



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 21, 2022

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

OR2022-39848

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# 991911 (ORR# R016722).

The Texas Department of Insurance (the "department") received a request for information pertaining to a specified investigation.¹ You state you have released some information to the requestor. You inform us the department will withhold information subject to section 701.151 of the Texas Insurance Code pursuant to Open Records Letter No. 2005-05223 (2005) and information subject to section 401.058 of the Texas Insurance Code pursuant to Open Records Letter No. 2017-20483 (2017).² You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.

¹ You state 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² *See* Open Records Letter No. 2005-05223 (determining information acquired by the department that is relevant to an inquiry by the insurance fraud unit and that the department's commissioner deems confidential is excepted from disclosure and need not be submitted to this office for review under section 552.301 of the Government Code); Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code). Open Records Letter No. 2017-20483 is a previous determination issued to the department authorizing it to withhold, under section 552.101 of the Government Code in conjunction with section 401.058 of the Insurance Code, insurance carrier examination reports without the necessity of requesting an attorney general decision if the examination was not conducted in connection with a liquidation or receivership.

Additionally, you state release of the submitted information may implicate the proprietary interests of Blue Cross Blue Shield of Texas (“BCBSTX”). Accordingly, you state, and provide documentation showing, you notified BCBSTX of the request for information and of its 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 BCBSTX. We have considered the submitted arguments and reviewed the submitted representative sample of information.³

Initially, we note the requestor agreed to the redaction of protected health information. Accordingly, this information is not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to the request.⁴

Next, we note BCBSTX argues against information not submitted to this office for our review. This ruling does not address information beyond what the department has submitted to us for our review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information submitted by the department as responsive to the request for information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. Section 552.101 encompasses section 751.207 of the Insurance Code, which is part of the Insurance Market Conduct Surveillance Act and provides, in part, “[a] final or preliminary market conduct examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under [the Act].” Ins. Code § 751.207(a); *see id.* § 751.003(a)(6) (defining “market conduct examination”). Section 751.151 of the Insurance Code requires the department’s commissioner of insurance (the “commissioner”) to gather certain market information to perform a market analysis. *See id.* § 751.151; *see also id.* § 751.003(a)(3) (defining “market analysis”). If the commissioner determines further inquiry into a particular insurer or insurance practice is required, the commissioner may take certain market conduct actions provided in section 751.152(b) before conducting a targeted examination. *See id.* § 751.152(a). However, if the commissioner determines a market conduct action specified in section 751.152(b) is not appropriate, section 751.201 permits the commissioner to conduct a targeted examination. *See id.* § 751.201. If the commissioner conducts such an examination, the commissioner must create an examination report. *See id.* § 751.206. The department claims the information it indicated was obtained during the course of a market conduct examination

³ 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.

⁴ As we are able to make this determination, we need not address the arguments against disclosure of this information.

and is confidential under section 751.207. Although the requestor contends the information at issue does not constitute information obtained during the course of a market conduct examination, whether the information at issue consists of information obtained during such an examination is a question of fact. This office cannot resolve factual disputes in the opinion process. *See* Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body, or upon those facts that are discernible from the documents submitted for our inspection. *See* ORD 552 at 4. Based on the department's representations and our review of the information at issue, we find the department must withhold the information it indicated under section 552.101 of the Government Code in conjunction with section 751.207 of the Insurance Code.⁵

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[.]" Gov't Code § 552.110(c). BCBSTX argues the information it marked consists of commercial or financial information subject to section 552.110(c). Upon review, we find BCBSTX has demonstrated some of the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the department must withhold the information we indicated under section 552.110(c) of the Government Code. However, we find BCBSTX 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 under section 552.110(c).

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). BCBSTX argues the remaining information consists of trade secrets subject to section 552.110(b). Upon review, however, we find BCBSTX has failed to provide specific factual evidence demonstrating any portion of the remaining information is a trade secret. Therefore, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

⁵ As our ruling is dispositive, we need not address BCBSTX's arguments against disclosure of this information.

In summary, the department must withhold the information it indicated under section 552.101 of the Government Code in conjunction with section 751.207 of the Insurance Code. The department must withhold the information we indicated under section 552.110(c) of the Government Code. 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,

Joseph Hoggatt
Assistant Attorney General
Open Records Division

JWH/jxd

Ref: ID# 991911

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)