



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 30, 2017

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2017-14750

Dear Mr. Miles:

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# 664265 (HHSC Ref. No. 12148).

The Texas Health and Human Services Commission (the "commission") received a request for each Medicaid Managed Care Organization's plan for value-based contracting during a specified time period. Although the commission takes no position as to whether the submitted information is excepted under the Act, it states release of the submitted information may implicate the proprietary interests of Aetna Better Health of Texas, Inc. ("Aetna"); Amerigroup Texas, Inc. ("Amerigroup"); Blue Cross Blue Shield of Texas ("BCBSTX"); CHRISTUS Health Plans; Cigna-HealthSpring ("Cigna"); Community First Health Plan; Community Health Choice, Inc. ("CHC"); Cook Children's Health Plan; Seton Health Plan d/b/a Dell Children's Health Plan ("DCHP"); DentaQuest USA Insurance Company, Inc. ("DentaQuest"); Driscoll Children's Health Plan ("Driscoll"); El Paso First Health Plans, Inc. ("EPFHP"); FirstCare; MCNA Dental ("MCNA"); Molina Health Care of Texas, Inc. ("Molina"); Parkland Community Health Plan ("PCHP"); Scott & White Health Plan ("SWHP"); Sendero Health Plans ("Sendero"); Superior Health Plan, Inc. ("Superior"); Texas Children's Health Plan ("TCHP"); and UnitedHealthcare Community

Plan of Texas (“United”).¹ Accordingly, the commission states, and provides documentation showing, it notified the 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. *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 Aetna, Amerigroup, BCBSTX, Cigna, CHC, DCHP, DentaQuest, Driscoll, EPFHP, MCNA, Molina, PCHP, SWHP, Sendero, Superior, TCHP, and United. We have reviewed the submitted information and the submitted arguments.

Initially, 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 any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information, and the commission may not withhold any portion of it on that basis. *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.

Next, DCHP and DentaQuest note the commission expressly indicated their information at issue would be confidential and not be shared publicly. However, 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).

¹We note BCBSTX contends the commission failed to notify certain third parties of the request for information pursuant to section 552.305(d) of the Government Code. *See* Gov’t Code § 552.305(d) (providing that “[i]f release of a person’s proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision.”). However, the commission does not inform us, nor can we discern, these third parties’ proprietary interests would be implicated by the public release of the information at issue. Thus, we find this is not an instance where the commission is required to notify these third parties pursuant to section 552.305 of the Government Code.

Consequently, unless the information falls within an exception to disclosure, the commission must release it, notwithstanding any expectations or agreement specifying otherwise.

BCBSTX, DCHP, EPFHP, MCNA, PCHP, SWHP, Sendero, Superior, TCHP, and United assert portions of their information are protected under section 552.104 of the Government Code. CHC and DentaQuest assert all of their information at issue is protected under section 552.104 of the Government Code. Section 552.104(a) 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. BCBSTX, CHC, DCHP, DentaQuest, EPFHP, MCNA, PCHP, SWHP, Sendero, Superior, TCHP, and United state they have competitors. In addition, BCBSTX, CHC, DCHP, DentaQuest, EPFHP, MCNA, PCHP, SWHP, Sendero, Superior, TCHP, and United state release of their information at issue would provide an advantage to their competitors. After review of the information at issue and consideration of the arguments, we find BCBSTX, CHC, DCHP, DentaQuest, EPFHP, MCNA, PCHP, SWHP, Sendero, Superior, TCHP, and United have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may withhold all of CHC’s and DentaQuest’s information; the information BCBSTX, DCHP, MCNA, PCHP, SWHP, Sendero, and Superior marked; and EPFHP’s, TCHP’s, and United’s information we marked under section 552.104(a) of the Government Code.²

Aetna, Amerigroup, Cigna, Driscoll, and Molina state their information at issue is 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

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

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 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). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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 (1999) (to prevent disclosure of commercial or financial information, party must show

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).

by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Aetna, Amerigroup, Cigna, and Molina assert their information at issue constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Aetna, Amerigroup, Cigna, and Molina have failed to establish a *prima facie* case that any portion of their information at issue meets the definition of a trade secret. We further find Aetna, Amerigroup, Cigna, and Molina have not demonstrated the necessary factors to establish a trade secret claim for their information at issue. *See* ORD 402. Therefore, the commission may not withhold any of Aetna's, Amerigroup's, Cigna's, or Molina's information at issue under section 552.110(a) of the Government Code.

Aetna, Amerigroup, Cigna, Driscoll, and Molina argue their information at issue consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Aetna, Amerigroup, Cigna, Driscoll, and Molina have failed to demonstrate the release of any of their information at issue would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the commission may not withhold any of Aetna's, Amerigroup's, Cigna's, Driscoll's, or Molina's information at issue under section 552.110(b) of the Government Code.

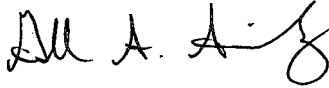
In summary, the commission may withhold all of CHC's and DentaQuest's information; the information BCBSTX, DCHP, MCNA, PCHP, SWHP, Sendero, and Superior marked; and EPFHP's, TCHP's, and United's information we marked under section 552.104(a) of the Government Code. The commission must release the remaining 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, appearing to read "Gerald A. Arismendez". The signature is fluid and cursive, with a large initial "G" and "A".

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/tdw

Ref: ID# 664265

Enc. Submitted documents

c: Requestor
(w/o enclosures)

21 Third Parties
(w/o enclosures)