



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 29, 2018

Mr. Cary E. Smith  
Mr. Jonathan Miles  
Texas Health and Human Services Commission  
P.O. Box 13247  
Austin, Texas 78711-3247

OR2017-20559A

Dear Mr. Smith and Mr. Miles:

This office issued Open Records Letter No. 2017-20559 (2017) on September 8, 2017. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision is substituted for Open Records Letter No. 2017-20559 and serves as the correct ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 693660 (HHSC Ref. No. 12952).

The Texas Health and Human Services Commission (the "commission") received a request for the "[p]harmaceutical [d]elivery [f]ee [p]ayment [m]ethodology records" for all managed care organizations during a specified time. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Aetna Better Health, Inc. ("Aetna"); Amerigroup Insurance Company & Amerigroup Texas, Inc.; Blue Cross and Blue Shield of Texas ("Blue Cross"); Children's Medical Center Health Plan ("CMCHP"); Community First Health Plans, Inc.; Community Health Choice, Inc.; Cook Children's Health Plan; CHRISTUS Health Plan ("CHRISTUS"); Driscoll Children's Health Plan; El Paso First Health Plans, Inc.; HealthSpring Life & Health Insurance Company, Inc. ("HealthSpring"); Molina Healthcare of Texas, Inc. ("Molina"); Parkland Community Health Plan, Inc.; Scott & White Health Plan; SHA LLC d/b/a FirstCare HealthPlans; Sendero Health Plan

(“Sendero”); Seton Health Plan, Inc.; Superior Health Plan (“Superior”); Texas Children’s Health Plan, Inc.; and United Healthcare Community Plan of Texas, LLC.<sup>1</sup> Accordingly, you state, and provide documentation showing, you notified the third parties 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 id.* § 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, Blue Cross, CMCHP, HealthSpring, Molina, and Superior.<sup>2</sup> We have also received comments from CaremarkPCS Health, L.L.C. (“CaremarkPCS”), a subcontractor of Aetna and CHRISTUS. We have reviewed the submitted representative sample of information and considered the submitted arguments.<sup>3</sup>

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 a protected proprietary interest 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.

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<sup>1</sup>We note the commission did not comply with section 552.301 of the Government Code in requesting a ruling from this office. *See Gov’t Code* § 552.301(e). Nonetheless, because the interest of a third party can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352.

<sup>2</sup>We note Sendero informed this office it does not object to the disclosure of its information.

<sup>3</sup>We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office. We also note we asked the commission to provide additional information pursuant to section 552.303 of the Government Code. *See Gov’t Code* § 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 commission pursuant to that request.

Aetna and Molina state their information 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 and Molina argue their information consists of commercial and financial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Aetna and Molina explain disclosure of their information would allow their competitors to undermine their market positions and cause Aetna and Molina to suffer competitive harm. Upon review, we find Aetna and Molina have demonstrated their information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold all of Aetna’s and Molina’s information under section 552.110(b) of the Government Code.<sup>4</sup>

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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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. Blue Cross, CMCHP, CaremarkPCS, HealthSpring, and Superior state they have competitors. In addition, Blue Cross, CMCHP, CaremarkPCS, HealthSpring, and Superior state release of the information at issue would give their competitors an advantage. After review of the information at issue and consideration of the arguments, we find Blue Cross, CMCHP, CaremarkPCS, HealthSpring, and Superior have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may withhold the information we indicated under section 552.104(a) of the Government Code.<sup>5</sup>

Superior asserts its remaining information is confidential under section 533.012 of the Government Code in conjunction with section 552.101 of the Government Code.

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<sup>4</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

<sup>5</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

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 533.012 of the Government Code, 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). Superior states it is a managed care organization that contracts with the commission pursuant to chapter 533 of the Government Code. *See id.* § 533.001(4) (defining “managed care organization”). The submitted information consists of pharmaceutical delivery fee payment methodology reports. Superior contends this information was submitted to the commission under section 533.012(a)(1) and is thus confidential under section 533.012(e).

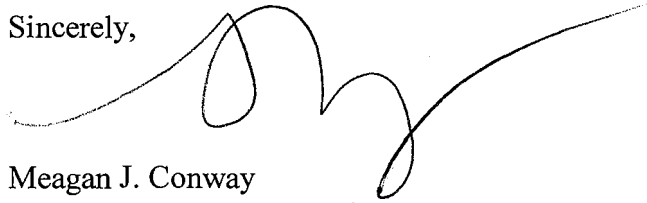
After our review, we determined that additional information concerning the applicability and scope of sections 533.012(a)(1) and 533.012(e) of the Government Code was required to render a decision in this instance and provided written notice of this determination to the commission. *See id.* § 552.303(c)-(d). In response, the commission informs us the submitted information was not collected from Superior under section 533.012(a). Generally, this office will not conclude that information was submitted pursuant to section 533.012(a)(1) without such a representation from the commission. Accordingly, we find that none of the remaining information is confidential under section 533.012(e) and it may not be withheld under section 552.101 on that basis.

In summary, the commission must withhold all of Aetna’s and Molina’s information under section 552.110(b) of the Government Code. The commission may withhold the information we indicated 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](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,



Meagan J. Conway  
Assistant Attorney General  
Open Records Division

MC/sb

Ref: ID# 693660

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

20 Third Parties  
(w/o enclosures)