



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 8, 2013

Mr. Nick Lealos
Office of Agency Counsel
Legal Section MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2013-07617

Dear Mr. Lealos:

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# 486716 (TDI No. 136247).

The Texas Department of Insurance (the "department") received a request for a copy of the managed Medicaid hospital contracts regarding seventeen named vendors filed with the department, including the relevant hospital level rate addendum. You state eleven of the named companies do not have managed Medicaid hospital contracts, and thus you indicate the department does not have responsive information pertaining to these eleven of the named vendors.¹ Although you take no position on the remaining requested information, you state it may contain proprietary information subject to exception under the Act. Accordingly, you state and provide documentation showing the department notified Community Health Choice ("Community"), Cook Children's Health Plan ("Cook"), Driscoll Children's Health Plan ("Driscoll"), SHA, L.L.C. ("SHA"), Superior Healthplan, Inc. ("Superior"), and Texas Children's Health Plan, Inc. ("TCHP") of the request for information and of their right to submit arguments to this office as to why the requested 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 received comments from Community and Driscoll. We have considered the submitted arguments and reviewed the submitted information.

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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 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 Cook, SHA, Superior, or TCHP explaining why the submitted information should not be released to the requestor. Therefore, we have no basis to conclude these third parties have a protected 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 of the submitted information based upon the interests of Cook, SHA, Superior, or TCHP.

Next, we address Community's comments regarding the submitted information. Community has informed this office that it has no objection to releasing its information at issue. Therefore, we have no basis to conclude Community has a protected interest in the submitted information, and the department may not withhold any of the submitted information based upon the interests of Community.

Next, we address Driscoll's arguments against disclosure of the submitted information. Driscoll asserts its contract contains "a confidentiality provision where the parties have agreed not to disclose the other's confidential or proprietary information[.]" We note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Driscoll has not identified any law that authorizes the department to enter into an agreement to keep any of the submitted information confidential. Therefore, the department may not withhold Driscoll's information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Driscoll 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* ORD 552 at 2. 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.² *See* RESTATEMENT OF TORTS § 757 cmt. b. 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).

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

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 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Driscoll contends some of the information at issue constitutes a protected trade secret. Upon review of the submitted information and the submitted arguments, we find Driscoll has failed to demonstrate how any portion of the information at issue meets the definition of a trade secret, nor has Driscoll demonstrated the necessary factors to establish a trade secret claim for the submitted information. *See* 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). Therefore, the department may not withhold any portion of Driscoll’s information pursuant to section 552.110(a) of the Government Code.

Driscoll also claims section 552.110(b) of the Government Code for its provider reimbursement rate information. Driscoll argues “the rates paid by [Driscoll] to individual hospitals and health systems differ” and if the rates are made public, “then each hospital whose reimbursement, for any component of the reimbursement rates, is lower than the amount paid to another hospital for that component, will want to re-negotiate the rate for that component.” Driscoll asserts this will hinder its ability to negotiate rates. However, we note that in its correspondence with our office, Driscoll did not mark or identify any specific information that it seeks to withhold from the submitted materials under section 552.110. Further, upon our review of the information submitted by the department pertaining to Driscoll, we find no information that appears to consist of individual provider reimbursement rates.³ Therefore, we find Driscoll has failed to demonstrate the release of any of its information would cause the company substantial competitive harm. Accordingly, the department may not withhold any of Driscoll’s information under section 552.110(b) of the Government Code.

We note some of the remaining information is subject to common-law privacy. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”⁴ Gov’t Code § 552.101. Section 552.101 of the Government Code excepts from disclosure

³Although the responsive documents pertaining to Driscoll contain a document entitled “Reimbursement Schedule,” we are unable to determine, based on the arguments provided by Driscoll, how this document reflects individual provider reimbursement rates.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

“information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception 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 demonstrated. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Upon review, we find the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. The remaining submitted information must be released.⁵

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,



Britni Fabian
Assistant Attorney General
Open Records Division

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⁵We note the information to be released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting an attorney general decision under the Act. *See* Gov’t Code § 552.147(b).

Ref: ID# 486716

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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