



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 20, 2012

Mr. Stanton Strickland
Associate Commissioner
General Counsel Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2012-05688

Dear Mr. Strickland:

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# 451186 (TDI # 124240).

The Texas Department of Insurance (the "department") received a request for thirteen categories of information pertaining to any American International Group, Inc. entity, including its subsidiaries (collectively, "AIG"). You state you have released some of the requested information and will withhold information under sections 552.130, 552.136, and 552.137 of the Government Code, pursuant to Open Records Decision No. 684 (2009).¹

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including: Texas driver's license numbers under section 552.130(a)(1) and Texas license plate numbers under section 552.130(a)(2); certain access device numbers under section 552.136; and an e-mail address of a member of the public under section 552.137. However, the Texas legislature amended section 552.130 effective September 1, 2011, to allow a governmental body to redact the information described in subsections 552.130(a)(1) and (a)(3) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.130(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.130(e). *See id.* We note the Texas legislature also amended section 552.136 effective September 1, 2011, to allow a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See id.* § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* Thus, the statutory amendments to sections 552.130 and 552.136 superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to subsections 552.130(a)(1) and (a)(3) and section 552.136 in accordance with sections 552.130 and 552.136, respectively, not Open Records Decision No. 684.

You claim that some of the submitted information is excepted from disclosure under sections 552.101 and 552.111 of the Government Code, and privileged under Texas Rule of Civil Procedure 192.5. You also state that release of some of the submitted information may implicate the interests of AIG. Accordingly, you state, and provide documentation demonstrating, the department notified AIG of the request for information and of its right to submit arguments stating why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining 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). We have received comments submitted by a representative of AIG. We have considered the submitted arguments and reviewed the submitted information, some of which constitutes a representative sample.²

Initially, as you acknowledge, although the department received clarification for a portion of the request,³ the department did not comply with the requirements of section 552.301 of the Government Code in requesting a decision regarding the information subject to the clarification. Gov't Code § 552.301(b). Pursuant to 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 information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *Id.* § 552.302; *see also 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 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when 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 the department's claim under section 552.101 of the Government Code for the information at issue can provide a compelling reason for non-disclosure under section 552.302, we will address your argument under that exception for this information. We will also address the submitted arguments against disclosure of the information for which the department timely requested a decision.

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

³*See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

Next, you state a portion of the submitted information is from a closed investigative enforcement case file and is subject to section 552.022 of the Government Code, which provides, in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 [of the Government Code].

Gov't Code § 552.022(a)(1). Thus, this information must be released unless it is either excepted under 552.108 of the Government Code or is confidential under the Act or other law. You do not claim section 552.108. Although you assert this information is excepted from disclosure under section 552.111, this section is discretionary and does not make information confidential under the Act. *See* Gov't Code § 552.111; Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for "confidentiality" of information under specified exceptions); *see also* Open Records Decision Nos. 677 at 10 (2002) (attorney work product privilege under section 552.111 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 470 at 7 (1987) (governmental body may waive statutory predecessor to section 552.111 deliberative process). Therefore, the department may not withhold any of the information at issue under section 552.111. However, you also raise Texas Rule of Civil Procedure 192.5, and AIG raises section 552.110 of the Government Code. Section 552.110 makes information confidential under the Act. In addition, the Texas Supreme Court has held the Texas Rules of Civil Procedure are "other law" that make information expressly confidential for the purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will address your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 and AIG's arguments under section 552.110.

Rule 192.5 of the Texas Rules of Civil Procedure encompasses the attorney work product privilege. For purposes of section 552.022 of the Government Code, information is confidential under rule 192.5 only to the extent the information implicates the core work product aspect of the work product privilege. *See* ORD 677 at 9-10. Rule 192.5 defines core work product as the work product of an attorney or an attorney's representative, developed in anticipation of litigation or for trial, that contains the mental impressions, opinions, conclusions, or legal theories of the attorney or the attorney's representative. TEX. R. CIV. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under rule 192.5, a governmental body must demonstrate the material was (1) created for trial or in anticipation of litigation and (2) consists of the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney's representative. *Id.*

The first prong of the work product test, which requires a governmental body to show the information at issue was created in anticipation of litigation, has two parts. A governmental

body must demonstrate (1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation there was a substantial chance litigation would ensue and (2) the party resisting discovery believed in good faith there was a substantial chance litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. See *Nat'l Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second part of the work product test requires the governmental body to show the materials at issue contain the mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative. See TEX. R. CIV. P. 192.5(b)(1). A document containing core work product information that meets both parts of the work product test is privileged under rule 192.5, provided the information does not fall within the scope of the exceptions to the privilege enumerated in rule 192.5(c). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 425 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You explain that the information you have marked pertains to a litigation file for an investigation that was conducted for the purpose of preparing for administrative action against an insurance company. You state that the information at issue was prepared by department enforcement attorneys and reveals the attorneys’ mental processes, conclusions, and legal theories regarding the investigation. Based on your representations and our review, we agree the information you have marked under rule 192.5 is protected core work product. Accordingly, we find the department may withhold the information you have marked under Texas Rule of Civil Procedure 192.5.

AIG submits arguments against disclosure of portions of its information 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. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny 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) (citation omitted); *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 *See* 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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); 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).

AIG contends its information, including its pricing information, risk calculations, and valuation information, is commercial or financial information, release of which would cause AIG substantial competitive harm. Upon review of AIG’s arguments under section 552.110(b), we conclude AIG has established the release of some of its information, which we have marked, would cause it substantial competitive injury. Accordingly, the department

⁴There are six factors the Restatement gives as indicia of 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 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).

must withhold the information we have marked under section 552.110(b). However, we find that AIG has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining information would cause the company substantial competitive harm. We therefore conclude that the department may not withhold any of AIG's remaining information under section 552.110(b) of the Government Code.

AIG argues its remaining also constitutes trade secrets. Upon review, we find that AIG has failed to demonstrate that any of its remaining information for which it asserts section 552.110(a) meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the department may not withhold any of the remaining information on the basis of section 552.110(a) of the Government Code.

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 section encompasses information protected by other statutes. Section 823.051(a) of subchapter B of chapter 823 of the Insurance Code provides that "[e]ach insurer authorized to engage in the business of insurance in this state that is a member of an insurance holding company system shall register with the commissioner [of the department (the "commissioner")].” Ins. Code § 823.051(a). Section 823.053, located within subchapter B of chapter 823 of the Insurance Code, requires that a registered insurer must report dividend information to the department. *Id.* § 823.053(b). Section 823.011 of the Insurance Code states, in relevant part, the following:

(a) This section applies only to information, including documents and copies of documents, that is:

(1) reported under Subchapter B [of Chapter 823 of the Insurance Code.]

...

(b) The information shall be confidential and privileged for all purposes. Except as provided by Subsections (c) and (d), the information may not be disclosed without the prior written consent of the insurer to which it pertains.

(c) The commissioner may publish all or any part of the information in the manner that the commissioner considers appropriate if the commissioner, after giving the insurer and its affected affiliates notice and an opportunity to be heard, determines that the interests of policyholders or the public will be served by the publication of the information.

...

(f) Information described by Subsection (a), including information in the possession of the National Association of Insurance Commissioners under this section, is confidential and privileged for all purposes, including for purposes of:

(1) Chapter 552, Government Code[.]

Id. § 823.011(a)(1), (b)-(c), (f)(1) (internal citation omitted). You inform us that the submitted information includes ordinary dividend information that was filed with the commissioner under subchapter B. You do not indicate that the exceptions to confidentiality found in subsections (c) or (d) of section 823.011 apply to the information at issue, or that the insurer to which it pertains has consented to its disclosure. *See id.* § 823.011(b)-(d). We, therefore, conclude that the department must withhold this information, which we have marked, under section 823.011 of the Insurance Code pursuant to section 552.101 of the Government Code.

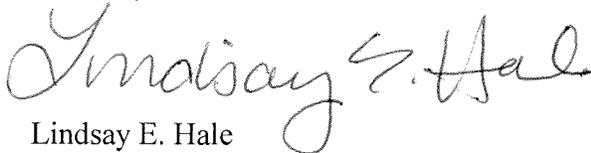
You raise section 552.101 of the Government Code in conjunction with section 402.005 of the Insurance Code for some of the submitted information. Chapter 402 of the Insurance Code requires certain insurers and health maintenance organizations to report material transaction information to the commissioner. Section 402.005(a) provides that “[a] report obtained by or disclosed to the commissioner under [chapter 402] is confidential and is not subject to a subpoena, other than a grand jury subpoena.” *Id.* § 402.005(a). You state the information you have marked is pledge asset information governed by sections 422.051 and 422.052 of the Insurance Code. Section 422.051 provides the restrictions on the encumbrance of assets and section 422.052 requires an insurer to report to the commissioner information pertaining to pledge and encumbered assets. *Id.* §§ 422.051, .052. You further state the information for which you raise section 402.005 was filed with the commissioner under section 422.052. Upon review, we find you have not explained how section 402.005, which expressly applies to reports made under chapter 402, makes information confidential that is governed by chapter 422. *See generally* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). As such, we find you have failed to demonstrate the applicability of section 402.005 to the information at issue and it may not be withheld under section 552.101 of the Government Code on this basis.

In summary, the department: (1) may withhold the information you have marked under Texas Rule of Civil Procedure 192.5; (2) must withhold the information we have marked under section 552.110 of the Government Code; and (3) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 823.011 of the Insurance Code. The department must release the remaining information.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 451186

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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