



ATTORNEY GENERAL OF TEXAS
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September 7, 2006

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division, MC 110-1A
Texas Department of Insurance
P. O. Box 149104
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OR2006-10421

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# 258719.

The Texas Department of Insurance (the "department") received six requests for information pertaining to the workers' compensation certification applications for Concentra HCN and Concentra Texas Star Network. You state that the department has released a portion of the requested information to the requestors pursuant to Open Records Letters Nos. 2006-04182 (2006) and 2006-05643 (2006). You claim that portions of the remaining requested information are excepted from disclosure under sections 552.101, 552.136, and 552.137 of the Government Code.¹ You also claim that the requested information may contain the proprietary information of a third party. Although you take no position on the proprietary nature of the information, you state, and provide documentation showing, that you have notified Concentra Integrated Services ("Concentra") of the requests and of its opportunity to submit comments to this office as to why the requested information should not be released to the requestors. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542

¹The department informs us it has redacted social security numbers from the requested information pursuant to section 552.147 of the Government Code. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

(1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, you acknowledge, and we agree, that the department has not complied with the statutory deadlines prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless a compelling reason exists for withholding the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (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). A compelling reason for withholding information is demonstrated where information is made confidential by other law or where third-party interests are at issue. Open Records Decision No. 150 (1977). Because third-party interests may be affected, and because sections 552.101, 552.136, and 552.137 can provide compelling reasons to withhold information, we will address the submitted arguments for the submitted information.

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. The department claims that the contracts you have marked are confidential under section 1305.102(k), 1305.152(a), or 1305.154(a) of the Insurance Code. Section 1305.102(k) of the Insurance Code provides “[a] management contract filed with the department under this section is confidential and is not subject to disclosure as public information under [the Act].” Ins. Code § 1305.102(k). Section 1305.152(a) of the Insurance Code provides “[a] network shall enter into a written contract with each provider or group of providers that participates in the network. A provider contract under this section is confidential and is not subject to disclosure as public information under [the Act].” Ins. Code § 1305.152(a). Section 1305.154(a) of the Insurance Code provides “[e]xcept for emergencies and out-of network referrals, a network may provide health care service to employees only through a written contract with an insurance carrier. A network-carrier contract under this section is confidential and is not subject to disclosure as public information under [the Act].” Ins. Code § 1305.154(a). The department explains that the contracts you have marked are the types of contracts made confidential under sections 1305.102(k), 1305.152(a), and 1305.154(a) of the Insurance Code. Based on your representations, we agree that the information you have marked is confidential under these sections of the Insurance Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the

information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). Based upon our review, the department must withhold the personal financial information we have marked under section 552.101 in conjunction with common law privacy.

Concentra raises section 552.110 of the Government Code. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. See Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to its competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 (1982), 306 (1982), 255, 232. This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*

Concentra asserts that some of the remaining information constitutes a trade secret under section 552.110(a). Upon review of the submitted arguments and the information at issue, we determine that Concentra has demonstrated that some of the information at issue, which we have marked, qualifies as a trade secret for purposes of section 552.110(a). However, we find that none of the remaining information at issue may be withheld on this basis. *See* ORD 552 at 5-6; *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939).

Concentra also argues that some of the submitted information constitutes commercial or financial information protected under section 552.110(b). Upon review, we conclude that Concentra has demonstrated that some of the information at issue, which we marked, constitutes commercial or financial information, the release of which would cause Concentra

substantial competitive harm. *See* Open Records Decision No. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). However, none of the remaining information at issue may be withheld on this basis. *See* ORD 319 at 3 (information relating to organization, personnel, market studies, professional references, qualifications and experience not ordinarily excepted from disclosure under statutory predecessor to section 552.110).

Section 552.136 of the Government Code provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, the department must withhold the insurance policy and bank account numbers we have marked pursuant to section 552.136.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The e-mail addresses you have marked and the additional e-mail addresses we have marked do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that the relevant members of the public have affirmatively consented to the release of these e-mail addresses. Therefore, the department must withhold the e-mail addresses you have marked and the additional e-mail addresses we have marked under section 552.137.

Finally, the department claims that some of the submitted information is protected by copyright. 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).

In summary, the department must withhold the information you have marked under sections 1305.102(k), 1305.152(a), and 1305.154(a) of the Insurance Code in conjunction with section 552.101 of the Government Code. The department must withhold the information we have marked under common law privacy in conjunction with section 552.101 of the Government Code. The department must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The department must

withhold the e-mail addresses you have marked and the additional e-mail addresses we have marked under section 552.137. The remaining submitted information must be released to the requestors, but any information protected by copyright must be released in accordance with copyright law.

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, 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,



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Open Records Division

TLH/krl

Ref: ID# 258719

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