



OFFICE *of the* ATTORNEY GENERAL
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Ms. Cynthia Villarreal-Reyna
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Legal and Compliance Division, MC 110-1A
Texas Department of Insurance
P. O. Box 149104
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OR2003-2353

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179052.

The Texas Department of Insurance (the "department") received a request for copies of documents maintained by the department in connection with policy filings made by two specified insurance companies for six month direct-bill personal automobile policies. The requestor subsequently clarified that he was not seeking, among other items, e-mail addresses of members of the public.¹ See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Although the department does not take a position with respect to the release of the requested information, it claims that this information may be subject to third party confidentiality claims. Pursuant to section 552.305(d) of the Government Code, the department notified two interested third parties, Home State County Mutual Insurance Company ("Home State") and Old American County Mutual Fire ("Old American"), of the department's receipt of the request and of each company's right to submit arguments to this office as to why any portion of the requested information relating to each company should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990)

¹ Accordingly, this ruling does not address whether any such information contained within the submitted documents is excepted from disclosure.

(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 to disclosure under Public Information Act in certain circumstances). We have considered the arguments of all interested parties and have reviewed the submitted representative sample documents.² We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that person may submit comments stating why information should or should not be released).

Initially, we must address the procedural requirements of section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). You acknowledge, and we agree, that the department did not request this decision from us within ten business days of the department's receipt of this request. Consequently, the department failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from our office. Because the department failed to comply with the procedural requirements of section 552.301, the information at issue is now presumed public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The department must demonstrate a compelling interest in order to overcome the presumption that the information at issue is now public. *See id.* Normally, a compelling interest is demonstrated when some other source of law makes the requested information confidential or when third party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Since the department claims that the release of the requested information may implicate the proprietary interests of third parties, we will address the department's claim with respect to the information at issue.

Next, we note that the department previously requested decisions from this office regarding the public availability of program policy filings by Old American. We ruled on those requests in Open Records Letter Nos. 2003-0339 (2003) and 2002-3890 (2002). To the extent that the information at issue here is identical to the information at issue in Open Records Letter Nos. 2003-0339 and 2002-3890, the department may rely on those decisions as previous determinations regarding the public availability of the information. *See* Gov't Code § 552.301(f); *see also* Open Records Decision No. 673 (2001) (regarding previous determinations). With respect to responsive information, the public availability of which was

² 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.

not addressed in Open Records Letter Nos. 2003-0339 and 2002-3890, we address your claims and the arguments submitted by Old American.

Home State and Old American both argue that the submitted information pertaining to each company is confidential and should not be released to the requestor because confidentiality notices have been placed on the documents. We note, however, that information is not considered to be confidential under the Public Information Act (the "Act") simply because the party submitting the information anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); *see also* Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

Home State also argues that the entirety of the submitted information pertaining to Home State is excepted from disclosure pursuant to section 552.110 of the Government Code. Old American also argues that the submitted underwriting guidelines and rules pertaining to Old American are excepted from disclosure pursuant to section 552.110.³ We note that the Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, 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 also 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

³ We note that Old American does not seek to withhold the submitted program rates from the requestor.

position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.⁴ See Open Records Decision No. 552 at 5 (1990).

Section 552.110(b) of the Government Code exempts 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." Gov't Code § 552.110(b). 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. 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).

Based on our review of each company's arguments and the submitted information, we find that Home State and Old American have sufficiently demonstrated the applicability of section 552.110(a) of the Government Code to much of the information at issue. Specifically, we find that each company has sufficiently demonstrated that its respective underwriting guidelines and rules pertaining to its respective insurance programs are trade secrets. Thus, we determine that Home State and Old American have made a *prima facie* case under section 552.110(a) for that information and we have received no arguments to rebut this claim as a matter of law. Accordingly, we conclude that the department must withhold the underwriting guidelines and rules pertaining to the Home State and Old American insurance programs at issue pursuant to section 552.110(a). However, we also find that neither company has adequately demonstrated that the remaining submitted

⁴ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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 also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information with respect to each company constitutes trade secret information or commercial or financial information the release of which would result in substantial competitive harm to each company. Consequently, we also conclude that the department may not withhold any portion of the remaining submitted information pursuant to section 552.110 of the Government Code.

Home State and Old American also argue that the remaining submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 31.05 of the Penal Code.⁵ 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 note that we have already determined that no portion of the remaining submitted information constitutes trade secret information or commercial or financial information the release of which would result in substantial competitive harm to either Home State or Old American. We also note that section 31.05 does not expressly make information confidential. In order for section 552.101 to apply to information that is requested of a governmental body, a statute must contain language that expressly makes 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, we conclude that the department may not withhold any portion of the remaining submitted information pursuant to section 552.101 of the Government Code in conjunction with section 31.05 of the Penal Code.⁶

⁵ Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

⁶ We note that Old American asks this office to issue a previous determination to the department regarding the public availability of the company's underwriting guidelines. The department has not asked this office to issue a previous determination for this information. We decline to issue a previous determination regarding Old American's underwriting guidelines at this time.

In summary, the department must withhold the submitted underwriting guidelines and rules pertaining to Home States and Old American pursuant to section 552.110(a) of the Government Code. The department must release the remaining submitted information at issue 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 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 Dep't of Pub. 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,



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Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 179052

Enc. Marked documents

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