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January 5, 2016

Mr. Bob Davis
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Legal Section, General Counsel Division
Texas Department of Insurance
P.O. Box 149104
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OR2016-00229

Dear Mr. Davis:

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# 593318 (TDI# 165621).

The Texas Department of Insurance (the "department") received a request for the 2016 individual rate filing plans for Blue Cross and Blue Shield of Texas ("BCBS"); Humana Health Plan of Texas, Inc. ("Humana"); Insurance Company of Scott and White ("Scott and White"); and UnitedHealthcare Life Insurance Company ("UHC"). You state you will release some information to the requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of BCBS, Humana, Scott and White, and UHC.¹ Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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

¹We note, and you acknowledge, the department did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b). Nevertheless, because the interests of third parties can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352.

Humana and UHC. We have considered the submitted arguments and reviewed the submitted information.

UHC argues its information is subject to a previous request for information, as a result of which this office issued Open Records Letter No. 2014-19324 (2014). However, none of the submitted information was at issue in that ruling. Accordingly, the department may not withhold any of the submitted information in accordance with Open Records Letter No. 2014-19324. *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).

You state some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-16920 (2015), 2015-20032 (2015), and 2015-21777 (2015). In those rulings, we determined the department may withhold some information under section 552.104, must withhold certain information under sections 552.110 and 552.137 of the Government Code, and must release the remaining information. There is no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, the department must continue to rely on Open Records Letter Nos. 2015-16920, 2015-20032, and 2015-21777 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* ORD 673. However, the information you have submitted was not at issue in the previous rulings. Accordingly, we will address the public availability of this information.

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) of the Government Code 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, we have not received comments from BCBS or Scott and White explaining why their information should not be released. Therefore, we have no basis to conclude BCBS or Scott and White has 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 the submitted information on the basis of any proprietary interest BCBS or Scott and White may have in the 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). Consequently, unless the requested information falls within an exception to disclosure, the department must release it, notwithstanding any expectations or agreement specifying otherwise.

Humana claims portions of its information are confidential under section 552.101 of the Government Code in conjunction with section 38.003 of the Insurance Code. Section 552.101 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 section 38.003, which provides the following:

- (a) This section applies to all underwriting guidelines that are not subject to Section 38.002.
- (b) For purposes of this section, “insurer” means a reciprocal or interinsurance exchange, mutual insurance company, capital stock company, county mutual insurance company, Lloyd’s plan, life, accident, or health or casualty insurance company, health maintenance organization, mutual life insurance company, mutual insurance company other than life, mutual, or natural premium life insurance company, general casualty company, fraternal benefit society, group hospital service company, or other legal entity engaged in the business of insurance in this state. The term includes an affiliate as described by Section 823.003(a) if that affiliate is authorized to write and is writing insurance in this state.
- (c) The department or the office of public insurance counsel may obtain a copy of an insurer’s underwriting guidelines.
- (d) Underwriting guidelines are confidential, and the department or the office of public insurance counsel may not make the guidelines available to the public.
- (e) The department or the office of public insurance counsel may disclose to the public a summary of an insurer’s underwriting guidelines in a manner that does not directly or indirectly identify the insurer.
- (f) When underwriting guidelines are furnished to the department or the office of public insurance counsel, only a person within the department or the office of public insurance counsel with a need to know may have access to the guidelines. The department and the office of public insurance counsel shall establish internal control systems to limit access to the guidelines and shall keep records of the access provided.

(g) This section does not preclude the use of underwriting guidelines as evidence in prosecuting a violation of this code. Each copy of an insurer's underwriting guidelines that is used in prosecuting a violation is presumed to be confidential and is subject to a protective order until all appeals of the case have been exhausted. If an insurer is found, after the exhaustion of all appeals, to have violated this code, a copy of the underwriting guidelines used as evidence of the violation is no longer presumed to be confidential.

(h) A violation of this section is a violation of Chapter 552, Government Code.

Ins. Code § 38.003. Section 38.003(a) makes section 38.003 applicable to all insurance underwriting guidelines not subject to section 38.002. *Id.* § 38.003(a). Section 38.002 is applicable only to automobile and residential property insurance underwriting guidelines. *See id.* § 38.002(a)(1) (defining “insurer” for purposes of section 38.002 as certain types of entities “engaged in the business of personal automobile insurance or residential property insurance”). Humana contends the requestor seeks underwriting guidelines, which are confidential under section 38.003. *Cf. id.* § 38.002(a)(4) (defining “underwriting guidelines” for purposes of section 38.002 as “a rule, standard, guideline, or practice, whether written, oral, or electronic, that is used by an insurer or its agent to decide whether to accept or reject an application for coverage under a personal automobile insurance policy or residential property insurance policy or to determine how to classify those risks that are accepted for the purpose of determining a rate”). Upon review, we find the information at issue does not consist of underwriting guidelines. Thus, the department may not withhold the information at issue under section 552.101 of the Government Code in conjunction with section 38.003 of the Insurance Code.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. UHC states it has competitors. In addition, UHC states release of its information would give advantage to its competitors or other bidders. After review of the information at issue and consideration of the arguments, we find UHC has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we have marked under section 552.104(a) of the Government Code.²

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret is

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 private person’s claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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) 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 specific factual or evidentiary showing, not

³The following are the six factors that the Restatement gives 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 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 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6.

Humana argues some of its information is excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find Humana has demonstrated portions of its information, which we have marked, consist of commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the department must withhold the information we have marked under section 552.110(b) of the Government Code.⁴ However, we find Humana has failed to demonstrate the release of the remaining information at issue would result in substantial harm to its competitive position. *See* ORD 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); *see also* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the department may not withhold any of the remaining information under section 552.110(b).

Humana asserts some of its remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Humana has failed to establish a *prima facie* case that any portion of its remaining information at issue meets the definition of a trade secret. We further find Humana has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Therefore, the department may not withhold any of Humana's remaining information at issue under section 552.110(a) of the Government Code. Consequently, the department may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

In summary, the department must continue to rely on Open Records Letter Nos. 2015-16920, 2015-20032, and 2015-21777 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold the information we have marked under section 552.104(a) of the Government Code. The department must withhold the information we have marked under section 552.110(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 the remaining argument against disclosure of this information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Open Records Division

KJM/som

Ref: ID# 593318

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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