



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

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Ms. Cynthia Villarreal-Reyna  
Section Chief  
Legal and Compliance Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2003-2584

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# 179643.

The Texas Department of Insurance (the "department") received a request for the responses submitted by Allstate Insurance, State Farm Insurance, and USAA Insurance ("USAA") in answer to the department's inquiry regarding credit scoring for homeowners insurance. The department contends that an e-mail address is confidential under section 552.137 of the Government Code. Furthermore, the department asserts that USAA may have a proprietary interest in its information under section 552.110 of the Government Code. The department takes no position as to the proprietary nature of the information. The department has notified USAA of the request for information. Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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). The remaining two companies, Allstate and State Farm, have not filed responses to the department's inquiry. We have considered the department's, requestor's, and insurance company's arguments, and we have reviewed the submitted information.

First, the department informs this office that Allstate and State Farm were not required to respond to the inquiry because their inquiry information could be obtained from the market conduct examinations of the two companies that were pending at time the department sent the inquiry. The department states that it is withholding information obtained during the course of these investigations in accordance with section 9 of article 1.15 of the Insurance Code and a previous determination from this office. Section 9 of article 1.15 provides:

A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law . . . . This section applies if the carrier examined is under supervision or conservation but does not apply to an examination conducted in connection with a liquidation or a receivership under this code or another insurance law of this state.

Ins. Code art. 1.15, § 9. Open Records Decision No. 640 (1996) concluded that this provision makes confidential information the department represents to be work papers related to examination reports concerning a carrier that was not in liquidation or receivership. In Open Records Letter No. 99-1264 (1999), this office concluded that the department may rely on Open Records Decision No. 640 as a previous determination as to the protection afforded to information covered by section 9 of article 1.15, and the department need not ask this office for an open records ruling.

USAA first contends that its response is confidential under section 9 of article 1.15 because the department's section 38.001 inquiry is in the nature of a targeted market conduct examination. As the regulatory agency over insurance companies, we will rely on the department's representations as to its actions. Because the department has not informed this office that it conducted a market conduct examination of USAA under article 1.15 and that USAA's information was obtained during the course of an examination under article 1.15, we conclude that USAA's information is not confidential under section 9 of article 1.15.

Next, we address whether the response submitted by USAA is excepted from public disclosure under section 552.110 of the Government Code as proprietary information. Section 552.110 protects the property interests of private persons by excepting from disclosure trade secrets obtained from a person and 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>1</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).

USAA asserts trade secret protection for the opening two paragraphs of its response letter and answers to questions 1, 10, 13, and 18. After reviewing the requestor's comments and USAA's arguments, we conclude that USAA has established a *prima facie* case that its underwriting information is a trade secret and entitled to protection from public disclosure under section 552.110(a). The requestor's arguments do not rebut USAA's claims as a matter of law. Thus, the department must withhold the information we have marked in the first two paragraphs of USAA's response letter and all of its answers in response to questions 1, 10, 13, and 18.

The submitted information also contains an e-mail address obtained from the public. Section 552.137 of the Government Code provides:

- (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. The department informs us that the member of the public has not affirmatively consented to the release of the e-mail address contained in the submitted materials. The department must, therefore, withhold the e-mail address under section 552.137.

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<sup>1</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).

In summary, the department must withhold the information we have marked in the first two paragraphs of USAA's response letter and all of its answers in response to questions 1, 10, 13, and 18 under section 552.110(a). The marked e-mail address is confidential under section 552.137. The department must release the remaining submitted information.

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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/sdk

Ref: ID# 179643

Enc. Submitted documents

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