



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2009

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Section Chief, Agency Counsel Section
Texas Department of Insurance
Legal & Regulatory Affairs Division, MC 110-1A
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OR2009-10595A

Dear Ms. Villarreal-Reyna:

You have submitted to this office a request to reconsider Open Records Letter No. 2009-10595 (2009). After review, we have determined that the prior ruling should be corrected. *See* Gov't Code §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2009-10595 and serves as the correct ruling. Your request was assigned ID# 359129 (TDI# 90938).

The Texas Department of Insurance (the "department") received a request for 2008 Annual Statements filed with the department by any viatical or life settlement provider. You state you have released some of the requested information to the requestor. Although the department takes no position on whether the submitted information is excepted from disclosure, you state that release of this information may implicate the proprietary interests of third parties.¹ Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received arguments from representatives of Berkshire, Legacy, Life, and Maple. We have considered the submitted arguments and reviewed the submitted information.

¹The third parties are Eastwest Life & Health Insurance Brokers ("Eastwest"), Berkshire Settlements, Inc. ("Berkshire"), Cale Wellman Carson ("Cale"), Legacy Benefits, L.L.C. d/b/a NY Legacy Benefits ("Legacy"), Life Settlement Solutions ("Life"), and Maple Life Financial ("Maple").

Initially, we must address the department's procedural obligations under the Act. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. *See* Gov't Code § 552.301(a), (b). In addition, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). In this instance, you state the department received the request for information on May 4, 2009. However, you did not request a ruling from this office or submit the information at issue until May 27, 2009. Consequently, we find the department failed to comply with the requirements of section 552.301 in requesting this decision from our office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 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). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake, we will consider whether the submitted information must be withheld.

Next, we note a portion of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-08357 (2009). In that decision, this office ruled the department must withhold Legacy's broker information, the estimated premium, amount paid to owner, and the premiums paid under section 552.110 of the Government Code, and release the remaining information. You have not indicated the facts and circumstances have changed since the issuance of this prior ruling. Thus, with regard to Legacy's information previously requested and ruled on by this office, we conclude the department must continue to rely on our ruling in Open Records Letter No. 2009-08357 as a previous determination and withhold or release the information at issue in accordance with that decision. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we note that Berkshire did not submit comments in response to the request at issue in the

previous ruling. In this instance, Berkshire has submitted arguments to our office. Therefore, because circumstances have changed, the department may not rely upon the previous ruling as a previous determination for Berkshire's information. Accordingly, we will address the submitted arguments for Berkshire's information as well as the rest of the submitted information not previously ruled on.

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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Eastwest and Cale. Thus, we have no basis for concluding that any portion of the submitted information constitutes the proprietary information of Eastwest or Cale. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3. Accordingly, the department may not withhold any of the submitted information based on the proprietary interests of Eastwest or Cale. As no arguments are made against the disclosure of these third parties' information, it must be released to the requestor.

Life asserts that its submitted report 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). Life 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 collected, assembled, or maintained the report in connection with the transaction of the department's official business. Therefore, we conclude that the report pertaining to Life is subject to the Act and must be released unless Life demonstrates that the information falls within an exception to public disclosure under the Act. *See* Gov't Code § 552.305(b).

Life also argues that its submitted report 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 Life's report

falls within an exception to disclosure, it must be released, notwithstanding any agreement between the department and Life 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). Although Life claims its report is confidential under section 552.101, it 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 Life's information under section 552.101 of the Government Code.

We understand Berkshire to argue that portions of its submitted report must be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.² Section 552.101 encompasses the doctrine of common-law privacy, which excepts from public disclosure information that (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. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Berkshire argues that access to the submitted report could allow access to personal health information of insured individuals. However, upon review, we find the information at issue does not identify or reveal medical information of a named individual. Thus, Berkshire has not demonstrated, nor does it otherwise appear, how any portion of Berkshire's information is highly intimate or embarrassing and not of legitimate public concern. Therefore, none of Berkshire's information may be withheld under section 552.101 on the basis of common-law privacy.

Life and Berkshire both 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). This section, however, is a discretionary exception that only protect the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied); Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a

²Section 552.102 of the Government Code excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102. Although Berkshire raises section 552.102, this section only applies to information in the personnel file of an employee of a governmental body.

competitive situation, and not interests of private parties submitting information to the government). As the department does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the submitted information. Therefore, the department may not withhold any of the submitted information pursuant to section 552.104.

Life also contends that its submitted report is excepted from disclosure under section 552.112 of the Government Code. Section 552.112 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." However, section 552.112 protects the interests of a governmental body, rather than the interests of third parties. *See Birnbaum*, 994 S.W.2d at 776. Because the department does not raise section 552.112, this section is not applicable to the submitted information, and none of it may be withheld on that basis. *Id.*

Life, Berkshire, and Maple 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: (1) trade secrets and (2) 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 must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *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. 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).

Life, Berkshire, and Maple each assert that their respective reports should be withheld pursuant to section 552.110. After reviewing the submitted reports and the submitted arguments, we find that Life, Berkshire, and Maple have each failed to establish a *prima facie* case that any of their submitted information is a trade secret, nor have Life, Berkshire, or Maple demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision No. 402 (1983). Thus, the department may not withhold any of Life’s, Berkshire’s, or Maple’s information under section 552.110(a). We conclude, however, that Life, Berkshire, and Maple have established that release of the service provider and broker information in their reports would cause substantial competitive injury to the companies. Furthermore, Life and Maple have also established that release of their pricing information would cause them substantial competitive injury. Therefore, the department must withhold this information, which we have marked, under

section 552.110(b). However, we find Life, Berkshire, and Maple have made only conclusory allegations that release of the remaining information at issue would cause the companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Accordingly, the department must withhold only the information we have marked under section 552.110(b) of the Government Code.

In summary, with regard to Legacy's information previously requested and ruled on by this office, the department may continue to rely upon Open Records Letter No. 2009-08357 as a previous determination and withhold or release the information at issue in the prior request in accordance with that ruling. The department must withhold the marked information contained in Life's, Berkshire's, and Maple's reports pursuant to section 552.110(b) of the Government Code. The remaining information must be released.

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, 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,



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Open Records Division

CA/rl

Ref: ID# 359129

Enc. Submitted documents

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