Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 2, 1997

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR97-1012

Dear Ms. Keller:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 105719.

The Texas Department of Insurance (the "department") received a request for all documents relating to an investigation of Aberdeen Insurance Services, Inc. (the "company"). You claim that some of the requested information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.112 of the Government Code. You also claim that the company may assert that some of the requested information is proprietary information. Pursuant to section 552.305 of the Government Code, this office informed the company of the request and of its obligation to submit to this office its arguments as why any claimed exceptions to disclosure apply to its information. The company responded, claiming that its information is excepted from required public disclosure under sections 552.101 and 552.110.[1] You have submitted samples of the requested information to this office for review.[2] We have considered the exceptions claimed and reviewed the submitted information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses

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[1]We address the company's claimed section 552.101 exception together with the department's claimed exception under that same statute.

[2]In reaching our conclusion here, we assume that 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 that those records contain substantially different types of information than that submitted to this office.

information protected by other statutes. Article 1.15, section 9, of the Insurance Code makes confidential the examination reports and related work papers obtained during the course of an examination of a carrier. Ins. Code art. 1.15, § 9, Open Records Decision No. 640 (1996).[3] We therefore conclude that the department must withhold the information which it claims falls within section 9 of article 1.15 under section 552.101 of the Government Code.[4]

You claim that some of the submitted information is excepted from disclosure under section 17(c) of article 1.15A of the Insurance Code. That section provides:

> In the conduct of the periodic review by the department's examiners, photocopies of pertinent audit work papers may be made and retained by the board. Reviews by the department's examiners are considered investigations, and all work papers obtained during the course of those investigations may be made confidential by the commissioner, unless admitted as evidence in a hearing before a governmental agency or in a court of competent jurisdiction.

Ins. Code art. 1.15A, § 17(c). The statute appears to give the commissioner the discretion to make photocopies of pertinent audit work papers confidential unless they have been admitted as evidence in a hearing. Assuming that the documents which the department claims are protected by this statute have not been admitted as evidence before a governmental agency or court, we conclude that the commissioner may make them confidential and therefore not disclose them to the public.

Section 552.101 also incorporates the informer's privilege. This privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5. You have not explained how the communications in the

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[3]We note that Open Records Decision No. 640 (1996) is a previous determination for the type of documents addressed in that opinion within the meaning of section 552.301(a) of the Government Code.

[4]For purposes of this ruling, we assume that the company is not in liquidation or receivership. Ins. Code art. 1.15, § 9; *see* Open Records Decision No. 640 (1996) at 3-4.

document you claim is encompassed by the informer's privilege relate to violations of a criminal or civil statute. Therefore, the department may not withhold the document for which it claims the informer's privilege.

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. Open Records Decision No. 574 (1990) at 5. We have reviewed the documents which you claim are excepted under section 552.107(1) and marked the information in those documents that may be withheld under that exception.

In Open Records Decision No. 647 (1996), this office concluded that a governmental body may withhold information under section 552.111 of the Government Code as attorney work product if the governmental body can show (1) that the information was created for civil trial or in anticipation of civil litigation under the test articulated in *National Tank v. Brotherton*, 851 S.W.2d 193 (Tex. 1993), or after a civil lawsuit is filed, and (2) that the work product consists of or tends to reveal an attorney's "mental processes, conclusions, and legal theories." Open Records Decision No. 647 (1996) at 5. Here, you have not established that the documents you claim are excepted under section 552.111 were prepared in anticipation of litigation. As you have claimed no other exception for these documents, they must be released.

Section 552.112(a) excepts from public disclosure information "contained in or related 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." Insurance companies are included within the term "financial institutions" for purposes of section 552.112(a). Open Records Decision No. 158 (1977) at 5-6. One of the submitted documents not previously addressed under section 552.101 contains information about the financial condition of the company. The department may withhold that document under section 552.112(a) of the Government Code.

Section 552.110 excepts from disclosure trade secrets or financial information obtained from a person and confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds 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. 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 a single or ephemeral event 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); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.[5]

After reviewing the company's arguments, we conclude that the company has made a prima facie case that its customer lists are trade secrets. Therefore, the department must withhold the identities of the company's customers in the business plan submitted to this office for review.

Section 552.110 also excepts from disclosure commercial or financial information obtained from a person and confidential by statute or judicial decision. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Association 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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). "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).

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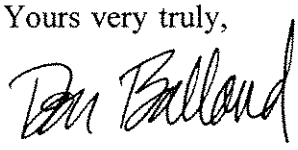
[5]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of 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.

We have reviewed the company's arguments and conclude that the company has not established that the second prong of section 552.110 applies to the remainder of its business plan. Therefore, with the exception of the identities of customers, the department may not withhold the company's business plan under section 552.110.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
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JDB/SES/ch

Ref.: ID# 105719

Enclosures: Marked documents

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