



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2006

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

OR2006-04847

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 248663.

The Texas Department of Insurance (the "department") received a request for information relating to the "Esurance" rate filing and amendments of Home State Insurance Group ("Home State"). You inform us that the department has released some of the requested information. You claim that some of the information that you have submitted is excepted from disclosure under section 552.101 of the Government Code. You also believe that the submitted information may implicate the proprietary interests of Home State. You notified Home State of this request for information and of its right to submit arguments to this office as to why the requested information should not be released.¹ We have considered the exception you claim and have reviewed the submitted information.

We note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 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). As of the date of this decision, this office has received no correspondence from Home State. Thus, Home State has not demonstrated that any of the

¹*See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

submitted information is proprietary for the purposes of the Act. *See* Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the department's claim under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. You raise section 552.101 in conjunction with section 38.002 of the Insurance Code, which provides in part:

(b) Each insurer shall file with the department a copy of the insurer's underwriting guidelines. The insurer shall update its filing each time the underwriting guidelines are changed. If a group of insurers file one set of underwriting guidelines for the group, they shall identify which underwriting guidelines apply to each company in the group.

...

(d) The department or the office of public insurance counsel may disclose to the public a summary of an insurer's underwriting guidelines in a manner that does not directly or indirectly identify the insurer.

...

(f) The underwriting guidelines are subject to Chapter 552, Government Code.

Ins. Code § 38.002(b), (d), (f). You state that the submitted documents contain underwriting guidelines of Home State that are subject to section 38.002. We note that Home State appears to be a county mutual insurance company. Section 38.002 of the Insurance Code is made specifically applicable to the underwriting guidelines of a county mutual insurance company. *See* Ins. Code § 38.002(a)(1) (defining "insurer" for purposes of Ins. Code § 38.002). Thus, section 38.002 supersedes the determination in Open Records Decision No. 653 (1997) that a predecessor statute was not applicable to the underwriting guidelines of a county mutual insurer. *See* ORD 653 at 2-4 (addressing former Ins. Code art. 1.24D).

You inform us that the department does not have a summary of Home State's underwriting guidelines and is therefore unable to release such a summary under section 38.002(d).² You

²As you correctly note, the Act does not require the department to release information that did not exist when it received this request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

also state that, because the requestor has only asked for information relating to Home State, "there would be no way to release the underwriting guidelines without identifying Home State in an indirect manner." You therefore seek to withhold the marked portions of the submitted information, which you inform us are the underwriting guidelines in question, under section 552.101 of the Government Code in conjunction with section 38.002. You assert that release of this information would violate section 38.002(d).

We disagree. Statutory confidentiality under section 552.101 requires express language that makes certain information confidential or states that information shall not be released to the public. *See* Open Records Decision No. 478 at 2 (1987). Thus, for the purposes of section 552.101, a statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from a statutory structure. *See* Open Records Decision No. 658 at 4 (1998). Section 38.002 of the Insurance Code does not expressly provide for the confidentiality of the requested underwriting guidelines or any other information. *Compare* Ins. Code 38.002(d) ("The department or the office of public insurance counsel may disclose to the public a summary of an insurer's underwriting guidelines in a manner that does not directly or indirectly identify the insurer.") *with id.* § 38.003(d) ("Underwriting guidelines are confidential, and the department or the office of public insurance counsel may not make the guidelines available to the public.")³ Furthermore, Home State's underwriting guidelines are not themselves implicitly confidential, for the purposes of section 552.101, merely because section 38.002(d) provides for the release of a de-identified summary of the guidelines. *See* Open Records Decision No. 525 at 4 (1989) (information cannot be withheld from public disclosure by negative implication simply because statute designates other specific information as public information). Therefore, having considered your arguments, we conclude that the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 38.002 of the Insurance Code. As you claim no other exception to disclosure, the submitted information must be released.

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

³We note that section 38.003 "applies to all underwriting guidelines that are not subject to Section 38.002." Ins. Code § 38.003(a).

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).

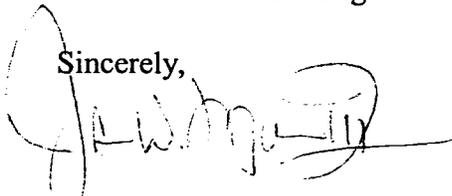
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 248663

Enc: Submitted documents

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