



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

OR2003-2839

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# 180083.

The Texas Department of Insurance (the "department") received a request for the responses submitted by the following companies in answer to the department's inquiry regarding credit scoring for automobile insurance under section 38.001 of the Insurance Code: Allstate Indemnity Company and Allstate Property and Casualty Company ("Allstate"); Mid-Century Insurance Company of Texas ("MCT"); Progressive County Mutual Insurance Company ("Progressive"); and State Farm Mutual Automobile Insurance Company ("State Farm").¹ The department contends that an e-mail address is confidential under section 552.137 of the Government Code. Furthermore, the department asserts that the insurance companies may have a proprietary interest in their 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 the insurance companies 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). We have considered the department's, requestor's, and insurance companies' arguments, and we have reviewed the submitted information.

¹ Although the requestor referred to Mid-Century Insurance Company's response, MCT informs us that it submitted a response, not Mid-Century Insurance Company, which is a separate entity from MCT.

Because Progressive did not submit arguments in response to the section 552.305 notice, we have no basis to conclude that Progressive'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). Therefore, the department must release Progressive's information to the requestor. This office received comments from Allstate, State Farm, and MCT.

First, MCT contends that some of its information is excepted from public disclosure pursuant to section 36.158 of the Insurance Code because the information MCT submitted in response to the department's inquiry is information that the department subpoenaed. Section 36.158 states:

(a) A record or other evidence acquired under a subpoena under this subchapter is not a public record for the period the commissioner considers reasonably necessary to:

- (1) complete the investigation;
- (2) protect the person being investigated from unwarranted inquiry; or
- (3) serve the public interest.

Ins. Code § 36.158(a). The Commissioner of Insurance has not informed this office that he wishes to withhold the information in accordance with this section. Thus, the department may not withhold MCT's information under section 36.158.

Second, MCT urges that it is prohibited by two court orders from disclosing the submitted information. Section 552.107(2) of the Government Code excepts from required public disclosure information "a court by order has prohibited disclosure of the information." The protective orders state all information designated as confidential produced or exchanged in the course of litigation shall be used solely for the purpose of preparation and trial of the cases and shall not be disclosed to any person. *Villanueva v. Texas Farmers Ins. Co., Mid-Century Ins. Co. of Tex., and Farmers Tex. County Mut. Ins. Co.*, No. GN0-01347 (53rd Dist. Ct., Travis County, Tex., Dec. 11, 2001); *Paladino v. Mid-Century Ins. Co. of Tex., Texas Farmers Ins. Co., and Farmers Tex. County Mut. Ins. Co.*, No. GN200207 (250th Dist. Ct., Travis County, Tex., Nov. 19, 2002). The department, which is the entity that may have to disclose MCT's information, is not a party to the two protective orders. Thus, the department may not withhold MCT's information pursuant to section 552.107(2).

Third, MCT, Allstate, and State Farm argue that section 38.002 of the Insurance Code deems their information confidential. Section 38.002, which contains a confidentiality provision for certain insurers' underwriting guidelines, reads in pertinent part as follows:

(a) The department or the office of public insurance counsel may obtain a copy of an insurer's underwriting guidelines.

(b) Underwriting guidelines are confidential, and the department or the office of public insurance counsel may not make the guidelines available to the public.

Ins. Code § 38.002. This provision does not apply to the underwriting guidelines of a county mutual insurance company. *See Open Records Decision No. 653 at 2-3 (1997)*. The department states that it "does not assert that this information is otherwise confidential." In addition, the department informs this office that this information is not considered underwriting guidelines confidential under section 38.002. Thus, MCT's, Allstate's, and State Farm's responses are not confidential under section 38.002.

Fourth, State Farm and Allstate argue that their responses to questions 7 and 8 are protected from public disclosure under section 17.61(f) of the Business and Commerce Code. This section requires the Office of the Attorney General to withhold all documentary material that its consumer protection division obtained pursuant to a Civil Investigative Demand. State Farm's answers to these two questions referred the department to materials it produced in response to a Civil Investigative Demand. The department did not submit these materials to this office. Thus, this ruling does not address the public nature of such materials. As for Allstate, the inquiry response shows that Allstate directly answered these questions and did not refer to any materials produced in response to a Civil Investigative Demand. Thus, Allstate's information is not confidential under section 17.61(f).

Fifth, MCT, Allstate, and State Farm contend their information 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 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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).² 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).

State Farm and Allstate assert protection under both prongs of section 552.110 for their responses. After reviewing State Farm's and Allstate's arguments, we conclude that State Farm and Allstate have not established a *prima facie* case that their responses are trade secrets and entitled to protection from public disclosure under section 552.110(a). Moreover, State Farm and Allstate have not provided specific factual or evidentiary showings that substantial competitive injury would likely result from disclosure of their responses under section 552.110(b). Thus, the department must release State Farm's and Allstate's responses.

²The 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).

MCT argues that its information is protected as a trade secret and commercial or financial information. After reviewing MCT's arguments and information, we have marked the information that is protected under section 552.110(b) as commercial or financial information. Therefore, the department must withhold MCT's information we have marked under section 552.110(b). As for the remaining information, we conclude that the information does not meet the definition of a trade secret and that MCT has not established a prima facie case for withholding the remaining information. Hence, the department may not withhold MCT's remaining information under section 552.110(a).

Lastly, MCT maintains that its information is confidential under sections 36.159 and 38.001(d) of the Insurance Code. Section 36.159 states, "[a] record subpoenaed and produced under this subchapter that is otherwise privileged or confidential by law remains privileged or confidential until admitted into evidence in an administrative hearing or a court." Ins. Code § 36.159(a). Section 38.001(d) states, "[a] response made under this section that is otherwise privileged or confidential by law remains privileged or confidential until introduced into evidence at an administrative hearing or in a court." *Id.* § 38.001(d). We have determined that MCT's remaining information is not confidential under section 552.110. MCT has not cited to nor do we know of any others laws that make MCT's remaining information confidential. Because MCT's remaining information is not otherwise privileged or confidential by law, the department may not withhold MCT's remaining information under either section 36.159 or 38.001(d).

However, we note that some of MCT's information is copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

The submitted information also contains e-mail addresses 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 members of the public have not affirmatively consented to the release of the e-mail addresses contained in the submitted materials. The department must, therefore, withhold the e-mail addresses under section 552.137.

In summary, the department must withhold MCT's information that we have marked under section 552.110. The marked e-mail addresses are 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).

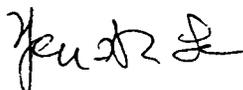
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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# 180083

Enc. Submitted documents

c: Mr. James H. Mallett
1623 Greenhaven Drive
Richardson, Texas 75080
(w/o enclosures)

Mr. Mark L. Walters
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Ms. Mary F. Keller
York, Keller & Field
1265 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
(w/ submitted documents)

Ms. Jo Betsy Norton
Regional Counsel
Allstate Insurance Indemnity Company
Allstate Property & Casualty Insurance
1005 Congress Avenue, Suite 825
Austin, Texas 78701
(w/o enclosures)

Mr. William H. Graves
President
Progressive County Mutual
1124 South IH-35
Austin, Texas 78704-2614
(w/o enclosures)