



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 13, 2009

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Texas Department of Insurance
Legal Services Division, Mail Code 110-1A
P.O. Box 149104
Austin, Texas 78711-9104

OR2009-01945

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# 335400 (TDI # 84574).

The Texas Department of Insurance (the "department") received a request for Viatical Settlement Provider Annual Reports for FYE 2006 and 2007 submitted by each viatical settlement provider, excluding the requestor. You state that you have provided the requestor with some of the requested information. Although you take no position on the remaining requested information, you state it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the department notified Maple Life Financial, Inc., ("Maple Life") of this request for information and of its right to submit arguments to this office as to why the information should not be released.¹ Maple Life has submitted arguments under section 552.110 of the Government Code. We have considered its arguments and reviewed 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

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

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 party interests are at stake, we will address whether the submitted information must be withheld to protect the interests of Maple Life.

The submitted information consists of Maple Life's 2006 viatical annual report, which contains more than twenty-five categories of information pertaining to each viatical settlement transaction entered into by Maple Life during 2006. Maple Life 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.² 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).

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).

After reviewing the submitted information and Maple Life's arguments, we conclude that Maple Life has failed to establish a *prima facie* case that any of the submitted information is a trade secret protected by section 552.110(a). See ORD 402. Furthermore, we find that Maple Life has made only conclusory allegations that release of the submitted information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Thus, we find that Maple Life has failed to establish the applicability of section 552.110(b). Accordingly, the department may not withhold the submitted report under section 552.110, but instead must release this information to the requestor.

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 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,

²The 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).

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,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/jb

Ref: ID# 335400

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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