



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 31, 2009

Ms. Cynthia Villarreal-Reyna  
Section Chief, Agency Counsel  
Legal & Regulatory Affairs Division  
Texas Department of Insurance  
P.O. Box 149104 MC 110-1A  
Austin, Texas 78714-9104

OR2009-18473

Dear Ms. Villarreal-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# 366012 (TDI #97148).

The Texas Department of Insurance (the "department") received a request for certain rate filings relating to seven insurance companies and all documents, including correspondence, associated with the filings. You state that some of the requested information has been released. You inform us that some of the submitted information is subject to chapter 2251 of the Insurance Code. Although you take no other position on the public availability of the submitted information, you believe that some of the information may implicate the interests of Allstate Fire and Casualty Insurance Company and Allstate Texas Lloyd's (collectively "Allstate"); Nationwide Property and Casualty Insurance Company ("Nationwide"), and United Services Automobile Association ("USAA"). You inform us that Allstate, Nationwide, and USAA were notified 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.<sup>1</sup> We received correspondence from Allstate and Nationwide. We have considered all the submitted arguments and reviewed the submitted information.<sup>2</sup>

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<sup>1</sup>See 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).

<sup>2</sup>We note that the submitted information does not appear to include some of the documents that Allstate contends should be withheld from disclosure. This decision is applicable only to the information that the department submitted to this office in requesting this decision. See Gov't Code § 552.301(e)(1)(D) (governmental body must submit specific information at issue in requesting attorney general's decision).

We note that the requestor has informed the department that he does not seek access to e-mail addresses. Thus, the e-mail addresses contained in the submitted documents are not responsive to this request for information. Therefore, this decision does not address the public availability of the submitted e-mail addresses, and they need not be released in response to this request.

Next, we address the department's representations regarding chapter 2251 of the Insurance Code. Section 2251.107 of chapter 2251 provides that "[e]ach filing made, and any supporting information filed, under this chapter is open to public inspection as of the date of the filing." Ins. Code § 2251.107. In its request for this decision, the department indicated that section 2251.107 is applicable in this instance. In subsequent correspondence with this office under section 552.303 of the Government Code, you inform us that some of the submitted information consists of filings made, and/or supporting documentation filed, under chapter 2251 of the Insurance Code.<sup>3</sup> You have marked that information. Based on your representations, we find that section 2251.107 of the Insurance Code is applicable to the marked information. Although we understand Allstate and Nationwide to contend that some of the marked information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code, we note that information that a statute specifically makes public may not be withheld from the public under any of the Act's exceptions to public disclosure. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, because filings made, and any supporting documentation filed, under chapter 2251 of the Insurance Code are made public by section 2251.107, none of the information the department has marked may be withheld under section 552.101 or section 552.110. As no other arguments against disclosure of that information have been submitted, the marked information must be released pursuant to section 2251.107 of the Insurance Code.<sup>4</sup>

Next, we address Allstate's and Nationwide's arguments against disclosure of the remaining information at issue. We begin with Nationwide's claim under section 552.101 of the Government Code. Section 552.101 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 other statutes make confidential. Nationwide raises section 552.101 in conjunction with section 38.001 of the Insurance Code, which provides in part:

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<sup>3</sup>See Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by Gov't Code § 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice).

<sup>4</sup>As we are able to make this determination, we do not address Allstate's and Nationwide's arguments regarding any of the submitted information that is subject to section 2251.107 of the Insurance Code. We note that this information also includes all of the submitted documents relating to USAA, which has submitted no arguments to this office.

(b) The department may address a reasonable inquiry to an insurance company, including a Lloyd's plan or reciprocal or interinsurance exchange, or an agent or other holder of an authorization relating to:

(1) the person's business condition; or

(2) any matter connected with the person's transactions that the department considers necessary for the public good or for the proper discharge of the department's duties.

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(d) A response made under this section that is otherwise privileged or confidential by law remains privileged or confidential until introduced into evidence at an administrative hearing or in a court.

Ins. Code § 38.001(b), (d). We note that section 38.001(d) does not itself make any information privileged or confidential. Rather, section 38.001(d) provides that information furnished to the department that is otherwise privileged or confidential remains privileged or confidential until introduced into evidence at an administrative hearing or in a court. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Thus, the department may not withhold any of the remaining information relating to Nationwide under section 552.101 of the Government Code on the basis of section 38.001 of the Insurance Code. Nationwide has not otherwise directed our attention to any constitutional, statutory, or decisional law under which any of the remaining information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the department may not withhold any of the remaining information under section 552.101 of the Government Code.

Both Allstate and Nationwide claim section 552.110 of the Government Code, which protects the proprietary interests of private parties by excepting from disclosure 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." *See* 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). 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>5</sup> *See* Open Records Decision No. 552 at 5 (1990). 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 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).

The department notes that the remaining information at issue relates to reinsurance agreements involving Allstate and Nationwide. Allstate contends that its information consists of trade secrets that are protected by section 552.110(a) and commercial or financial information that is excepted under section 552.110(b). Likewise, Nationwide appears to contend that its information constitutes trade secrets under section 552.110(a) and commercial or financial information excepted under section 552.110(b). Having considered

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<sup>5</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 other 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).

the parties' arguments and reviewed the information at issue, we conclude that neither Allstate nor Nationwide has demonstrated that any of the remaining information meets the definition of a trade secret under section 757 of the Restatement of Torts or otherwise constitutes a trade secret for purposes of section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (trade secret "is not simply information as to a single or ephemeral event in the conduct of the business"). We also conclude that neither Allstate nor Nationwide has made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause either Allstate or Nationwide substantial competitive harm. Therefore, the department may not withhold any of the remaining information under section 552.110 of the Government Code.

We note that section 552.136 of the Government Code is applicable to some of the remaining information.<sup>6</sup> Section 552.136(b) provides that "[n]otwithstanding any other provision of [the Act], 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). We have marked bank account and routing numbers that the department must withhold under section 552.136 of the Government Code.<sup>7</sup>

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 also must 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: (1) the department must release the marked information that is subject to section 2251.107 of the Insurance Code; (2) the department must withhold the information we have marked under section 552.136 of the Government Code; and (3) the department must also release the rest of the submitted information. Any information that is protected by copyright may only be released in accordance with copyright law.

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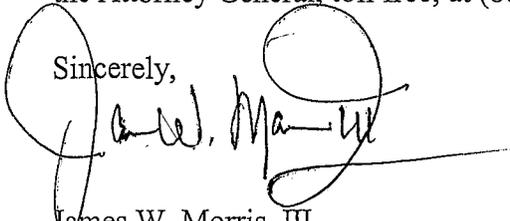
<sup>6</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

<sup>7</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a bank account number and a bank routing number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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](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,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/cc

Ref: ID# 366012

Enc: Submitted documents

c: Requestor  
(w/o enclosures)

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