Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 24, 1997

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

OR97-1710

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# 106677.

The Texas Department of Insurance (the "department") received a request for information relating to the state's "recent investigation into the deceptive sales practices of the Prudential Insurance Company" including:

> 1. Any and all documents, including but not limited to records, memoranda, notes, correspondence, reports, or writings of any kind regarding the state of Texas' investigation into the deceptive sales practices of the Prudential Insurance Company;
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> 2. Any and all documents, including but not limited to records, memoranda, notes, correspondence, or writings of any kind regarding the state of Texas' contribution to the *Report of the Multi-state Life Insurance Task Force and Multi-state Market Conduct Examination of the Prudential Insurance Company of America, 5/96.*

These documents were circulated in confidence among seven states: Texas, California,[1] Florida, Massachusetts[2], West Virginia, Washington and Louisiana[3] (the "multi-state task

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[1]The California Department of Insurance submitted a list of documents for which it does not claim exception to release. *See* May 12, 1997 correspondence to the Office of the Attorney General.

[2]The Massachusetts Attorney General informs this office that it does not object to the release of some information that the State of Massachusetts provided to the department, namely material specified in the May 19, 1987, correspondence to this office. However, the Massachusetts Department of Insurance objects to the disclosure of all the documents, as it indicates Massachusetts has not signed the final

force") which resulted in the "Report of the Multi-State Insurance Task Force and Multi-State Market Conduct Examination of the Prudential Insurance Company of America, 5/96." You claim that some of the requested information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code. You also claim that some of the requested information may involve the proprietary interests of Prudential Insurance Company (Prudential) as well as other state insurance departments. You have submitted samples of the requested information to this office for review.[4]

Pursuant to section 552.305 of the Government Code, this office informed Prudential, the various state insurance departments and state attorneys general of the request and of the opportunity to submit exceptions to disclosure under section 552.110. Responses were received from Prudential and most states involving exceptions to public disclosure under sections 552.110 and 552.101.[5] 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 information protected by other statutes. Article 1.19-1, section 1(d), of the Insurance Code makes confidential material acquired under its authorization. Article 1.19-1 §1(d) provides, in part:

> Any information or material acquired under this article under a subpoena is not a public record for as long as the board or commissioner considers reasonably necessary to complete the investigation, protect the person being investigated from unwarranted injury, or serve the public interest.

Ins. Code art. 1.19-1 §1(d). You state that certain designated documents were obtained pursuant to subpoena under the authority of article 1.19-1 § 1(d) and that article 1.19-1 § 1(d) is still applicable. We therefore conclude that the department must withhold the information which it claims falls within section 1(d) of article 1.19-1, in conjunction with section 552.101 of the Government Code. We will address your other arguments concerning the remaining documents.

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settlement documents with Prudential.

[3]In a May 20, 1997 letter from the Louisiana Commissioner of Insurance to this office, the department objects to the release of such documents.

[4]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.

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

Please note that although you assert that section 552.101 excepts from disclosure information that may be subject to a court order, this argument is more appropriately addressed under section 552.107(2) of the Government Code. Section 552.107(2) provides an exception to disclosure if, "a court by order has prohibited disclosure of the information." The department obtained some of the documents pursuant to a class action agreement and a stipulation of confidentiality signed by a department attorney in a cause before the United States District Court in the District of New Jersey, Master Docket No. 95-4704 (AMW) MDL No. 1061 styled as *In Re The Prudential Insurance Company of American Sales Practices Litigation*. You assert that an injunction order from a Florida circuit court pertaining to information released by Florida to Texas makes certain information confidential. To the extent this order is binding on the department, section 552.107(2) is applicable.

Additionally, some of the documents were produced to plaintiffs in a federal class action suit against Prudential and these documents were obtained by the department pursuant to a class action agreement and a stipulation of confidentiality signed by a department attorney. The department asserts that the "Stipulation of Confidentiality" makes these documents confidential. Governmental bodies may not withhold information pursuant to an agreement to keep the information confidential except where specifically authorized to do so by statute. Open Records Decision 444, 437 (1986). We note that the department does not indicate the statutory authority which enables the department to enter into confidentiality agreements. Consequently, the pertinent documents may not be withheld under section 552.107(2) of the Government Code.

The states of California[6], Louisiana[7], and Massachusetts[8] submitted objections to

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[6]Specifically California asserts the applicability of Cal. Gov't Code § 6254(d)(3) which provides: "Except as provided in Section 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following: . . .(d) Contained in or related to: (1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities or of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies. (2) Examination, operating, or condition reports prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1). (3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, on behalf of, or for the use of, any state agency referred to in paragraph (1). (4) Information received in confidence by any state agency referred to in paragraph (1); (f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, poison, explosion, larceny, robbery, car jacking, vandalism, vehicle theft, or crime as defined by subdivision(c) of section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or related

the disclosure of the information they shared with the department. Accordingly, you assert that the transferred information is made confidential under these states' relevant statutory provisions. A review of the provisions to which you cite does not appear to make these documents confidential. However, to the extent that there are applicable statutes, which you have not cited, that make such information confidential, we agree it must be withheld.

You assert that some of the documents at issue may be withheld under Government Code section 552.111. 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. The documents may not be withheld under the attorney work product aspect of section 552.111.

We also note that section 552.111 of the Government Code excepts from required public disclosure:

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investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflect the analysis or conclusions of the investigating officer. (K) Records the disclosure of which is exempted or prohibited to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. *See also* Cal. Code of Civil Proc. § 2018(c) and Cal. Ins. Code § 12919.

[7]Louisiana cites to LSA-C.C.P. art. 1424 in conjunction with LSA-R.S. 22:2(I): The commissioner shall maintain, as confidential, any document or information received from the National Association of Insurance Commissioners or insurance department of other states, which is confidential in other states. The commission may provide documents or information, including otherwise confidential documents or information, to state and federal law enforcement agencies, to the National Association of Insurance Commissioner or insurance departments of other states if the recipient agrees to maintain its confidentiality.

[8]Mass Gen.Laws c. 93A, §7, clause 26 [copy attached], the state's consumer protection act, authorizes the attorney general, "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter" to obtain documents and testimony from parties having relevant information. However, the "information produced . . . shall not . . . be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same." Additionally, Massachusetts notes that under Mass.Gen.Laws c. 4, § 7, c. 26, materials compiled in connection with an investigation are exempted from the definition of "public records" which may be obtained upon request: "Public records" shall mean all books, papers [etc.] . . . made or received by any officer or employee of any agency . . . unless such materials or data fall within the following exemptions in that they are: (f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest."

> An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* In Open Records Decision No. 559 (1990), the attorney general held that the predecessor statute to section 552.111 protects drafts of a document that has been or will be released in final form and any comments or other notations on the drafts because they necessarily represent the advice, opinion and recommendation of the drafter as to the form and content of the final document.

You assert that a portion of the submitted information constitutes drafts completed by Prudential. To the extent that these are drafts prepared by Prudential and not the department, section 552.111 is not applicable. *See* Open Records Decision No. 559 (1990). This information must be released.

Section 552.110 of the Government Code excepts from disclosure trade secrets or financial information obtained from a person and confidential by statute or judicial decision. We note that this office previously ruled on the required public disclosure of various Prudential documents under section 552.110 of the Government Code. This ruling addresses only the Prudential documents that this office has not previously ruled upon. 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. 1958), *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.[9]

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).

We have reviewed Prudential's arguments and conclude that the company has not established that either prong of section 552.110 applies to the information at issue. Therefore, the department may not withhold the information under section 552.110 of the Government Code.

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,

Janet I. Monteros
Assistant Attorney General
Open Records Division

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[9]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.

JIM/glg

Ref.: ID# 106677

Enclosures: Submitted documents to follow

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