



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 14, 2016

Ms. Laura Cedillo
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2016-20786

Dear Ms. Cedillo

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# 626344 (ORR# W128486).

The City of San Antonio (the "city") received a request for twenty-seven categories of information, including information related to a specified request for proposals and specified audits during a specified time period. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Arthur J. Gallagher & Co. d/b/a Gallagher Benefits ("Gallagher"); Buck Consultants, L.L.C. ("Buck"); Hay Group ("Hay"); Holmes Murphy & Associates, L.L.C. ("Holmes"); McGriff, Seibels & Williams of Texas, Inc. ("MSW"); MHBT, a Marsh & McLennan Agency, L.L.C. ("MHBT"); Precision Actuarial, Inc. ("Precision"); UnitedHealthCare ("United"); and Wells Fargo Insurance Services USA, Inc. ("Wells Fargo"). Accordingly, you state, and provide documentation showing, you notified Gallagher, Buck, Hay, Holmes, MSW, MHBT, Precision, United, and Wells Fargo of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released.¹ *See Gov't Code*

¹We note the city did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See Gov't Code* § 552.301(b). Nonetheless, because third-party interests can provide a compelling reason to overcome the presumption of openness, we will consider the submitted arguments against release of the submitted information. *See id.* §§ 552.007, .302, .352; *see also* Open Records Decision No. 586 at 3 (1991).

§ 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 United and Wells Fargo. We have reviewed the submitted information and the submitted arguments.

Initially, you inform us some of the requested information is the subject of litigation pending against the Office of the Attorney General. In Open Records Letter No. 2016-01542 (2016), which pertained to a previous request for the same information, this office determined the city must release the information at issue. In response to that ruling, United filed a lawsuit against this office styled *UnitedHealth Group, Inc. v. Ken Paxton, Attorney Gen. of Tex. & the City of San Antonio*, No. D-1-GN-16-000450 (53rd Dist. Ct., Travis County, Tex.). Accordingly, to the extent the submitted information is at issue in *UnitedHealth Group, Inc.*, we will allow the trial court to resolve the issue of whether the information at issue must be released to the public.

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Gallagher, Buck, Hay, Holmes, MSW, MHBT, or Precision explaining why the submitted information should not be released. Therefore, we have no basis to conclude Gallagher, Buck, Hay, Holmes, MSW, MHBT, or Precision 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 city may not withhold the submitted information on the basis of any proprietary interest Gallagher, Buck, Hay, Holmes, MSW, MHBT, or Precision may have in the information.

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. United states it has competitors. In addition, United states release of its information would provide United's competitors with insider knowledge of its confidential bid information, trade secrets, and competitively sensitive methodologies, and would allow those companies to underbid United in future bids. After review of the information at issue and consideration of the arguments, we find United has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude to the extent United's information is not the subject of *UnitedHealth Group, Inc.*,

the city may withhold United's information under section 552.104(a) of the Government Code.²

Next, Wells Fargo states portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person 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, which holds a trade secret to be:

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* *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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

²As our ruling is dispositive, we need not address United's remaining arguments against disclosure of its information.

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

office must accept a claim that 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). 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. Open Records Decision No. 402 (1983).

Wells Fargo asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Wells Fargo has established a *prima facie* case that the information at issue constitutes trade secret information. Accordingly, the city must withhold the information, which we have marked, under section 552.110(a) of the Government Code.

Some of the remaining information is subject to section 552.136 of the Government Code.⁴ Section 552.136 provides, “Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code.

We note some of the materials at issue may 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, to the extent the submitted information is at issue in *UnitedHealth Group, Inc.*, we will allow the trial court to resolve the issue of whether such information must be released to the public. To the extent United’s information is not the subject of *UnitedHealth Group, Inc.*, the city may withhold United’s information under section 552.104(a) of the Government Code. The city must withhold the information we marked under section 552.110(a) of the Government Code. The city must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code. The city must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

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).

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.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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 626344

Enc. Submitted documents

c: Requestor
(w/o enclosures)

9 Third Parties
(w/o enclosures)