



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 10, 2008

Ms. Cynthia Villarreal-Reyna
Section Chief
Agency Counsel
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Texas Department of Insurance
P.O. Box 149104
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OR2008-02413A

Dear Ms. Villarreal-Reyna:

This office issued Open Records Letter No. 2008-02413 (2008) on February 22, 2008. In that ruling we determined, among other things, that because Legacy Benefits Corporation d/b/a Legacy Settlements Corporation ("Legacy") did not submit comments to this office explaining why its requested information should not be released, we had no basis to withhold the information. We therefore ordered the release of Legacy's information. Legacy now informs us that it was not notified of the request for information and its opportunity to submit comments to this office prior to the issuance of Open Records Letter No. 2008-02413. Legacy has submitted comments explaining why its information should not be released and has asked this office to reconsider Open Records Letter No. 2008-02413. We have considered Legacy's request and will reconsider the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on February 22, 2008. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")).

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# 302782.

The Texas Department of Insurance (the "department") received a request for the most recent life settlement reports for seventeen named companies. We understand you have provided,

or will provide, the requestor with some of the requested reports. You state you have no responsive information for one of the companies.¹ Although you take no position with respect to the public availability of the submitted information, you believe this information may implicate the proprietary interests of Life Settlement Solutions, Inc. ("LSS"), Life Settlement Corporation d/b/a Peachtree Life Settlements ("Peachtree"), and Legacy. Accordingly, you notified these companies of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). LSS, Peachtree, and Legacy have submitted arguments. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us that a portion of the requested information related to Coventry First of Texas, LLC was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-08610 (2007). With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the department must continue to rely on the ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2007-08610. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the information not previously ruled upon, we will address the submitted arguments.

Next, we note, and you acknowledge, that the department has not complied with the time period prescribed by section 552.301(b) of the Government Code in seeking an open records decision from this office. When a governmental body fails to comply with the requirements of section 552.301, the information at issue is presumed public. *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). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See* Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. A compelling reason exists when third-party interests are at stake or when information is confidential under other

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *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), 563 at 8 (1990), 555 at 1-2 (1990).

law. Open Records Decision No. 150 (1977). Because third party interests are at stake in this instance, we will address whether the submitted information is excepted under the Act.

LSS asserts that its submitted information is not subject to the Act. The Act is applicable to "public information." See Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, virtually all information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); see also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). LSS argues that its information is not public within the meaning of the statute because the "information does not contain any 'information about the affairs of government and the official acts of public officials and employees,' [and] it is not of the type intended to be covered by the Act." However, the department has submitted the requested viatical report, which was collected, assembled, or maintained in connection with the transaction of the department's official business and the department is a governmental body as defined by section 552.003. Therefore, we conclude that the viatical report pertaining to LSS is subject to the Act and must be released unless LSS demonstrates that the information falls within an exception to public disclosure under the Act. See Gov't Code § 552.305(b).

Peachtree argues that its submitted information is excepted from disclosure because it was provided to the department with the expectation that it would be kept confidential or it is subject to a non-disclosure agreement. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Consequently, unless Peachtree's information falls within an exception to disclosure, it must be released, notwithstanding any agreement between the department and Peachtree specifying otherwise.

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. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. See Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). LSS claims its information is confidential under section 552.101; however, LSS has not directed our attention to any law under which any of its information is considered to be confidential for the purposes of section 552.101. Therefore, the department may not withhold any of LSS's information under section 552.101 of the Government Code.

Peachtree asserts that its submitted information is excepted under section 552.101 of the Government Code. Peachtree's documents contain information that Peachtree provided to the department pursuant to section 3.1705 of title 28 of the Texas Administrative Code. *See* 28 T.A.C. § 3.1705 (identifying information of viatical providers and brokers as well as viatical settlement agreement information must be submitted to department); *see also* Ins. Code § 1111.003(a) (department commissioner shall adopt reasonable rules relating to life settlements and relating to viatical settlements). Peachtree asserts that this information is confidential under section 3.1714 of title 28 of the Texas Administrative Code, which provides that "[a] viatical or life settlement provider, provider representative, or broker shall not release any viator's, life settlor's, or owner's confidential information to any person[.]" 28 T.A.C. § 3.1714(c); *see also* Ins. Code § 1111.003(b)(7) (rules adopted by department commissioner must include rules governing maintenance of appropriate confidentiality of personal and medical information). The department informs us that section 3.1714(c) prohibits a viatical or life settlement provider from releasing confidential information it solicited or obtained from viators, life settlers, or owners, except under certain circumstances. The department further explains that section 3.1714(c) "does not address what the department can or cannot do with such information." *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Therefore, we conclude that Peachtree's submitted information is not confidential under section 3.1714 of title 28 of the Texas Administrative Code, and the department may not withhold this information under section 552.101 of the Government Code.

Next, LSS, Peachtree, and Legacy argue that their respective reports are excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). Additionally, LSS contends that its information is excepted from disclosure under section 552.112 of the Government Code, which excepts from public disclosure "information contained in or relating to examination, operation, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." *Id.* § 552.112(a). These sections, however, are discretionary exceptions that only protect the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the department does not seek to withhold any information pursuant to section 552.104 or section 552.112, we find these sections do not apply to the submitted information. *See* ORD 592 (governmental body may waive section 552.104). Therefore, the department may not withhold any of the submitted information pursuant to section 552.104 or section 552.112.

Finally, LSS, Peachtree, and Legacy claim that their respective reports are excepted from disclosure under section 552.110 of the Government Code, which protects the proprietary

interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). 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.1958); *see also* ORD 552 at 2. 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); *see also Huffines*, 314 S.W.2d at 776. 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). The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret:

- (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; 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

LSS and Legacy assert that their respective reports should be withheld pursuant to sections 552.110(a) and (b), while Peachtree asserts that its report should be withheld pursuant to section 552.110(b). After reviewing the submitted information and LSS's, Peachtree's, and Legacy's arguments, we find that all three companies have established that release of the broker information in their respective reports would cause substantial competitive injury to the companies. Therefore, the department must withhold this information, which we have marked, under section 552.110(b). We find, however, that LSS, Peachtree, and Legacy have made only conclusory allegations that release of the remaining submitted information would cause the companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. In addition, we conclude that LSS and Legacy have failed to establish *prima facie* cases that any of their remaining information is a trade secret. *See* Open Records Decision No. 402 (1983). Thus, the department may not withhold any of LSS's, Peachtree's, or Legacy's remaining information under section 552.110.

In summary, the department must withhold the marked broker information contained in LSS's, Peachtree's, and Legacy's reports pursuant to section 552.110 of the Government Code. The remaining 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

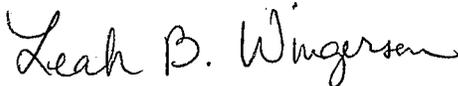
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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

LW/ma

Ref: ID# 302782

Enc. Submitted documents

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