



BlueCross BlueShield  
of Texas

cc w/o eng:

Mathew Blake Hutson

June 15, 2010

**VIA OVERNIGHT MAIL AND CERTIFIED MAIL, RETURN RECEIPT REQUESTED**

The Honorable Greg Abbott  
Attorney General of Texas  
Office of the Attorney General  
Open Records Division  
P.O. Box 12548  
Austin, TX 78711-2548

Re: Public Information Request Submitted to the Texas Department of Insurance by Mr. Mathew Blake Hutson, Consumers Union Attorney General ID # 387605

Dear General Abbott:

On behalf of Blue Cross and Blue Shield of Texas ("BCBSTX" or the "Company") this brief is submitted to object to the public disclosure of certain confidential information that BCBSTX submitted to the Texas Department of Insurance (the "TDI") in connection with certain rate filings for BCBSTX's individual health plans (together, the "Rate Filing").<sup>1</sup>

Your Office assigned Open Records Request I.D. # 387605 to this request. BCBSTX is an interested party entitled to submit a response to your Office to raise and explain the applicability of any exception to the Texas Public Information Act (the "Act"). See TEX. GOV'T CODE § 552.305 (Vernon's 2005). This brief is being submitted within the time frame provided for under the Act.<sup>2</sup>

**I. BACKGROUND.**

**A. Factual Background.**

On or about December 12, 2007 (Policy Form No. IND-CMM-1) and on or about April 21, 2008 (Policy Form No. PPO-SELCHOICE-3), respectively, BCBSTX submitted rate filings (together, the "Rate Filing") to the Texas Department of Insurance ("TDI") for its individual health insurance policy. The Rate Filing contained the revisions and actuarial statement to support the Rate Filing for the individual policy. Some of the information contained in the Rate Filing is confidential and proprietary information and should not be released publicly.

<sup>1</sup> This letter brief is being provided to your Office on the condition that it and its exhibits remain confidential. We request the opportunity to redact BCBSTX's confidential information contained herein should your Office deem that any portion of this brief and/or any of the exhibits may be subject to public disclosure.

<sup>2</sup> In correspondence dated June 2, 2010, BCBSTX confirmed that the submission of this brief by June 18, 2010 would be well within the time frame to respond to the referenced open records request.

On May 14, 2010, Mr. Mathew Blake Hutson submitted an open records request to the TDI (the "Hutson Request") asking for the BCBSTX Rate Filing. According to the request, Hutson is an employee of or is otherwise affiliated with Consumers Union. A copy of the Hutson Request was attached to the TDI's May 19, 2010 letter to your office, captioned "Request Concerning Blue Cross Blue Shield Life/Health Rate Filings (TDI # 104244).

We submit this letter brief on BCBSTX's behalf to provide information concerning the confidential and proprietary nature of BCBSTX's documents submitted in connection with the Rate Filing. As detailed below, BCBSTX asserts that specific information should remain confidential and is specifically exempt from public disclosure. Enclosed with this letter brief are copies of the certain portions of the Rate Filing for which BCBSTX seeks protection. The copies are included as Exhibit A and the confidential information is identified by highlighted text. The points set out in this letter brief are supported by the affidavit of Kija Davis ("Davis Aff."), an actuary for BCBSTX, which is included as Exhibit B, respectively.

As discussed in greater detail below, specific portions of BCBSTX's Rate Filing are confidential under both the trade secret subsection and the commercial and financial information subsection of § 552.110 of the Act. Because BCBSTX's confidential information meets the criteria for exemption from public disclosure under §§ 552.110(a) and (b) of the Act, the information at issue should not be publicly disclosed.

**B. Identification of the Confidential Information.**

For your convenience and pursuant to the recommendations promulgated by your Office, we have identified the specific portions of the Rate Filing that contain confidential information and should not be disclosed.

The following information from the Rate Filing is identified and attached hereto at Exhibit A and is identified herein as the "Confidential Information." This Confidential Information consists of certain internal financial information contained in the actuarial memorandum that was submitted as part of the Rate Filing. Specifically, this information includes BCBSTX's:

- 1) Target loss ratio
- 2) Overall calculated increase
- 3) Average annual trend assumption and deductible leveraging
- 4) Morbidity or deterioration increase
- 5) Average annual premium
- 6) Exhibit II to the actuarial memorandum

The above-referenced information was submitted to the TDI by BCBSTX with the expectation that it would remain confidential due to its proprietary nature and the harmful effects if disclosed to competitors or others. While BCBSTX's published rates contained in the Rate Filing are public information, BCBSTX considers specific underlying actuarial information supporting the filing, which is identified in Exhibit A, confidential and proprietary. The

information provided in the Rate Filing goes above and beyond the information required by TDI to be submitted and was not intended to be released publicly.

**II. BCBSTX's Confidential Information is Exempt from Public Disclosure under § 552.110 of the Act.**

The Confidential Information contained in BCBSTX's Rate Filing is exempt from disclosure under § 552.110 of the Act, which protects "trade secrets" and "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."

As detailed more specifically below and in the Davis Aff., the Confidential Information consists of proprietary financial information that reveals BCBSTX's rating methodology and assumptions, claims experience, administrative expenses, and other confidential financial information that BCBSTX has developed as part of its rating process and strategy. As further demonstrated in the Davis Aff., BCBSTX's competitors would benefit if they had access to the above-referenced confidential information. As a result, BCBSTX has carried its burden of showing, by specific factual evidence, that the documents constitute trade secret information and that the release of these documents, which contain commercial and financial information, would cause BCBSTX substantial competitive harm.

**A. The Confidential Information consists of Commercial or Financial Information, the Public Disclosure of Which Would Cause BCBSTX Substantial Competitive Harm.**

The information sought under this open records request is exempt from disclosure pursuant to § 552.110(b) of the Act, which excepts from disclosure "[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."

BCBSTX faces actual competition in a market of fierce competitors. BCBSTX is a division of Health Care Service Corporation ("HCSC"), a Mutual Legal Reserve Company and an Independent Licensee of the Blue Cross and Blue Shield Association. BCBSTX provides a variety of health care coverage products for individuals, families, small group employers and large group employers. The health benefit plan marketplace is highly competitive, with BCBSTX experiencing competition from numerous companies in this area. BCBSTX's competitors include Aetna Incorporated, Cigna, Humana, United and many others. Detailed proprietary information of this type would be very valuable to BCBSTX's competitors. Davis Aff. ¶¶ 9-10.

The information which BCBSTX seeks to protect is information which could be used to create or enhance competitors' products and offerings and would result in substantial competitive injury to BCBSTX, if disclosed. With knowledge of the information described below, competitors will be able to undercut future rate filings BCBSTX might submit. BCBSTX believes that this shows a definite likelihood that substantial competitive injury will result from release of this information. See Tex. Atty Gen. ORD-669 (2000) (ruling that § 552.110(b) applied to protect

the information at issue where competitors could create or enhance their own products and market those products to the company's detriment).

As evidence of the measures BCBSTX has taken to protect its proprietary and confidential information, BCBSTX directs the reviewer's attention to the cover letters that BCBSTX provided to the TDI at the time of the submission of its Rate Filing, which are attached as Exhibit C, noting that the filing contained confidential and proprietary information that should not be publicly disclosed. While the Attorney General has previously noted that information is not confidential under the Act simply because the party submitting the information identifies it as confidential, the fact that BCBSTX classified this information as confidential provides additional evidence of the measures that BCBSTX has taken to maintain the confidentiality of this information. The fact that this information was identified as confidential also demonstrates the importance that BCBSTX placed on preventing the public disclosure of this information.

The Confidential Information includes BCBSTX's target loss ratio, the overall calculated increase for all policies, the average annual trend assumption and deductible leveraging, the morbidity or deterioration increase, the average annual premium, and the entirety of Exhibit II to the actuarial memorandum, which contains BCBSTX's assumptions and rating methodology. This information reflects the most sensitive aspects of BCBSTX's rating process, and the disclosure of the confidential financial information would cause BCBSTX substantial competitive harm. Public disclosure of this information would allow competitors directly to see or indirectly to infer how BCBSTX analyzes data to develop rates and price its products. This information is an integral component of BCBSTX's success and its continued ability to remain competitive in the marketplace. BCBSTX spent a considerable amount of time and other resources developing the Confidential Information. If this information were publicly disclosed, competitors could revise their rate strategies and underlying actuarial information in a way that undercuts BCBSTX's business opportunities, which would cause BCBSTX substantial competitive harm.

*The Target Loss Ratio and Overall Calculated Increase.* The target loss ratio and overall calculated increase is sensitive commercial and financial information. If released, competitors would be able to discern BCBSTX's administrative rates, projected profit, and claims experience, all of which is considered confidential information. In essence, disclosure of this information would allow competitors insight into the details of BCBSTX's expense margins and pricing of products. This would enable competitors to potentially forecast future prices and then under price BCBSTX's products.

*Average Annual Trend Assumption and Deductible Leveraging.* The average annual trend assumption and deductible leveraging information is commercial and financial information regarding BCBSTX's claims experience that is used internally to calculate rate revisions. The trend is the estimate of what BCBSTX anticipates claims to increase from one year to the next. If released to competitors, this information would enable competitors to duplicate at minimal cost the highly sensitive and proprietary information that lies at the core of BCBSTX's business allowing competitors the opportunity to estimate future rate revisions or other rate actions; thus, enabling competitors to selectively under price certain products in the future.

*Morbidity or Deterioration Assumption and Average Annual Premium.* The morbidity or deterioration assumption is commercial and financial information regarding BCBSTX's anticipated enrollee population. This information is based on BCBSTX's internal claims

experience, the disclosure of which would result in substantial competitive harm. The average annual premium is also commercial or financial information, which would result in substantial competitive harm, if disclosed. If this information were publicly disclosed, competitors could revise their pricing strategies in a way that undercuts BCBSTX's business opportunities, which would cause BCBSTX substantial competitive harm.

*Exhibit II to the Actuarial Memorandum.* Exhibit II contains commercial and financial information that reveals BCBSTX's claims experience, rating methodology, assumptions, and rating formulas, which provides insight into BCBSTX's internal operations. BCBSTX is in the business of insurance and benefit administration, and its actuarial and underwriting information and multiple formulas used in determining pricing for its products are key factors in its ability to remain competitive. The information contained in Exhibit II is an aggregation of experience and research conducted by BCBSTX, and is highly confidential. If this information were disclosed, competitors could use BCBSTX's proprietary processes to develop rate information to compete against BCBSTX, without expending the considerable time and effort expended by BCBSTX to develop the information, which would result in substantial competitive injury to BCBSTX. The public disclosure of this information would allow BCBSTX's competitors within the industry to have access to the underlying financial information that BCBSTX uses to provide its unique and innovative services, resulting in substantial competitive harm, if disclosed.

With knowledge of BCBSTX's internal financial information referenced above, BCBSTX's competitors would have the opportunity to revamp their rating process and selectively under price products, which will result in substantial competitive injury to BCBSTX. The Act was never intended to be a vehicle for accessing a competitor's confidential business information. Because BCBSTX has devoted significant resources to developing its unique and innovative programs and services to remain competitive in the marketplace, allowing BCBSTX's competitors to obtain this information without an expenditure of time, effort, and money similar to BCBSTX's would cause substantial competitive injury. See Davis Aff. ¶¶ 11-13.

The courts and your Office have determined that evidence demonstrating the existence of *potential* economic harm is sufficient. As detailed above, there is a strong likelihood of substantial injury if BCBSTX's Confidential Information, which is contained in Exhibit A, is disclosed to the public.

For these reasons, and as more fully set out in the Davis Aff., the Confidential Information is protected as commercial and financial information under Tex. Gov't Code § 552.110.

**B. The Confidential Information Sought in the Hutson Request Constitutes Trade Secrets.**

The Confidential Information is also exempt from disclosure pursuant to § 552.110 of the Act because it contains trade secrets. Section 552.110(a) excepts from public disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Section 757 of the Restatement of Torts defines a "trade secret" to be "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."

According to the Restatement, six factors determine whether BCBSTX's confidential information will be accorded status as a trade secret:

- 1) the extent to which the information is known outside of BCBSTX's business;
- 2) the extent to which it is known by employees and others involved in BCBSTX's business;
- 3) the extent of measures taken by BCBSTX to guard the secrecy of the information;
- 4) the value of the information to BCBSTX and to its competitors;
- 5) the amount of effort or money expended by BCBSTX in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757, comment b (1939).

Application of the factors described above to BCBSTX's Confidential Information demonstrates that the subject information constitutes protected trade secrets and that BCBSTX has established a *prima facie* case for exemption of this information from public disclosure.

(1) *The extent to which information is known outside BCBSTX.* BCBSTX provided the Confidential Information only in connection with the Rate Filing requirements. The level of detail and aggregation of the information submitted in BCBSTX's Rate Filing is not available outside the Company. This information is not distributed to any other party external to the Company due to the fact that the information would, by its public disclosure, provide BCBSTX's competitors with an unfair advantage, as described below, particularly in paragraph (4). In fact, BCBSTX controls the dissemination of such information even within the Company. As a result, this information is not known outside BCBSTX.

(2) *The extent to which the information is known by employees and others involved in BCBSTX's business.* The Confidential Information contained in BCBSTX's Rate Filing is available only to those employees whose responsibilities directly relate to compiling the information and is shared on a "need to know" basis only. The compilation of such information is not known outside of BCBSTX. BCBSTX's employees have specific passwords and user identifications that allow limited access to BCBSTX's computer system applications, with such limitations established in relation to the employees' identified tasks.

(3) *The extent of measures taken by BCBSTX to guard the secrecy of the information.* The Confidential Information contained in BCBSTX's Rate Filing is stored on a private network drive accessible only by authorized BCBSTX personnel. It is not circulated or disseminated outside the Company. Review within BCBSTX of this information is restricted to the personnel enumerated in Paragraph (2) above. This

information is stored in hard copy form and electronically in locations that are only accessible by authorized BCBSTX personnel. The information is protected by appropriate computer security controls and information management policies. BCBSTX employees are subject to the company's code of conduct which prohibits improper disclosure of proprietary and confidential information.

(4) *The value of the information to BCBSTX and its competitors.* The Confidential Information provides details for every important aspect of BCBSTX's rating process. Because there is no other comparable information related to the rating process that is available publicly, the release of the information at issue would be extremely valuable to BCBSTX's competitors. Competitors should not be allowed to use the Act as a means of obtaining access to BCBSTX's expertise in this area and of gaining an unfair competitive advantage. Because there is no other comparable information available publicly, the release of the information at issue would be extremely valuable to BCBSTX's competitors. The information would enable competitors:

- To develop business strategies that undermine BCBSTX's position in the marketplace;
- To gain insight into BCBSTX's internal rating process, allowing competitors to learn details regarding expense margins, claims experience, administrative fees, and pricing of products; and
- To have access to rating information that would enable competitors to selectively under price products in the future.

(5) *The amount of effort or money expended by BCBSTX in developing the information.* The development of the Confidential Information contained within the Rate Filing represents the combined efforts of senior level employees in a variety of departments at BCBSTX. BCBSTX expended substantial financial and internal resources in developing, compiling and maintaining this information.

(6) *The ease or difficulty with which the information could be properly acquired or duplicated by others.* BCBSTX does not release the individual components or the compilation of this information to the general public. All newly hired BCBSTX employees receive training on maintaining confidentiality. BCBSTX employs efforts such as secure shredding, audits of desktops, printers and fax machines as well as annual internal compliance drives and annual compliance training to prevent disclosure of confidential and proprietary information. The information described on page three of this letter could not be properly acquired or duplicated by others without BCBSTX's permission. No one else can generate this information without knowledge of BCBSTX's confidential operations.

See Davis Aff. ¶¶ 14-21.

Accordingly, the above-referenced information consists of protected trade secrets and commercial or financial information, the release of which will cause substantial competitive harm

The Honorable Greg Abbott

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to BCBSTX. The information, therefore, should be protected from disclosure. See TEX. GOV'T CODE § 552.110 (Vernon's 2005).

**III. CONCLUSION.**

BCBSTX believes that the proprietary and confidential information described on pages 2-3 and contained in Exhibit A, which was submitted by BCBSTX to the TDI, falls within the exceptions to public disclosure set forth under §552.110 of the Act.

We respectfully request prompt notice of any adverse decision by your Office in this matter, so that BCBSTX will have sufficient time within which to take appropriate legal action to protect its confidential information. If your Office approves the disclosure of any of the confidential information referenced in this letter, we request an opportunity to review and respond prior to the disclosure of the information.

Thank you for your consideration of these comments submitted on behalf of BCBSTX. If you have any questions regarding this letter, please feel free to contact me at 972.766.6020.

Sincerely,

D. Keith George  
Assistant General Counsel

cc: Cynthia Villarreal-Reyna, TDI (w/o enclosures)  
Lauren Villa, TDI (w/ enclosures)  
Mathew Blake Hutson, Consumers Union (w/o enclosures)  
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Kija Davis, BCBSTX (w/o enclosures)