



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 27, 2008

Ms. Lisa M. Hoyt  
Staff Attorney  
Legal Services Division  
Texas Department of Insurance  
P. O. Box 149104  
Austin, Texas 78714

OR2008-05492A

Dear Ms. Hoyt:

This office issued Open Records Letter No. 2008-05492 (2008) on April 24, 2008. In that ruling we determined, among other things, that because Life Equity, LLC, ("Life Equity") 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 Life Equity's information. The Texas Department of Insurance (the "department") now states that the contact information it had on record for Life Equity was incorrect and, as a result, Life Equity was not made aware of the request for information until after this office issued Open Records Letter No. 2008-05492. Life Equity also 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. 2008-05492. Life Equity has submitted comments explaining why its information should not be released and has asked this office to reconsider Open Records Letter No. 2008-05492. We have considered Life Equity'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 April 24, 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 Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 308334.

The department received a request for "the annual reports that are required of viatical and life settlement firms" for specified providers.<sup>1</sup> You state you will withhold some of the

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<sup>1</sup>In letters dated March 26, 2008 and April 9, 2008, the department withdrew its request for an open records decision for information related to Life Settlement Corporation d/b/a Peachtree Life Settlements and Life Settlement Solutions, Inc.

requested information pursuant to our rulings in Open Records Letter Nos. 2004-04912 (2004) and 2007-08003 (2007). See Open Records Decision No. 673 (2001) (listing elements of first type of previous determination under Gov't Code § 552.301(a)). You take no position as to whether the submitted information is excepted from disclosure, but you state that release of this information may implicate the proprietary interests of Life Equity and Legacy Benefits Corporation d/b/a Legacy Settlements Corporation ("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). We have received correspondence from Life Equity. We have reviewed the submitted arguments and the submitted information.

Initially, we note, and you acknowledge, that the department has failed to comply with section 552.301 of the Government Code in requesting this decision. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third party interests are at stake. See Open Records Decision No. 150 at 2 (1977). Because third parties' interests are at stake, we will address whether the submitted information must be withheld to protect the interests of the third parties.

Next, 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 letter, this office has not received comments from Legacy explaining how the release of the submitted information would affect its proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of Legacy, and the department may not withhold any portion of the submitted information on that basis. See, e.g., Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret).

Life Equity asserts that its information is protected under section 552.110 of the Government Code, which protects the proprietary interests of private parties with respect to two types of information: (1) "[a] trade secret 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.” Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> *See* ORD 552 at 5. 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. *See* Open Records Decision No. 402 (1983).

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<sup>2</sup>The Restatement of Torts lists the following six factors 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;
- (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).

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 information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Life Equity contends that the information contained in the submitted 2002 and 2004 Annual Life and Viatical Settlement Company Reports is excepted under section 552.110(b). Life Equity argues that release of the purchase amount of each policy, the net death benefit purchased, the net amount paid to the owner, and the estimated total premiums to keep the policy in force for the mean life expectancy would cause its company substantial competitive injury. Life Equity explains that “[t]his information provides all of the key elements needed for anyone, especially a competitor, to easily ascertain Life Equity’s proprietary pricing model used to purchase life insurance policies.” We note that the submitted information does not include the purchase amount of each policy.<sup>3</sup> Having considered Life Equity’s arguments and reviewed the information at issue, we find that Life Equity has established that release of the net death benefit purchased, the net amount paid to the owner, and the estimated total premiums to keep the policy in force for the mean life expectancy would reveal its pricing model and cause it substantial competitive injury. Life Equity also argues that “one familiar with the viatical settlement provider industry could use the information contained in the [r]eport[s]” to determine the names of the insured individuals from whom Life Equity has purchased policies. We therefore understand Life Equity to argue that the insured individuals would constitute its customer list and that this information is also protected under section 552.110(b). We note that the names and other identifying information of the insured individuals are not contained in the submitted information.<sup>4</sup> As for the remaining information, we find that Life Equity has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information would cause it substantial competitive harm. Accordingly, the department must withhold only the information we have marked that reveals Life Equity’s pricing model under section 552.110(b) of the Government Code.<sup>5</sup>

Upon review, we determine that Life Equity has failed to demonstrate that any portion of the remaining information meets the definition of trade secret, nor has Life Equity demonstrated the necessary factors to establish a trade secret claim for this information. We therefore

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<sup>3</sup>Life Equity is required to provide the department with the submitted Annual Life and Viatical Settlement Company Reports pursuant to section 3.1705 of title 28 of the Texas Administrative Code. Section 3.1705 does not require disclosure of the purchase amount of each policy. *See* 28 T.A.C. § 3.1705.

<sup>4</sup>Section 3.1705(e) states that “[i]n complying with the reporting requirements of this section, a viatical or life settlement provider, provider representative, or broker shall not include any confidential information, or in any other way compromise the anonymity of any viator, life settlor, or owner, or the viator’s, life settlor’s, or owner’s family members, spouse, or significant other.” 28 T.A.C. § 3.1705(e).

<sup>5</sup>As our ruling is dispositive, we need not address your section 552.110(a) claim against disclosure of this information.

determine that Life Equity's remaining information is not excepted from disclosure under section 552.110(a) of the Government Code.

In summary, the department must withhold the information we have marked under section 552.110(b) 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). If the governmental body does not file suit over 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).

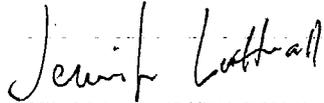
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/eeg

Ref: ID# 308334

Enc. Submitted documents

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