



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 9, 2020

Ms. Mary Dougherty  
Open Records Attorney  
Texas Department of Insurance  
P.O. Box 149104  
Austin, TX 78714

OR2020-22783

Dear Ms. Dougherty:

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# 843618.

The Texas Department of Insurance (the "department") received a request for eleven categories of information pertaining to four named companies.<sup>1</sup> You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5. Additionally, you state release of this information may implicate the proprietary interests of Ambetter Health; Celtic Insurance Company; Superior HealthPlan, Inc. ("Superior"); and Texas Oncology, P.A. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released.<sup>2</sup> *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 arguments from Superior. We have considered the submitted arguments and reviewed the submitted information.

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<sup>1</sup> We note the department 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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup> Additionally, we note although Superior raises section 552.101 of the Government Code and sections 401.020, 401.201, 843.006, 843.078, 843.156, and 1301.0056 of the Insurance Code, Superior makes no arguments in support of these assertions. Accordingly, we do not address Superior's arguments under these sections. *See* Gov't Code §§ 552.305(b), (d)(2)(B).

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) of the Government Code 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 those parties have protected proprietary interests in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the department may not withhold any portion of the submitted information related to those third parties on the basis of any proprietary interest they may have in the information.

Texas Rule of Evidence 503(b)(1) provides the following:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client:

(A) between the client or the client's representative and the client's lawyer or the lawyer's representative;

(B) between the client's lawyer and the lawyer's representative;

(C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action;

(D) between the client's representatives or between the client and the client's representative; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made to further the rendition of professional legal services to the client or reasonably necessary to transmit the communication. *Id.* 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. *See* ORD 676. Upon a demonstration of all three factors, the entire communication is confidential under rule 503 provided the client has not waived the privilege or the

communication does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

You state Exhibit B consists of a communication between department attorneys and employees that were made for the purpose of facilitating the rendition of professional legal services to the district. You state this communication was intended to be confidential and has remained confidential. Upon review, we find you have established the information at issue constitutes a privileged attorney-client communication under rule 503. *See Harlandale Indep. Sch. Dist. v. Cornyn*, 25 S.W.3d 328 (Tex. App.—Austin 2000, pet. denied) (concluding attorney’s entire investigative report was protected by attorney-client privilege where attorney was retained to conduct investigation in her capacity as attorney for purposes of providing legal service and advice). Thus, the department may withhold Exhibit B under Texas Rule of Evidence 503.<sup>3</sup>

Superior claims its information is confidential under section 552.101 of the Government Code in conjunction with sections 401.057 and 401.058 of the Insurance Code. Section 401.051 of the Insurance Code requires the department, or an examiner appointed by the department, to visit each insurance carrier and examine the carrier’s financial condition, ability to meet liabilities, and compliance with the laws affecting the conduct of the carrier’s business. Ins. Code § 401.051(a), (b). In connection with this examination process, section 401.057 provides, in part:

(b) In conducting an examination under this subchapter, the department shall use audits and work papers that the carrier makes available to the department and that are prepared by an accountant or accounting firm meeting the qualifications of Section 401.011. The department may conduct a separate audit of the carrier if necessary. Work papers developed in the audit shall be maintained in the manner provided by Sections 401.020(b) and (c).

(c) The carrier shall provide the department with:

(1) the work papers of an accountant or accounting firm or the carrier; and

(2) a record of any communications between the accountant or accounting firm and the carrier that relate to an audit.

...

(e) Information obtained under this section is confidential and may not be disclosed to the public except when introduced as evidence in a hearing.

*Id.* § 401.057(b), (c), (e). Additionally, section 401.058 states:

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<sup>3</sup> As our ruling is dispositive, we need not address your remaining argument against disclosure.

(a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

*Id.* § 401.058. Superior generally asserts its information is confidential under chapter 401 of the Insurance Code, and is therefore confidential under sections 401.057 and 401.058. We note the department does not inform us, and we have no indication, the information at issue was obtained during the course of an examination under chapter 401 of the Insurance Code. As such, we find sections 401.057 and 401.058 are not applicable in this instance and the department may not withhold the remaining information at issue under section 552.101 of the Government Code on either of these bases.

Superior raises section 552.104 of the Government Code for a portion of its information. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3.* Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code 552.104(a). Therefore, we do not address Superior’s arguments under section 552.104 of the Government Code.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See Gov’t Code § 552.110(b).* Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). Superior generally argues some of its information is subject to section 552.110(b). Upon review, however, we find Superior has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade

secret. Therefore, the department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.110(c) of the Government Code excepts from disclosure “commercial 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[.]” *Id.* § 552.110(c). Superior generally argues its information is subject to section 552.110(c). Upon review, however, we find Superior has failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the department may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

In summary, the department may withhold Exhibit B pursuant to Texas Rule of Evidence 503. The department 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Ashley Crutchfield  
Assistant Attorney General  
Open Records Division

AC/gw

Ref: ID# 843618

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Third Parties  
(w/o enclosures)