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ATTORNEY GENERAL OF TEXAS

December 15, 2022

Ms. Mary Dougherty
Open Records Attorney
Texas Department of Insurance
P.O. Box 12030
Austin, Texas 78711

OR2022-39155

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# 987228 (Ref. No. R016544).

The Texas Department of Insurance (the "department") received a request for specified reports filed during a specified time period.¹ The department states it has released some information to the requestor. The department states it will redact personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).² Although the department takes no position as to whether the submitted information is excepted under the Act, the department states release of the submitted information may implicate the proprietary interests of Caremark, LLC ("Caremark"), Express Scripts Administrators LLC ("Express"), Humana Pharmacy Solutions Inc. ("Humana"), MedImpact Healthcare Systems Inc. ("MedImpact"), OptumRx Inc. ("Optum"), and Prime Therapeutics LLC ("Prime"). Accordingly, the department states, and provides documentation showing, it notified these interested third parties of the request

¹ We note the department sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (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).

² Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. See ORD 684.

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 Express, Humana, MedImpact, Optum, and Prime. 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) 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 Caremark explaining why the submitted information should not be released. Therefore, we have no basis to conclude Caremark has a protected proprietary interest 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 on the basis of any proprietary interest Caremark may have in the information.

Optum and MedImpact assert the information at issue is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 1369.502 of the Insurance Code. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. Section 1369.502 provides, in relevant part:

(a) Not later than March 1 of each year, each pharmacy benefit manager shall file a report with the commissioner. . .

...

(c) Not later than June 1 of each year, the commissioner shall publish the aggregated data from all reports for that year required by this section in an appropriate location on the department's Internet website. The combined aggregated data from the reports must be published in a manner that does not disclose or tend to disclose proprietary or confidential information of any pharmacy benefit manager.

Insurance Code § 1369.502(a), (c); *see id.* § 31.001(1) (commissioner defined as commissioner of insurance). Section 1369.502 provides the reporting requirements for pharmacy benefit manager information and provides the commissioner's duties with respect to such information. However, we find section 1369.502 does not make information confidential for purposes of the Act. *See id.* § 1369.502; Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public). Accordingly, the department may not withhold any of the submitted information under section 552.101 of the Government Code on that basis.

MedImpact raises section 552.104 of the Government Code for portions 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 MedImpact’s arguments under section 552.104.

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 *id.* § 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). Section 552.110(c) of the Government Code states:

- (c) 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 is [excepted from required disclosure].

Id. § 552.110(c). Express, Humana, MedImpact, Optum, and Prime argue portions of their information consist of commercial or financial information subject to section 552.110(c).³ Additionally, Prime argues some of its information consists of trade secrets subject to section 552.110(b). Upon review, we find Express, Humana, MedImpact, Optum, and Prime have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the department must withhold the information we marked under section

³ Although Optum does not cite to section 552.110 of the Government Code in its brief, we understand Optum to raise this exception based on the substance of its argument.

552.110(c) of the Government Code.⁴ However, we find Express, Humana, Optum, and Prime have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Additionally, we find Prime has failed to provide specific factual evidence demonstrating any of the remaining information is a trade secret. Therefore, the department may not withhold any of the remaining information at issue under section 552.110 of the Government Code.

Section 552.1101 of the Government Code provides, in relevant part, as follows:

(a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contract that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organization structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents, and

(2) give advantage to a competitor.

Id. § 552.1101(a). Express asserts disclosure of its remaining information at issue would reveal an individual approach to its internal processes, discounts, or pricing methodology and give advantage to a competitor. Upon review, we find Express has failed to demonstrate the applicability of section 552.1101 to any portion of the remaining information. Therefore, the department may not withhold any of the remaining information at issue under section 552.1101(a) of the Government Code.

In summary, the department must withhold the information we marked under section 552.110(c) of the Government Code. The department must release the remaining information.

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this 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,

Sarah E. Reese
Assistant Attorney General
Open Records Division

SER/pt

Ref: ID# 987228

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)