandoned his request.

The parties agree that Letter Ruling OR2010-11758 will not be considered a previous determination by the Office of the Attorney General under PIA section 552.301(a), (f); and, if the precise information is requested again, Employees

¹ Greg Abbott was sued in his official capacity as the Attorney General of the State of Texas. Ken Paxton is his successor in office and the proper defendant in this lawsuit.



Retirement System of Texas may ask for a decision from the Attorney General under PIA section 552.301(g). Accordingly, Employees Retirement System of Texas is not required to disclose the information subject to release in Letter Ruling OR2012-11758.

The Court is of the opinion that entry of an agreed dismissal order is appropriate.

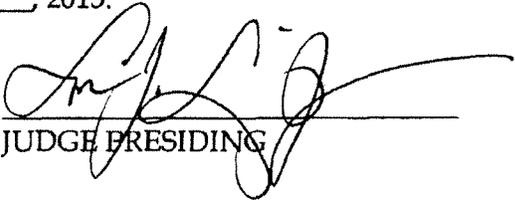
It is THEREFORE, ORDERED, ADJUDGED and DECREED that this cause is DISMISSED in all respects;

All court costs and attorney fees are taxed to the party incurring same;

All other requested relief not expressly granted herein is denied;

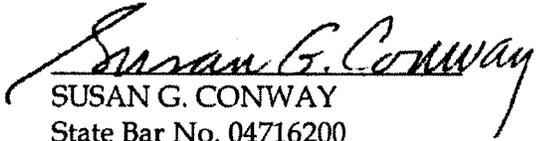
This order disposes of all claims between the parties and is final.

Signed this 24th day of AUGUST, 2015.



JUDGE PRESIDING

AGREED:



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