



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

April 22, 1997

Ms. Christine T. Rodriguez  
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OR97-0908

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 105466.

The Texas Department of Insurance (the "department") received a request for information concerning Boon-Chapman Benefit Administrators, Inc.'s ("Boon-Chapman") application to operate as a third-party administrator. You inform us that you will provide some of the requested information; however, you request our decision whether the remainder of the requested information is excepted from disclosure pursuant to Government Code sections 552.101, 552.103, 552.107, 552.110, 552.111, and 552.112. You have submitted the information at issue to this office for review.

Pursuant to section 552.305 of the Government Code, we notified Boon-Chapman of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. Boon-Chapman responded by asserting that its financial statements and the application for a multiple employee welfare arrangement ("MEWA") are excepted from disclosure under section 552.110 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act, 5 U.S.C. § 552, when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of

Information Act, disclosure of the requested information must be likely either to (1) impair the government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

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. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. *Id.*<sup>1</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

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

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

First, we find that Boon-Chapman has met its burden under the commercial or financial information prong of section 552.110 for its financial statements. However, we find that portions of the three audit letters included in the financial records are not protected by section 552.110 and must be released. Therefore, the department must withhold the financial statements pursuant to section 552.110, but the department must release the portions of the audit letters we have marked.

Second, we conclude that the list of participating employers constitutes a customer list that is protected as a trade secret and therefore must be withheld under section 552.110. Moreover, we note that the identities of the participating members are made confidential by statute. *See* Ins. Code art. 21.07-6, § 14(e) (third-party administrator's trade secrets, including the identity and addresses of policyholders and certificate holders are confidential); *id.* § 14A(a) (information that identifies an individual covered by a plan is confidential). We have marked the documents included in the submitted list of participating employers that must be released because they do not contain members' identifying information.

Lastly, Boon-Chapman has not met its burden of establishing that the plan documents and service agreements are protected by either prong of section 552.110; therefore, the plan documents and service agreements may not be withheld based on section 552.110.

Next, we address your arguments that the plan documents and service agreements are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with article 3.95-2(h)(3) of the Insurance Code. Article 3.95-2(h), which requires a MEWA applicant to submit certain information to obtain a final certificate of authority, makes two categories of information confidential: 1) the names and addresses of certain employers participating in the MEWA<sup>2</sup> and 2) all plan documents and agreements with service providers. It appears that the plan documents and service agreements at issue were submitted to the department for the purposes of obtaining a final certificate of authority. If this is indeed the case, then these documents are made confidential by article 3.95-2(h)(3). However, if the documents were submitted to obtain an initial certificate of authority under article 3.95-2(b), then the information is not confidential because subsection (b) contains no express confidentiality provision for any information provided during the initial certification phase. As a general rule, statutory confidentiality under section 552.101 requires express language making particular information confidential. Open Records Decision No. 478 (1987).

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<sup>2</sup>As we have ruled that the list of participating employers is protected by section 552.110, we need not address the applicability of article 3.95-2(h) to the information in this instance.

You also submit a document which you assert is excepted from disclosure under section 552.103. To show that section 552.103(a) is applicable, the department must demonstrate that 1) litigation is pending or reasonably anticipated and 2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You inform us that there is an ongoing investigation of Boon-Chapman for alleged violations of state insurance laws, and that you anticipate the investigation will culminate in an administrative contested case. We conclude that litigation is reasonably anticipated and that the submitted document is related to the reasonably anticipated litigation. Thus, you may withhold the document pursuant to section 552.103.

We note that, generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103, and it must be disclosed. Moreover, the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, you contend that some of the requested information is excepted from disclosure under sections 552.107 and 552.111. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. Section 552.111 excepts "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

After reviewing the information submitted under these claimed exceptions, we agree that most of the information is excepted by sections 552.107 and 552.111. We have marked the information that is not excepted by either of these sections and therefore must be released.

Finally, you claim that the settlement agreement and examination report summary contain information concerning the financial condition of Boon-Chapman and therefore is excepted from disclosure by section 552.112. Section 552.112(a) excepts from disclosure "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." An insurance company regulated by the department is considered a "financial institution" for purposes of section 552.112. Open Records Decision Nos. 637 (1996) at 4, 158 (1977) at 5-6. The examination report you seek to withhold was prepared by or on behalf of the department. Therefore, we conclude that the examination report is excepted from disclosure pursuant to section 552.112. However, you have not argued nor does the settlement agreement appear to relate to an examination, operating, or condition report, nor does it appear to have been prepared by or on behalf of the department. Consequently, the settlement agreement is not excepted by section 552.112. We note that the settlement agreement contains a list of participating employers which may be deemed confidential by article 3.95-2(h) as discussed above.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

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Ref.: ID# 105466

Enclosures: Marked documents

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