



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2012

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

OR2012-13624

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# 463387 (TDI # 127861).

The Texas Department of Insurance (the "department") received a request for Figure 48 Access Database information for the years 2008, 2009, 2010, and 2011, and CCP2 Access Database information for the years 2008, 2009, and 2010. Although you claim no exceptions to disclosure of the submitted information, you indicate its release may implicate the proprietary interests of certain third parties. Accordingly, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released.¹ See Gov't Code § 552.305(d); 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 to disclosure under Act in certain circumstances). In correspondence to our office, representatives for Blue Cross Blue Shield and PacifiCare Life Assurance Company state the companies do not object to release of their respective

¹The notified third parties are: Aetna Health, Inc.; Blue Cross Blue Shield; Chesapeake Life Insurance Company; CT Corporation System; Mega Life and Health Insurance Company; Mid-West National Life Insurance Company of Tennessee; PacifiCare Life Assurance Co.; PacifiCare Life & Health Insurance Co.; Standard Security Life Insurance Company of NY; Unicare Health Plans of Texas, Inc.; Unicare Life & Health Insurance Company; United HealthCare Insurance Co.; and United HealthCare of Texas.

information. We have received comments from Aetna Health, Inc. (“Aetna”) and a representative for PacifiCare Life & Health Insurance Company, United Healthcare Insurance Company, and United Healthcare of Texas (collectively, “PacifiCare/United”). We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Initially, we note it appears some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-14751 (2011). In that decision, this office determined the department must withhold certain information under section 552.110(b) of the Government Code, but must release the remaining information at issue. Accordingly, as we are unaware of any change in the relevant law, facts, and circumstances on which the previous ruling was based, we conclude, to the extent the information is identical to the information at issue in Open Records Letter No. 2011-14751, the department may rely on Open Records Letter No. 2011-14751 as a previous determination and withhold or release such 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note, and you acknowledge, the department did not comply with its ten-business-day deadline under section 552.301(b) of the Government Code in requesting this decision. *See* Gov’t Code § 552.301(b). The department also failed to comply with its fifteen-business-day deadline under section 552.301(e) of the Government Code. *See id.* § 552.301(e)(1). The submitted information, therefore, is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See 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 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). This statutory presumption can generally be overcome 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 third parties’ interests are at stake, we will consider whether any of the submitted information is excepted under the Act. Further, we note some of the submitted information is subject to section 552.137 of the Government Code. Because section 552.137

²We assume the “representative sample” of information submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

can provide a compelling reason for non-disclosure under section 552.302, we will consider the applicability of this exception to the submitted information.³

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only Aetna and PacifiCare/United have submitted comments to this office explaining why their information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in the submitted information. *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. Accordingly, the department may not withhold any portion of the submitted information based upon the proprietary interests of the remaining third parties.

We note Aetna seeks to withhold information the department did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Aetna and PacifiCare/United assert portions of their information are excepted from disclosure under section 552.110(b) of the Government Code, which 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[.]" *Id.* § 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.*; *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Aetna and PacifiCare/United claim some of the companies' respective information constitutes commercial information that, if released, would cause the companies substantial competitive harm. In advancing its arguments, PacifiCare/United relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if

³The 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).

disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only PacifiCare/United's interests in its information.

Upon review, we find Aetna and PacifiCare/United have each established the information at issue, which we have marked, constitutes commercial or financial information, the release of which would cause them substantial competitive injury. Therefore, the department must withhold the information we have marked under section 552.110(b) of the Government Code.⁴

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 addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the department must withhold these e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b).

In summary, to the extent the information is identical to the information at issue in Open Records Letter No. 2011-14751, the department may rely on Open Records Letter No. 2011-14751 as a previous determination and withhold or release such information in accordance with that ruling. The department must withhold the information we have marked under section 552.110(b) of the Government Code and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their release under section 552.137(b) of the Government Code. 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.

⁴As our ruling is dispositive, we need not address PacifiCare/United's remaining arguments against disclosure.

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,



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Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 463387

Enc. Submitted documents

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