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ATTORNEY GENERAL OF TEXAS

September 6, 2017

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2017-20293

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# 674298 (HHSC ORR No. 12735).

The Texas Health and Human Services Commission (the "commission") received a request for all agreements between nine specified companies and their subcontractors. 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.; Blue Cross Blue Shield of Texas ("BCBSTX"); Children's Medical Center Health Plan ("CMCHP"); Community First Health Plan; Driscoll Children's Health Plan ("Driscoll"); Superior Health Plan, Inc. ("Superior"); Texas Children's Health Plan ("TCHP"); and UnitedHealthcare Community Plan of Texas. Accordingly, the commission states, and provides documentation showing, it notified each third party 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. *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, BCBSTX, CMCHP, Driscoll, Superior, and TCHP. We have reviewed the submitted information and the submitted arguments.

Initially, we understand BCBSTX to argue its information at issue is not subject to the Act. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). BCBSTX contends its information at issue consists of "contract[s] between two private companies." BCBSTX also contends "the contract[s] do not call for the payment of public funds by any governmental body." However, we note the submitted information was collected, assembled, or maintained in connection with the transaction of official business of the commission. Accordingly, we find the submitted information is subject to the Act and the commission must release it unless it demonstrates the information falls within an exception to public disclosure under the Act. *See* Gov't Code § 552.006, .021, .301, .302. Accordingly, we will consider the submitted arguments against disclosure of this information.

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.

BCBSTX, CMCHP, and Superior assert portions of their information are 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, CMCHP, and Superior state they have competitors. In addition, BCBSTX, CMCHP, and Superior 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, CMCHP, and Superior have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may withhold the information BCBSTX and Superior marked, and CMCHP’s information we marked under section 552.104(a) of the Government Code.¹

Aetna, Driscoll, and TCHP state their information at issue is excepted from disclosure under section 552.110 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* ORD 661 at 5.

Aetna, Driscoll, and TCHP 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. Aetna, Driscoll, and TCHP explain the agreements at issue describe relationships with their affiliates and identify sensitive pricing and financial information. Further, Aetna, Driscoll, and TCHP explain disclosure of their information at issue would allow their competitors to undermine their market positions and suffer competitive harm. Upon review, we find Aetna, Driscoll, and TCHP have demonstrated their information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

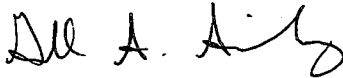
must withhold all of Aetna's, Driscoll's, and TCHP's information under section 552.110(b) of the Government Code.²

In summary, the commission may withhold the information BCBSTX and Superior marked, and CMCHP's information we marked under section 552.104(a) of the Government Code. The commission must withhold all of Aetna's, Driscoll's, and TCHP's information 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/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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/tdw

Ref: ID# 674298

Enc. Submitted documents

c: Requestor
(w/o enclosures)

9 Third Parties
(w/o enclosures)

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