



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 27, 2009

Ms. Cynthia Villareal-Reyna
Section Chief, Legal Services Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2009-01072

Dear Ms. Villareal-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# 333242 (TDI Request No. 84237).

The Texas Department of Insurance (the "department") received a request for information on the five entities that submitted an application as a workers' compensation self insured group. You state that you are releasing some of the requested information to the requestor. You take no position with respect to the public availability of the remaining requested information, but believe that the request may implicate the proprietary interests of the Texas Association of Energy Producers ("TAEP"), Texas Association of Independent Publishers ("TAIP"), Texas Auto Dealers Association ("TADA"), Texas Construction Trust ("TCT"), and The Mercantile Trust of Texas ("MTT"). Accordingly, you notified these entities of this request for information and of their right to submit arguments to this office as to why the 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). TAEP, TCT, and MTT responded to the notice and argue that portions of the information at issue are excepted from disclosure under sections 552.101, 552.102, 552.104, and 552.110 of the Government Code. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that 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) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither TAIP nor TADA has submitted any comments to this office explaining how release of the information at issue would affect their proprietary interests. Therefore, these entities have not provided us with any basis to conclude that they have a protected proprietary interest in any of the submitted information. *See 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. 639 at 4 (1996), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3. Accordingly, the department may not withhold any of TAIP's or TADA's submitted information on that basis.

Next, we note that the department has not submitted information that MTT identifies as: "Key Personnel," "Feasability Study," "Members' Net Worth," "Biographical Affidavits and Finger Prints of Trustees," "Proof of Estimated Premiums for Members," and "Executed Documents for Members." Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the department as responsive to the instant request for information. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).¹ However, we will address MTT's other arguments against disclosure.

TAEP claims that a portion of the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Pursuant to section 401.052 of the Insurance Code, the department or an examiner appointed by the department is required to visit each insurance carrier at least once every five years and examine its financial condition, ability to meet liabilities, and compliance with laws affecting the conduct of its business. Ins. Code § 401.052. In connection with this examination process, section 401.058 of the Insurance Code provides the following:

- (a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

¹ Accordingly, we need not address MTT's argument under section 552.102 of the Government Code.

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

Id. § 401.058. The department states in a letter to this office dated January 23, 2009, that “the documents responsive to the open records request . . . were not obtained by [the department] during an examination.” Therefore, we find that no portion of the submitted information is confidential under section 401.058 of the Insurance Code and may not be withheld on that basis.

Next, TCT argues some of its information is protected by the doctrine of common-law privacy. Section 552.101 also encompasses the doctrine of common-law privacy, which excepts from disclosure private facts about an individual. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Information is excepted from required public disclosure by the common-law right of privacy if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Id.* at 685. We note that common-law privacy protects the privacy interests of individuals, but not of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). In this instance, the information at issue pertains to businesses and not to an individual. Accordingly, we find that the submitted information is not protected under the doctrine of common-law privacy. Therefore, the department may not withhold any portion of the submitted information under section 552.101 in conjunction with common-law privacy.

TAEP and MTT raise section 552.104 of the Government Code. This section excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which 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 this exception, none of the submitted information may be withheld on this basis.

TAEP, TCT, and MTT all assert that portions of their information are excepted 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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* ORD 232. This office must accept a claim that information subject to the Act is excepted 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.* § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

After reviewing the submitted information and the arguments, we find that TAEP, TCT, and MTT have made a *prima facie* case that some of their client information is protected as trade secret information. We note, however, that TCT publishes the identities of some of its clients on its website. In light of TCT’s own publication of such information, we cannot conclude that the identities of these published clients qualify as trade secrets. Furthermore, we determine that TAEP, TCT, and MTT have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the department must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We determine that no portion of the remaining submitted information is excepted from disclosure under section 552.110(a) of the Government Code.

We also find that TAEP, TCT, and MTT have failed to provide specific factual evidence demonstrating that release of any of the remaining information would result in substantial competitive harm to their interests. *See* Open Records Decision Nos. 661 (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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, we determine that none of the remaining information is excepted from disclosure under section 552.110(b) of the Government Code.

We note that the remaining information contains an insurance policy number. Section 552.136 states 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.”² Gov’t Code § 552.136. Accordingly, we find that the department must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

The remaining information also contains e-mail addresses. 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). *Id.* § 552.137(a)-(c). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the department must withhold the marked e-mail addresses in accordance with section 552.137 unless the owners of the e-mail addresses have consented to their release.

We also note that some of the submitted information appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must also comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the department must withhold the information we have marked under section 552.110 of the Government Code. The department must withhold the information we have marked under section 552.136. The department must withhold the marked e-mail addresses in accordance with section 552.137, unless the owners of the e-mail addresses have consented to their release. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chris Schulz', with a long horizontal flourish extending to the right.

Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

Ref: ID# 333242

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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