



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 22, 2017

Mr. Carey E. Smith
Senior Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2017-19157

Dear Mr. Smith:

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# 669840 (HHSC Ref. No. OR-20170511-12742).

The Health and Human Services Commission (the "commission") received a request for specified affiliate reports.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of multiple third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights 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 Aetna Better Health TX ("Aetna"); Blue Cross Blue Shield of Texas ("BCBS"); Children's Medical Center Health Plan ("CMC"); Cigna-HealthSpring ("Cigna"); Dell Children's Health Plan ("DCHP"); DentaQuest USA

¹We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Insurance Co., Inc. (“DentaQuest”); FirstCare Health Plans (“FirstCare”); MCNA Dental (“MCNA”); Driscoll Health Plan (“Driscoll”); Molina Healthcare of Texas (“Molina”); Scott & White Health Plan (“Scott & White”); and Superior HealthPlan, Inc. (“Superior”).² We have reviewed the submitted information and considered 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* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests 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 commission may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, Scott & White argues a portion of its information is not responsive to the request for information. However, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the commission has submitted the information at issue for our review, we find the commission has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

Further, we note DCHP argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the commission has submitted to us for our review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the commission submitted as responsive to the request for information.

CMC, DCHP, Molina, Scott & White, and Superior contend their information is confidential under section 533.012 of the Government Code. Section 552.101 of the Government Code exempts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101

²We note El Paso First Health Plans, Inc. does not object to the release of the submitted information.

encompasses information protected by other statutes, such as section 533.012, which provides in part:

(a) Each managed care organization contracting with the commission under this chapter shall submit . . . to the commission . . . :

(1) a description of any financial or other business relationship between the organization and any subcontractor providing health care services under the contract;

...

(e) Information submitted to the commission . . . under Subsection (a)(1) is confidential and not subject to disclosure under Chapter 552, Government Code.

Id. § 533.012(a)(1), (e). CMC, DCHP, Molina, Scott & White, and Superior state they are managed care organizations that contract with the commission pursuant to chapter 533 of the Government Code. *See id.* § 533.001(4) (defining “managed care organization”). We note the submitted information consists of affiliate reports. CMC, DCHP, Molina, Scott & White, and Superior contend this information was submitted to the commission under section 533.012(a)(1) and is thus confidential under section 533.012(e).

After our review, we determined that additional information concerning the applicability and scope of sections 533.012(a)(1) and 533.012(e) of the Government Code was required to render a decision in this instance and provided written notice of this determination to the commission. *See id.* § 552.303(c)-(d). The commission responded to our request for additional information on August 4, 2017. In that response, the commission states that it makes no claim that the submitted information was collected from CMC, DCHP, Molina, Scott & White, or Superior under section 533.012(a)(1). Generally, this office will not conclude that information was submitted pursuant to section 533.012(a)(1) without such a representation from the commission. Therefore, because we are unable to conclude that the information at issue was submitted to the commission pursuant to section 533.012(a)(1), we find that none of the submitted information is confidential under section 533.012(e) and it may not be withheld under section 552.101 on that basis.

Driscoll argues section 552.101 of the Government Code in conjunction with common-law privacy for some of the submitted information. 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 intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (employee's 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), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find Driscoll has failed to demonstrate the information at issue is highly intimate or embarrassing and not of legitimate public interest. Accordingly, the commission may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

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. BCBS, DCHP, DentaQuest, FirstCare, MCNA, Scott & White, and Superior state they have competitors. BCBS, DCHP, DentaQuest, FirstCare, MCNA, Scott & White, and Superior argue release of their information at issue would provide their competitors with an unfair advantage. After review of the information at issue and consideration of the arguments, we find BCBS, DCHP, DentaQuest, FirstCare, MCNA, Scott & White, and Superior have established the release of their information at issue would give advantage to competitors or bidders. Thus, the commission may withhold the information we have marked, DentaQuest's information in its entirety, and the information BCBS, DCHP, FirstCare, Scott & White, and Superior indicated under section 552.104(a) of the Government Code.³

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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 that are 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 763, 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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* ORD 552 at 5. 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).

⁴The 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).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Aetna, Driscoll, Cigna, MCNA, and Molina argue all or portions of their information consist 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 Cigna, Driscoll, and Molina have established portions of their information, which we have marked, consist of commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the commission must withhold the information we have marked under section 552.110(b) of the Government Code.⁵ However, we find Aetna, Driscoll, Cigna, MCNA, and Molina have failed to demonstrate release of any of the remaining information would result in substantial harm to their competitive positions. *See* ORDs 661, 319 at 3. Therefore, the commission may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Cigna, MCNA, and Molina also assert all or portions of their remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Cigna, MCNA, and Molina have failed to establish a *prima facie* case that any of the remaining information meets the definition of a trade secret, nor have these parties demonstrated the necessary factors to establish a trade secret claim for this information. Therefore, the commission may not withhold any of the remaining information under section 552.110(a) of the Government Code.

In summary, the commission may withhold the information we have marked, DentaQuest’s information in its entirety, and the information BCBS, DCHP, FirstCare, and Scott & White indicated under section 552.104(a) of the Government Code. The commission must withhold the information we have marked under section 552.110(b) of the Government Code. The commission must release the remaining information.

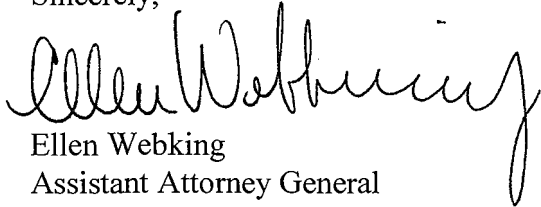
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

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

[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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/tdw

Ref: ID# 669840

Enc. Submitted documents

c: Requestor
(w/o enclosures)

22 Third Parties
(w/o enclosures)