



July 17, 2002

Ms. Ann Bright  
Section Chief, Agency Counsel Section  
Legal & Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2002-3890

Dear Ms. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165854.

The Texas Department of Insurance (the "department") received a request for the private passenger auto program rate filings for Old American County Mutual, Charter County Mutual, Progressive County Mutual, and Southern County Mutual.

You state, and provide documentation showing, that you notified Old American County Mutual Fire Insurance Company ("Old American") and Southern County Mutual Insurance Company ("Southern"), two of the third parties whose proprietary interests may be implicated, of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). You make no arguments regarding the proprietary nature of the third parties' information. You claim that a portion of the requested information is excepted from disclosure under section 552.137 of the Government Code.

We first note that your request for this decision does not address the request for information relating to Charter County Mutual or Progressive County Mutual. Therefore, we assume that, to the extent this information exists, it has been released to the requestor. If not, you must do so immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

Section 552.305(d) allows a third party ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code §552.305(d)(2)(B). No response was received from Southern. Because Southern did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that this company's information is excepted from disclosure under section 552.110. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that the department may not withhold any portion of Southern's information under section 552.110. Old American responded to the notice and asserted that sections 552.101 and 552.110 of the Government Code except a portion of the submitted information from public disclosure. We have considered the exceptions claimed and reviewed the submitted information.

Old American claims that its underwriting guidelines and rules pertaining to the ACCC and Harbor programs are excepted from disclosure under section 552.110 of the Government Code.<sup>1</sup> Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110(a), (b).

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

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<sup>1</sup>Old American does not seek to withhold the ACCC and Harbor program rates.

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).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 661 (1999); *see also National Parks*, 498 F.2d at 770.

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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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

After reviewing Old American's brief, we conclude that it has demonstrated the applicability of section 552.110(a) to much of the information at issue. We find that Old American has demonstrated that its underwriting guidelines and rules pertaining to insurance programs are trade secrets. Thus, we conclude that Old American has made a *prima facie* case under section 552.110(a) for that information and we have received no arguments to rebut this claim. However, we find that Old American has not adequately demonstrated that the remaining submitted information consists of either a trade secret or commercial or financial information the release of which would result in substantial competitive harm to Old American. Therefore, we determine that Old American has not shown that the remainder of the submitted information is excepted under section 552.110. *Id.* We have marked the information that the department must withhold from disclosure under section 552.110(a).

Old American also argues that the submitted information is confidential under section 31.05 of the Penal Code.<sup>3</sup> Section 31.05 provides in pertinent part:

- (b) A person commits an offense if, without the owner's effective consent, he knowingly:
  - (1) steals a trade secret;
  - (2) makes a copy of an article representing a trade secret; or
  - (3) communicates or transmits a trade secret.
- (c) An offense under this section is a felony of the third degree.

Penal Code § 31.05(b), (c). We have already concluded that the remainder of the information at issue does not consist of a trade secret. We also note that section 31.05 does not expressly make information confidential. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* Open Records Decision No. 465 at 4-5 (1987). Accordingly, the department may not withhold any portion of the submitted information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 31.05 of the Penal Code.

We note that the submitted information also contains e-mail addresses that have been provided by members of the public for the purpose of communicating electronically with the governmental body. Section 552.137 of the Government Code makes certain e-mail addresses confidential.<sup>4</sup> Section 552.137 provides in relevant part:

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<sup>3</sup>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 protected by other statutes.

<sup>4</sup>House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified at Gov't Code §

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. You inform us that no member of the public has affirmatively consented to the release of these e-mail addresses. We have marked the information the department must withhold under section 552.137.

In summary, we have marked the information that the department must withhold from disclosure under section 552.110(a). The e-mail address of a member of the public must be withheld from disclosure under section 552.137. The remainder of the submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

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552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 165854

Enc. Submitted documents

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