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ATTORNEY GENERAL OF TEXAS

August 28, 2017

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

OR2017-19557

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# 670708 (Reference No. 12841).

The Texas Health and Human Services Commission (the "commission") received a request for specified information pertaining to managed care organizations during a specified time period.¹ 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 Blue Cross Blue Shield of Texas ("BCBSTX"); Children's Medical Center Health Plan ("CMCHP"); CHRISTUS Health Plan; Cigna-Health Spring ("Cigna"); MCNA Dental ("MCNA"); Molina HealthCare of Texas Insurance Company ("Molina"); Superior Health Plan, Inc. ("Superior"); Scott and White Health Plan ("SWHP"); and UnitedHealthcare Community Plan of Texas ("United").² Accordingly, the commission

¹We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (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).

²We 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.

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 BCBSTX, CMCHP, Cigna, MCNA, Molina, Superior, SWHP, and United. We have considered the submitted arguments and reviewed the submitted information.

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 party explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third party 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.

Superior and SWHP assert portions of their information are protected under section 552.104 of the Government Code. BCBSTX, MCNA, and United 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, MCNA, Superior, SWHP, and United state they have competitors. In addition, BCBSTX, MCNA, Superior, SWHP, 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, MCNA, Superior, SWHP, 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 BCBSTX, MCNA, and United's information and the information of Superior and SWHP we marked under section 552.104(a) of the Government Code.³

Cigna and Molina state their information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person

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

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.⁴ 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* 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). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply

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).

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* ORD 661 at 5.

Cigna and Molina argue their information at issue consists of commercial or financial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Molina has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold the portions of Molina’s information we marked under section 552.110(b) of the Government Code.⁵ However, we find Molina has not established any of its remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov’t Code § 552.110(b). Therefore, the commission may not withhold any of Molina’s remaining information on this basis. Additionally, we find Cigna has made only conclusory allegations the release of the information at issue would result in substantial damage 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 Cigna’s information under section 552.110(b) of the Government Code.

Cigna and Molina assert their information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude 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 Cigna and Molina have not demonstrated the necessary factors to establish a trade secret claim for their information at issue. *See* ORD 402.

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

Therefore, the commission may not withhold any of Cigna's or Molina's information at issue under section 552.110(a) of the Government Code.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 823.011 of the Insurance Code. Section 823.011 makes confidential certain information typically provided to or obtained by the Texas Department of Insurance (the "department") pertaining to the registration and examination of insurers and states, in relevant part, the following:

(a) This section applies only to information, including documents and copies of documents, that is:

(1) reported or otherwise protected under Subchapter B or C or Section 823.201(d) or (e) or Section 823.0147;

(2) disclosed to the commissioner under Section 823.010; or

(3) obtained by or disclosed to the commissioner or another person in the course of an examination or investigation under Subchapter H or Chapter 401.

(b) The information shall be confidential and privileged for all purposes. Except as provided by Subsections (c) and (d), the information may not be disclosed without the prior written consent of the insurer to which it pertains.

Id. § 823.011(a), (b). CMCHP and Superior assert their information is confidential under section 823.011 of the Insurance Code. However, the present request is for information held by the commission, not the department. We note the information at issue was not reported to or obtained by the commission as described in subsections 823.011(a)(1) through (a)(3). Instead, CMCHP and Superior submitted the information at issue to the commission pursuant to contracts the commission awarded CMCHP and Superior. Thus, section 823.011 is not applicable to the information that CMCHP and Superior submitted to the commission. Accordingly, we conclude that the information at issue is not confidential under section 823.011 of the Insurance Code and may not be withheld on that basis under section 552.101 of the Government Code.

CMCHP and Superior also assert that their information is confidential under section 533.012 of the Government Code. Section 552.101 of the Government Code also 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.

Gov't Code § 533.012(a)(1), (e). CMCHP 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 Form B filings. CMCHP 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). In response, the commission informs us that it makes no claim that the submitted information was collected from CMCHP 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.

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), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, we note an individual's name, address, and telephone number are generally not private information under common-law privacy. *See* 554 at 3 (disclosure of person's name, address, or telephone number not an invasion of privacy). We note the submitted information contains business ownership percentages. Upon review, we find the information we marked satisfies the

standard articulated by the Texas Supreme Court in *Industrial Foundation*. Thus, the commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find no portion of the remaining information at issue is highly intimate or embarrassing information of an individual that is of no legitimate public concern. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.101 of the Government Code on the basis of common-law privacy.

Section 552.101 of the Government Code also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)). After review of the remaining information, we find Molina has failed to demonstrate any portion of the information at issue falls within the zones of privacy or implicates an individual's privacy interests for purposes of constitutional privacy. Therefore, the commission may not withhold any of Molina's remaining information under section 552.101 on the basis of constitutional privacy.

We note some of the remaining information appears to 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, the commission may withhold all of BCBSTX, MCNA, and United's information and the information of Superior and SWHP we marked under section 552.104(a) of the Government Code. The commission must withhold the portions of Molina's information we marked under section 552.110(b) of the Government Code. The commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

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,



Emily Buchanan
Attorney
Open Records Division

EB/som

Ref: ID# 670708

Enc. Submitted documents

c: Requestor
(w/o enclosures)

9 Third Parties
(w/o enclosures)