



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2009

Ms. Cynthia Villarreal-Reyna
Section Chief
Legal and Regulatory Affairs
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2009-15405

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# 360080 (TDI # 94428).

The Texas Department of Insurance (the "department") received a request for information pertaining to all credit scoring model filings received by the department on or after January 1, 2006.¹ You state you have released some of the requested information to the requestor. You claim that a portion of the submitted information is excepted from disclosure under section 552.137 of the Government Code. You also state that release of some of the requested information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the department has notified the interested third parties of the request and of their right

¹We note the requestor modified his request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

to submit arguments to this office explaining why their information should not be released.² See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). Pursuant to section 552.305(d), we have received comments from USAA objecting to the release of its information. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note, and the department acknowledges, that the department failed to comply with the procedural requirements of section 552.301 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; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because third party interests are at stake and because section 552.137 of the Government Code presents a compelling reason against disclosure, we will address the submitted arguments.

We note 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only USAA has submitted to this office reasons explaining why its information should not be released. Therefore, the remaining third parties have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. See 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 (1990). Therefore, the department may not withhold any portion of the submitted

²The notified third parties are: USAA Texas Lloyds ("USAA"); Amica Mutual Insurance Co.; Property & Casualty Insurance Co. of Hartford and Sentinel Insurance Co., Ltd.; National General Assurance Co.; Merastar Insurance Co.; and Bristol West Insurance Company.

information on the basis of any proprietary interest that the remaining third parties may have in this information.

We next address USAA's arguments to withhold its submitted information.³ USAA first asserts that its information is confidential because its documents were marked as such when they were submitted to the department. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

USAA next asserts that its information is confidential under Section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. *Id.* § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 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. 1957); *see also* Open Records Decision No. 552 at 2 (1990). 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

³Although USAA raises section 552.101 of the Government Code, they have not asserted any law under which any of the information at issue is considered to be confidential for purposes of section 552.101. Accordingly, we do not address this exception.

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.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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). We also note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Section 552.110(b) of the Government Code 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.*; *see also* 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).

Upon review, we find that USAA has failed to demonstrate how any of its information at issue meets the definition of a trade secret. Thus, USAA has failed to establish that any portion of its information constitutes a protected trade secret under section 552.110(a) of the Government Code. Further, we find that USAA has only made conclusory allegations that release of its information would result in substantial damage to its competitive position. *See*

⁴The 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; (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).

ORD 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). Thus, USAA has not demonstrated that substantial competitive injury would result from the release of its information. *See* ORD 661 at 5-6. Accordingly, we find that the department may not withhold any portion of the submitted information under section 552.110(b) of the Government Code.

You seek to withhold e-mail addresses contained in the submitted information pursuant to section 552.137 of the Government Code. Section 552.137 of the Government Code states that “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its public disclosure. *Id.* § 552.137(a)-(b). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *Id.* § 552.137(c). The department informs us that it has not received consent to release any of the e-mail addresses at issue. Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

Lastly, we note that some of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990). Accordingly, the submitted information must be released to the requestor in accordance with copyright.

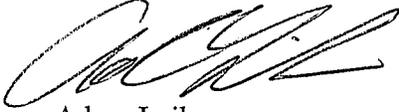
In summary, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released to the requestor in accordance with copyright law.

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 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, toll free, at (888) 672-6787.

Sincerely,



Adam Leiber
Assistant Attorney General
Open Records Division

ACL/rl

Ref: ID# 360080

Enc. Submitted documents

c: Requestor
(w/o enclosures)

cc: Ms. Laura Mahan Bishop, President
USAA Texas Lloyds
9800 Fredericksburg Road
San Antonio, Texas 78288
(w/o enclosures)

Mr. Robert Anthony Dimuccio
Amica Mutual Insurance Company
Amica Lloyds of Texas
P.O. Box 6008
Providence, Rhode Islands 08940-6008
(w/o enclosures)

Ms. Johnna Maxwell
Attorney for Amica Mutual Insurance Company
& Amica Lloyds of Texas
2277 Plaza Drive, Suite 400
Sugar Land, Texas 77479-6701
(w/o enclosures)

Mr. Neal Stephen Wolin, President
Property & Casualty Insurance Company of Hartford
Sentinel Insurance Company, Ltd.
One Hartford Plaza T 16 85
Hartford, Connecticut 06155
(w/o enclosures)

Corporation Service Company
Attorney for Property & Casualty Insurance Company of Hartford
& Sentinel Insurance Company, Ltd.
& Bristol West Insurance Company
701 Brazos Street, Suite 1050
Austin, Texas 78701
(w/o enclosures)

CT Corporation System
Attorney for National General Assurance Company &
Merastar Insurance Company
350 North St. Paul Street
Dallas, Texas 75201
(w/o enclosures)

Ms. Mary Hennessy
National General Assurance Company
500 West 5th Street
Winston-Salem, North Carolina 27102-3199
(w/o enclosures)

Mr. Timothy Bruns
Merastar Insurance Company
P.O. box 181101
Chattanooga, Tennessee 37414-6101
(w/o enclosures)

Mr. Simon Noonan
Bristol West Insurance Company
5701 Stirling Road
Davie, Florida 33314
(w/o enclosures)