

NO. D-1-GN-16-003858

PFIZER, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
KEN PAXTON,	§	
ATTORNEY GENERAL OF TEXAS	§	
Defendant.	§	250TH JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION

Plaintiff Pfizer, Inc. files this Original Petition for declaratory judgment. In support of its claims, Plaintiff alleges as follows:

Summary

1. Plaintiff seeks a declaratory judgment that its detailed financial information and other confidential information submitted to the Texas Health and Human Services Commission (“HHSC”) falls within one or more of the disclosure exemptions in the Texas Public Information Act, TEX. GOV’T CODE §§ 552.001, *et seq.* (the “PIA” or the “Act”) and is otherwise exempt from disclosure under Texas law, and therefore must not be disclosed in response to a request made to HHSC under the PIA. Discovery in this case is intended to be conducted under Level 2 of Rule 190.3 of the Texas Rules of Civil Procedure. Plaintiff seeks only non-monetary relief.

Parties

2. Plaintiff Pfizer, Inc. is a corporation, duly formed and existing under the laws of Delaware, with its principal place of business in New York, New York.

3. Defendant Ken Paxton is the Attorney General of the State of Texas. He is sued solely in his official capacity and may be served with process at the Price Daniel Building, 209 W. 14th Street, 8th Floor, Austin, Texas 78701.

Jurisdiction and Venue

4. This is an action for declaratory judgment pursuant to TEX. GOV'T CODE § 552.325 and CIV. PRAC. & REM. CODE §§ 37.001, *et seq.*, brought to determine an actual, justiciable controversy between Plaintiff and Defendant based on the facts set forth below. Such an action is specifically contemplated by TEX. GOV'T CODE § 552.325. Plaintiff seeks no relief beyond that provided for by TEX. GOV'T CODE § 552.325, and pleads the UDJA solely as procedurally necessary to give effect to TEX. GOV'T CODE § 552.325.

5. Pursuant to CIV. PRAC. & REM. CODE § 15.014, venue is proper in Travis County.

Factual Background

6. Plaintiff submitted highly confidential information to support an application to HHSC. After evaluation of the extensive information submitted, HHSC approved Plaintiff's application.

7. On a date unknown to Plaintiff, HHSC received a request under the PIA (the "Request") for highly confidential information submitted to HHSC by Plaintiff and many other pharmaceutical companies.

8. In connection with the Request, HHSC requested a decision from the Defendant as to whether the requested confidential information was exempt from disclosure under the PIA. HHSC failed to provide the required notice under Gov't Code § 552.305(d) to any of the companies whose information had been requested, including Plaintiff. As such, none

of the companies affected by the PIA request had an opportunity to submit briefing to the Defendant in order to protect their third-party interests under the Act.

9. On July 27, 2016, Defendant issued its decision to HHSC regarding whether it must release Plaintiff's confidential and proprietary financial information and other materials to the Requestor. *See* July 27, 2016 Attorney General Letter, attached as **Exhibit A**.

10. In Open Records Letter Ruling OR2016-16919, Defendant concluded that all of the requested confidential financial information was not exempt from release under the PIA, and should be released to the Requestor. The Letter Ruling was never sent by Defendant to Plaintiff or any of the other affected companies.

Request for Declaratory Judgment and Permanent Injunction

11. There is a dispute between Plaintiff and Defendant as to whether Plaintiff's confidential commercial and/or financial information sought by the Requestor is exempt from release under GOV'T CODE §§ 552.101, 552.104, and 552.110, CIV. PRAC. & REM. CODE § 134A.002(6), applicable case law, and related statutes. Further, release of the requested information is specifically prohibited by 42 U.S.C. § 1396r-8. Therefore, Plaintiff seeks a declaratory judgment that all such information is exempt from release under GOV'T CODE §§ 552.101, 552.104 and 552.110, CIV. PRAC. & REM. CODE § 134A.002(6), applicable case law and related statutes, and must not be disclosed or otherwise released by HHSC.

Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, Plaintiff Pfizer, Inc. prays that this Court enter a declaratory judgment that all of its confidential commercial, and/or financial and other information that Defendant ordered produced is not subject to the Act pursuant to 42 U.S.C. § 1396r-8 and/or CIV. PRAC. & REM. CODE § 134A.002(6), or is otherwise exempt from

release under TEX. GOV'T CODE §§ 552.101, 552.104 and 552.110, and under any other applicable law, and must not be disclosed or otherwise released by HHSC, and that this Court grant Plaintiff such other relief as it may show itself to be justly entitled.

August 19, 2016

Respectfully submitted,

/s/ R. F. Johnson III

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ATTORNEYS FOR PLAINTIFF



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 27, 2016

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2016-16919

Dear Mr. Miles:

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# 618119.

The Texas Health and Human Services Commission (the "commission") received a request for federal and state rebate amounts for all drugs listed on the Texas Medicaid Preferred Drug List. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted to this office by the requestor. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor is Texas State Senator Charles Schwertner. Section 552.008 of the Government Code grants access to requested information, including confidential information, to individual members, agencies, or committees of the Texas Legislature. Section 552.008 provides:

- (a) Th[e Act] does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

- (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
- (2) the information be labeled as confidential;
- (3) the information be kept securely; or
- (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

...

(c) This section does not affect:

- (1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;
- (2) the procedures under which the information is obtained under other law; or

(3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008(a)–(b), (c). In his request letter, Senator Schwertner states he is “formally requesting the ... information to use for legislative purposes” under section 552.008 of the Government Code. Further, you state the commission acknowledges the requestor seeks the information for legislative purposes, and that section 552.008 provides the Act does not grant authority to withhold information from individual members, agencies, or committees of the legislature if the information is going to be used for legislative purposes. However, you state the submitted information consists of the federal and state rebate amounts for all drugs listed on the Texas Medicaid Preferred Drug List, and that this information is made confidential under section 531.071(a) of the Government Code in conjunction with section 552.101 of the Government Code. Section 531.071(a) provides in part the following:

(a) Notwithstanding any other state law, information obtained or maintained by the commission regarding prescription drug rebate negotiations or a supplemental Medicaid or other rebate agreement, including trade secrets, rebate amount, rebate percentage, and manufacturer or labeler pricing, is confidential and not subject to disclosure under [the Act.]

Gov't Code § 531.071. You emphasize that section 531.071 states information subject to this section is confidential “notwithstanding any other state law” and that the information is “not subject to disclosure under the [Act].” You assert “[s]ince any other state law would include the provisions of the [Act] that provide access to the information by the Legislature, and the Legislature did not expressly except themselves from the confidentiality requirement in section 531.071(a), it is unclear whether or not a member of the Legislature can obtain this information.” You also state the language of section 531.071 making the requested information confidential may except the requested information from the provisions of the Act entirely. You finally argue there is a conflict between the requirements of section 552.008 and section 531.071.

We note the Act is applicable only to “public information.” See Gov't Code §§ 552.002, .021. Section 552.002(a) reads as follows:

(a) In this chapter, “public information” means information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body;

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). As previously noted, you state the submitted information consists of the federal and state rebate amounts for all drugs listed on the Texas Medicaid Preferred Drug List. You further state "[s]ections 531.070 through 531.073 [of the Government Code] require the commission to establish a preferred drug list for the Texas Medicaid program and other medical assistance programs administered by the commission or other state health and human services agencies." *See* Gov't Code §§ 531.070-.073. Thus, we find, and you do not dispute, the commission maintains the submitted information in connection with the transaction of its official business. Upon review of your representations and the submitted information, we conclude the submitted information consists of public information as defined by section 552.002 of the Government Code, and is subject to the requirement of the Act. *See eg City of Fort Worth v. Abbott*, 258 SW3d 320, 327 (Tex. App.—Austin 2008, no pet.) (finding information subject section 411.153 of the Government Code, providing a "DNA record stored in the DNA database is confidential and is not subject to disclosure under the public information law, Chapter 552", excepted from release under the Act pursuant to section 552.101). Further, we agree the information at issue is made confidential under section 531.071(a), and thus is generally excepted from required public disclosure under section 552.101.

You argue, however, the confidentiality provided under section 531.071(a) of the Government Code and the access afforded legislators to public information under section 552.008 of the Government Code present a conflict. You additionally assert the confidentiality provisions of section 531.071 prevail over the right of access afforded to members of the legislature under section 552.008, and the commission must therefore withhold the information at issue from the requestor. In addressing your contention, we are guided by the principle of statutory construction that, where possible, we are to construe statutes so as to harmonize them with other relevant laws, not to find conflict. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 311 (Tex. 2010). In this regard, Senator Schwertner asserts,

[the commission's] interpretation leads to the absurd conclusion that the legislature intentionally excluded from legislative investigation a substantial program with broad public health and safety implications for the state [footnote omitted]. Legislators and the public at large have demonstrated a heightened interest in scrutiny of health-related matters, so an intentional exclusion of oversight would not have been the legislative intent. Rather, the intent was to exclude from the general public the information considered in [section] 531.071.

We further note that in *Texas Commission on Environmental Quality v. Abbott*, 311 S.W. 3d 663 (Tex. App.—Austin 2010, pet. denied), the Third Court of Appeals construed the term “confidential information” as used in section 552.008(b). The court stated:

[w]e further observe that subsection 552.008(b) protects the confidentiality of the [Texas Commission on Environmental Quality's] (“TCEQ”) documents once they are disclosed pursuant to a legislative request for information. [Citation omitted]. Subsection 552.008(b) preserves the confidentiality of [TCEQ's] documents while in the possession of Senator Shapleigh by authorizing [TCEQ] to require Senator Shapleigh to sign a confidentiality agreement prior to receiving the documents at issue *These protections make clear that the legislature intended to give its members and committees a right of access even to confidential information.*

Id. at 675 [emphasis added]. Accordingly, we will harmonize sections 531.071 and 552.008 of the Government Code in order to avoid finding a conflict between these statutes. In so doing, we conclude section 531.071 does not prohibit the commission from making the information at issue available to Senator Schwertner for legislative purposes in accordance with section 552.008 of the Government Code. *See* Gov't Code § 552.008(b). As noted, section 552.008 permits a governmental body to require a member of the legislature to sign a confidentiality agreement for the protection of information obtained pursuant to this section. *Id.* In addition, release of this information to Senator Schwertner under

section 552.008 does not waive or affect the confidentiality of the information or waive the commission's right to assert exceptions to required public disclosure of this information to future requestors. *See id.* Therefore, the commission must release the information at issue to Senator Schwertner pursuant to section 552.008 of the Government Code.

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, 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RH/som

Ref: ID# 618119

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Unofficial copy Travis Co. District Clerk Velda L. ...