



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2006

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2006-13538

Dear Ms. Waitt:

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# 264783.

The Texas Department of Insurance (the "department") received a request for copies of URA Plans for American Specialty Health Networks ("ASHN"), Hartford Fire Insurance Co. ("Hartford"), Liberty Mutual Managed Care ("Liberty"), and Physicians Review Network ("PRN"). You state that some of the requested information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.111, 552.136, 552.137, and 552.147 of the Government Code. You also claim that the requested information may contain the proprietary information of third parties. Although you take no position on the proprietary nature of the information, you state, and provide documentation showing, that you have notified ASHN, Hartford, Liberty, and PRN of the requests and of their 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 (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.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why

information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, Hartford has not submitted to this office any reasons explaining why its information should not be released. Therefore, Hartford has provided us with no basis to conclude that it has a protected proprietary interest in any of the submitted information. *See, e.g., id.* § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, we conclude that the department may not withhold any portion of the submitted information on the basis of any proprietary interest Hartford may have in the information.

Section 552.101 of the Government Code exempts from required public 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 other statutes make confidential. The department claims that a portion of the submitted information is confidential under article 21.58A of the Insurance Code. Article 21.58A relates to Health Care Utilization Review Agents and provides in part:

(i) Each utilization review agent shall utilize written medically acceptable screening criteria and review procedures which are established and periodically evaluated and updated with appropriate involvement from physicians, including practicing physicians, dentists, and other health care providers . . . Such written screening criteria and review procedures shall be available for review and inspection to determine appropriateness and compliance as deemed necessary by the commissioner and copying as necessary for the commissioner to carry out his or her lawful duties under this code, provided, however, that any information obtained or acquired under the authority of this subsection and article is confidential and privileged and not subject to the open records law or subpoena except to the extent necessary for the commissioner to enforce this article.

Ins. Code art. 21.58A § 4(i). You explain that the submitted review procedures and screening criteria are part of Hartford, Liberty, PRN, and ASHN's utilization review plans, and are the types of information that are confidential under section 4(i) of article 21.58A. Based on your representations, we agree that the information you have marked is confidential pursuant to section 21.58A of the Insurance Code and must be withheld under section 552.101 of the Government Code.¹

¹As our ruling under section 21.58A of the Insurance Code is dispositive, we need not address arguments under section 552.110 of the Government Code for this portion of the submitted information.

The department and ASHN claim that portions of the submitted information are protected by common-law privacy, which is also encompassed by section 552.101. Common-law privacy 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). 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). This office has stated on several occasions that an individual's home addresses and telephone numbers are generally not protected by common-law privacy under section 552.101. See Open Records Decision Nos. 554 at 3 (1990) (disclosure of a person's home address and telephone number is not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers do not qualify as "intimate aspects of human affairs"). Furthermore, we generally do not consider an individual's date of birth to be highly intimate or embarrassing information that is protected under common-law privacy. Upon review, we agree that you must withhold the marked financial information pursuant to section 552.101 in conjunction with common-law privacy. However, we find that no portion of the remaining submitted information is highly intimate or embarrassing information for the purposes of section 552.101, and none of it may be withheld on that basis.

Next, Liberty and PRN contend that portions of their information are excepted from disclosure under 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 *id.* § 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. 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 No. 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. Open Records Decision No. 552 (1990). 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. *See id.*; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Having considered Liberty and PRN's arguments and reviewed the submitted information, we find that the information we have marked must be withheld pursuant to section 552.110(b). However, we determine that neither Liberty nor PRN has demonstrated that any portion of the remaining information constitutes trade secret information or commercial or financial information, the release of which would cause them substantial competitive harm. *See Open Records Decision Nos. 552 at 5-6, 661* (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is "simply information as to single or ephemeral events in the conduct of the business" rather than "a process or device for continuous use in the operation of the business"). Accordingly, pursuant to section 552.110, the department must withhold only those portions of the submitted information that we have marked under that section.

Next, we address your arguments under section 552.111 of the Government Code, which excepts from public disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. Section 552.111 encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2* (1993). The purpose of this exception is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2* (1990).

In *Open Records Decision No. 615*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See Open Records Decision No. 615 at 5*. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See Open Records Decision No. 631 at 3* (1995). Furthermore, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See Open Records Decision No. 615 at 5*. But, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See Open Records Decision No. 313 at 3* (1982).

You state that the information you seek to withhold under section 552.111 consists of communications exchanged between department employees. You also state that these communications “address the handling of regulatory matters, recommended actions, and opinions and analyses of regulatory matters.” After reviewing your arguments and the information at issue, we find that the department may withhold the information at issue under section 552.111 of the Government Code.

The department also asserts that the marked insurance policy numbers are excepted from disclosure under section 552.136 of the Government Code. Section 552.136 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 numbers it has marked in the submitted information pursuant to section 552.136.

Next, the department claims that section 552.137 of the Government Code applies to the marked e-mail addresses. Section 552.137 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 id.* § 552.137(a)-(c). The e-mail addresses contained in the submitted information are not of a type specifically excluded by section 552.137(c). Accordingly, the department must withhold the e-mail addresses you have marked pursuant to section 552.137.

Section 552.147 of the Government Code provides that “[t]he social security number of a living person is excepted from” required public disclosure under the Act. *Id.* § 552.147. Therefore, the department must withhold the social security numbers you have marked under section 552.147.²

You inform us that some of the submitted information bears notices of copyright protection. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright law unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials that are protected by copyright law, 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).*

²We note that 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.

In summary, the department must withhold the information it has marked under section 552.101 of the Government Code in conjunction with section 21.58A of the Insurance Code, section 552.101 of the Government Code in conjunction with common-law privacy, and sections 552.111, 552.136, 552.137, and 552.147 of the Government Code. The department must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released to the requestor, 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).

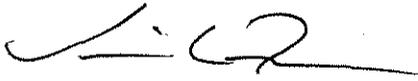
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Jaime L. Flores
Assistant Attorney General
Open Records Division

JLF/eb

Ref: ID# 264783

Enc. Submitted documents

c: Mr. Michael Hamby
Claims Eval
7080 Wildwood Place #160
Granite Bay, California 95746
(w/o enclosures)

Ms. Amanda Mineer
American Specialty Health Networks
777 Front Street
San Diego, California 92101
(w/o enclosures)

Ms. Julie McCollum
Hartford Fire Insurance Company
690 Asylum Avenue
Hartford, Connecticut 06115
(w/o enclosures)

Ms. Shirley Dillon
CT Corporation System
Hartford Fire Insurance Company
350 North St. Paul Street
Dallas, Texas 75201
(w/o enclosures)

Ms. Becky Sorenson
Liberty Mutual
100 Liberty Way
Dover, New Hampshire 03821
(w/o enclosures)

Ms. Becky Sorenson
100 Lincolnway West
Mishawaka, Indiana 46544
(w/o enclosures)

Ms. Joan F. Livesay
Physician's Review Network
7320 North Dreamy Draw Drive
Phoenix, Arizona 85020
(w/o enclosures)

Ms. Joan F. Livesay
Physician's Review Network
4422 North 24th Street
Phoenix, Arizona 85016
(w/o enclosures)

Ms. Lisa M. Smith
American Specialty Health
777 Front Street
San Diego, California 92101
(w/o enclosures)

Mr. James M. Czapla
Liberty Mutual
175 Berkeley Street, Mail Stop 06E
Boston, Massachusetts 02117
(w/o enclosures)