

January 21, 1999

Ms. Mary Keller  
Senior Associate Commissioner  
Legal and Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78711-2548

OR99-0185

Dear Ms. Keller:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 120295.

The Texas Department of Insurance (the "department") received requests for application information, quarterly reports, annual reports, settlement reports, and forms filed with the department by the following viatical settlement companies: Life Benefit Services, Inc.; Viatical Assistance Corp.; Genesis Viatical Co., L.L.C.; Community Partners, Inc.; Affirmative Lifestyles; Viadvocate, Inc.; Viaticus, Inc.; Eterna Benefits, L.L.C.; ALI Viatical Funding, Inc.; Life Today, Inc.; First American Fidelity Corp.; Alternative Benefit Solutions; Accelerated Benefits Capital, L.L.C.; and Lone Star Viatical, Inc. You state that some of the information has already been provided to the requestor, but you seek a decision from this office as to whether other records requested are confidential. The responsive records which you believe may be confidential have been submitted to this office for review.

Pursuant to section 552.305 of the Government Code, we notified these companies about the requests for information. This notification provided the companies an opportunity to submit reasons as to why the information at issue should be withheld from disclosure. Only four of the companies responded and provided arguments as to why information should be withheld from disclosure. The responding companies are: First American Fidelity Corp. ("First American"); Community Partners, Inc. (Community Partners"); Viaticus, Inc. ("Viaticus"); and Genesis Viatical Co., L.L.C. ("Genesis").<sup>1</sup>

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<sup>1</sup>This office received a brief from Kelco, Inc. ("Kelco"), asserting that the company's information is confidential. We note that the request did not seek information concerning Kelco. However, Kelco asked this office to reconsider its position in Open Records Letter No. 1116 (1996) that social security numbers provided to the department are not excepted from disclosure on the basis of common-law privacy, which was the exception asserted for withholding social security numbers. We note that this letter addresses the question of whether social security numbers provided in these forms are confidential.



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We first address First American's argument that some of the information "if disclosed, could breach the confidentiality of the viator in violation of 28 TAC 3.10014." Section 3.10014(a) of the Texas Administrative Code provides that the identity of the viator, the viator's family members, spouse, or significant other, is confidential and shall not be disclosed except in limited situations. As none of the information submitted by the department as responsive to the request contains identifying information about viators, their family members, spouses or significant others, we need not further address this concern.

Both First American and Genesis argue that the personally identifying information about key personnel, including social security numbers, is confidential on the basis of the employees' privacy interests. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information that is protected by common-law privacy under the test set out in *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld from public disclosure under a common-law right of privacy when the information is (1) highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 at 1 (1992). However, personally identifying information such as names, social security numbers, and addresses are not the types of information that are protected by common-law privacy. Open Records Decision No. 600 (1992). We note that social security numbers that were obtained or maintained by a governmental body pursuant to any provision of law, enacted on or after October 1, 1990, are confidential pursuant to section 405(c)(2)(C)(viii) of title 42 of the United States Code. This is a determination for the department to make.

Genesis asserts the applicability of section 552.104 to protect information from disclosure. Although neither First American nor Community Partners specifically identifies section 552.104 as an exception to disclosure, these companies appear to invoke section 552.104 in their arguments concerning competition in the marketplace. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in a particular commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 at 4 (1990). As the department has not raised section 552.104 nor indicated that it is applicable in this situation, the information at issue is not excepted from disclosure pursuant to section 552.104.

Viaticus and Genesis also assert the applicability of section 552.110 to the information at issue. Section 552.110 protects the property interests of third parties by excepting from disclosure two types of information: (1) trade secrets and (2)

commercial or financial information obtained from a person and that is privileged or confidential by statute or judicial decision. 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 at 2 (1990). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>2</sup> This office has held that if a governmental body takes no position with regard to the application of the trade secret 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 at 5-6 (1990).

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<sup>2</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 also* Open Records Decision Nos. 319 (1982), 306 (1982), 255 (1980).

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 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 at 4 (1996). 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. *Id.*

Viaticus asserts that the following information constitutes trade secrets that are confidential under the trade secret prong of section 552.110: (1) application forms and exhibits, (2) broker information and company quarterly and annual reports, and (3) viatical settlement agreement forms. The documents submitted to this office are catalogued as "financial reports", "quarterly reports", "correspondence", and "errors." We agree that Viaticus has shown that its marketing techniques (attachment 5 to application question No. 19) are trade secrets. We also agree that the broker list is protected information. We note that the remaining information for which Viaticus seeks protection does not fall within the definition of a trade secret.<sup>3</sup> As Viaticus did not argue the commercial or financial information prong of section 552.110, we need not consider whether any of the information at issue is protected under that aspect of section 552.110. The remaining Viaticus information is not protected from disclosure under section 552.110.

Genesis argues that sections 14 and 17 through 24 of its application, as well as all reports submitted to the department, and all forms submitted to the department, are confidential under both the trade secret and the commercial or financial information prongs of section 552.110. Genesis also specifically argues that section 16.2 of the reports, showing the company transactions during the reporting period, is protected financial or commercial information. The department submitted to this office records titled generally as "forms" and "quarterly reports." We agree that Genesis has shown that its responses to portions of the application form are protected commercial or financial information. Specifically, the Genesis responses to section 14 and 17 through 20 of the application are protected from disclosure. We also agree that section 16.2 of the reports showing company transactions for the reporting

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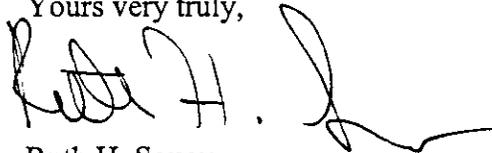
<sup>3</sup>We note that Viaticus argues its pricing structure information is a protected trade secret, but no pricing structure information was submitted to this office by the department.

period constitutes protected commercial or financial information. However, Genesis has not shown the applicability of either prong of section 552.110 to the remaining information at issue.

We note that neither First American nor Community Partners raise section 552.110 arguments concerning their information. The other companies whose information was requested did not submit any arguments to this office concerning section 552.110. *See* Open Records Decision No. 363 (1983) (third party has duty to establish how and why exception protects particular information). Thus, section 552.110 has not been shown to be applicable to any of the information concerning First American or Community Partners. Nor has section 552.110 been shown to be applicable to information concerning the other companies that did not submit arguments concerning why their information should be withheld from disclosure. Thus, this information is not protected from disclosure.<sup>4</sup>

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,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref: ID# 120295

Enclosures: Submitted documents via courier  
Open Records Letter No. 96-1116 (1996)

cc: Mr. E. J. Chaney  
2318 Greenleaf  
Wichita, Kansas 67226  
(w/o enclosures; w/Open Records Letter No. 96-1116 (1996))

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<sup>4</sup>We note that First American has asked for advance notice of the department's intent to release its records so that First American can evaluate its legal options.