



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 29, 2017

Mr. David Wheelus
Open Records Attorney
Office of Agency Counsel
Legal Division
Texas Department of Insurance
P.O. Box 149104, MC 110-1C
Austin, Texas 78701

OR2017-06524

Dear Mr. Wheelus:

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# 651082 (TDI #179600).

The Texas Department of Insurance (the "department") received a request for all information pertaining to three specified enforcement actions.¹ You state you will release some information. You inform us you will redact certain information pursuant to section 552.136(c) of the Government Code, in addition to Open Records Decision No. 684

¹You inform us you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the department received the required deposit on January 5, 2017. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

(2009) and Open Records Letter No. 2001-4777 (2001).² You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Amica Mutual Insurance Company (“Amica”), Cigna Healthcare of Texas (“Cigna”), and Humana Health Plan of Texas, Inc. (“Humana”).³ 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 Amica and Cigna.⁴ We have considered the submitted arguments and reviewed the submitted 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. Amica states it has competitors. In addition, Amica states release of the information at issue would give advantage to its competitors. After review of the information at issue and consideration of the arguments, we find Amica has established the release of the information at issue would give an advantage to a competitor or bidder. Thus,

²Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the information described in section 552.136(b). Gov’t Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body’s decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. In Open Records Letter No. 2001-4777, we authorized the department to withhold under section 552.101 of the Government Code in conjunction with common-law privacy, information that identifies an enrollee in a health plan, including the enrollee’s name, address, telephone number, birth date, social security number, and claim number.

³We note we asked the department to provide additional information pursuant to section 552.303 of the Government Code. *See id.* § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the information submitted by the department pursuant to that request.

⁴We note Humana has informed our office that it does not object to the release of any of its information.

we conclude the department may withhold the information we have marked under section 552.104(a) of the Government Code.⁵

Cigna claims its information is confidential under section 552.101 of the Government Code in conjunction with section 401.058 of the Insurance Code. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes, including section 401.058. Section 401.051 of the Insurance Code requires the department, or an examiner appointed by the department, to visit each insurance carrier and examine the carrier’s financial condition, ability to meet liabilities, and compliance with the laws affecting the conduct of the carrier’s business. Ins. Code § 401.051(a), (b). In connection with this examination process, section 401.058 provides:

(a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

Id. § 401.058. The department informs us that none of the information at issue was a part of an examination conducted pursuant to chapter 401 of the Insurance Code. Thus, based on the department’s representation and our review, we find Cigna has failed to demonstrate the applicability of section 401.058 to the information at issue. *See* Open Records Decision No. 640 at 4 (1996) (the department must withhold any information obtained from audit “work papers” that are “pertinent to the accountant’s examination of the financial statements of an insurer” under statutory predecessor to section 401.058). Consequently, the department may not withhold the information at issue under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered

⁵As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. 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 No. 600 at 9-10 (1992) (employee's withholding allowance certificate, designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, we conclude the department must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you have failed to demonstrate the remaining information is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department may not withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Cigna also claims its information is subject to section 552.110(b) of the Government Code. 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.*; *see also* Open Records Decision No. 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). Upon review, we find Cigna has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any its information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, we conclude the department may not withhold the information at issue under section 552.110(b) of the Government Code.

In summary, 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 552.101 of the Government Code in conjunction with common-law privacy. 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.

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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a horizontal line striking through the middle of the name.

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 651082

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)