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ATTORNEY GENERAL OF TEXAS

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Mr. Bob Davis
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General Counsel Division
Texas Department of Insurance
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OR2015-06853

Dear Mr. Davis:

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# 559458 (TDI# 157442).

The Texas Department of Insurance (the "department") received a request for all records and filings during a specified time period pertaining to Coventry Financial, L.L.C.; Coventry First, L.L.C. (collectively "Coventry"); and a named individual, including applications, annual statements, and exhibits. You state the department will release some information to the requestor and will redact information under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You state some of the requested information will be withheld pursuant to the previous determination issued to the department in Open Records Letter No. 1999-1264 (1999) (information is confidential that department represents to be work papers related to examination reports concerning carrier that is not in liquidation or receivership). *See* Open Records Decision No. 640 at 4 (1996) (department

¹Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

must withhold any information obtained from audit “work papers” that are “pertinent to the accountant’s examination of the financial statements of an insurer” under previous version of section 401.058 of Insurance Code). You claim a portion of the submitted information is excepted from disclosure under section 552.110 of the Government Code. Additionally, you state the proprietary interest of a third party might be implicated.² Accordingly, you notified Coventry of the request and of its right to submit arguments to this office explaining 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); *see also* 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 from Coventry. We have reviewed the submitted arguments and the submitted information.

Initially, we note some of the requested information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2007-08610 (2007), 2010-01231A (2010), 2011-08937A (2011), 2011-11033 (2011), 2012-00311A (2012), 2012-07767A (2012), 2012-07870A (2012), 2012-17087 (2012), and 2013-15283 (2013). Accordingly, for the responsive information that is identical to the information previously requested and ruled upon by this office, the department must continue to rely on Open Records Letter Nos. 2007-08610, 2010-01231A, 2011-08937A, 2011-11033, 2012-00311A, 2012-07767A, 2012-07870A, 2012-17087, and 2013-15283 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. *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).

Additionally, we note some of the requested information may have been the subject of Open Records Letter No. 2008-15078 (2008). We note this ruling was subsequently modified on appeal by an Agreed Final Judgment in *Coventry First v. Abbott*, Cause No. D-1-GN-08-004118 (53rd Dist. Ct., Travis County, Tex.). With regard to the information in the current request that is identical to the information previously requested and ruled upon in Open Records Letter No. 2008-15078, the department must rely on the Agreed Final Judgment to withhold or release the information at issue. To the extent the submitted

²We note the department did not comply with the requirements of section 552.301(e) of the Government Code in providing some of the information at issue. *See* Gov’t Code § 552.301(e). Nonetheless, third-party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the arguments of the interested third parties to withhold the information at issue.

information is not encompassed by the previous rulings and Agreed Final Judgment, we will consider the submitted arguments against disclosure.

Next, we note Coventry argues against disclosure of information the department did not submit to this office for review. This ruling does not address information beyond what the department has submitted to us for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information.

Section 552.101 of the Government Code exempts 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 law, such as the Gramm-Leach-Bliley Act (the “GLB Act”). *See* 15 U.S.C. §§ 6801-6809. The purpose of the GLB Act is to promote competition in the financial services industry. *See* H.R. Conf. Rep. No. 106-434, at 245 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 245. Reflecting Congressional concern regarding the dissemination of consumers' personal financial information, the GLB Act provides certain privacy protections “to protect the security and confidentiality of [consumers'] nonpublic personal information.” 15 U.S.C. § 6801(a). The statute defines nonpublic personal information (“NPI”) as “personally identifiable financial information [“PIFI”] - (i) provided by a consumer to a financial institution; (ii) resulting from any transaction with the consumer or any service performed for the consumer; or (iii) otherwise obtained by the financial institution.” *Id.* § 6809(4)(A); *see id.* § 6809(4)(C)(i) (PIFI includes “any list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any [NPI]”). Federal regulations define PIFI as:

any information: (i) [a] consumer provides to [a regulated financial institution] to obtain a financial product or service . . . ; (ii) [a]bout a consumer resulting from any transaction involving a financial product or service between [a regulated financial institution] and a consumer; or (iii) [a regulated financial institution] otherwise obtain[s] about a consumer in connection with providing a financial product or service to that consumer.

16 C.F.R. § 313.3(o)(1). Additional protection is provided to consumers by limitations placed on the reuse of PIFI obtained from a financial institution by a nonaffiliated third party. Section 6802(c) provides as follows:

. . . a nonaffiliated third party that receives from a financial institution [NPI] under this section shall not, directly or through an affiliate of such receiving third party, disclose such information to any other person that is a nonaffiliated third party of both the financial institution and such receiving

third party, unless such disclosure would be lawful if made directly to such other person by the financial institution.

15 U.S.C. § 6802(c). Coventry asserts portions of its information should be confidential under the GLB Act. However, Coventry does not inform this office, nor does the information on its face reflect, the information the department submitted is NPI or PIFI as defined by the federal regulations. *See Individual Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 17 (D.D.C. 2001) (“It is the context in which information is disclosed—rather than the intrinsic nature of the information itself—that determines whether information falls within the GLB Act.”). Thus, Coventry failed to establish the GLB Act is applicable to this information, and it may not be withheld under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses section 1111A.020 of the Insurance Code. Section 1111A.020 provides, in part,

(a) The documents and evidence obtained by the [C]ommissioner [of Insurance (the “commissioner”)] in an investigation of a suspected or an actual fraudulent life settlement act are privileged and confidential, are not a public record, and are not subject to discovery or subpoena in a civil or criminal action.

Ins. Code § 1111A.020(a). Coventry generally asserts its information contains documents subject to section 1111A.020(a). However, Coventry has failed to demonstrate the submitted information consists of documents or evidence obtained by the commissioner in an investigation of a suspected or actual fraudulent life settlement act. Therefore, none of the submitted information may be withheld under section 552.101 of the Government Code in conjunction with section 1111A.020(a) of the Insurance Code.

The department and Coventry raise section 552.110 of the Government Code. Section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we will only address Coventry’s arguments under section 552.110. 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. *See Gov’t Code § 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, 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 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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.³ RESTATEMENT OF TORTS § 757 cmt. b. 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 section 552.110(a) is applicable unless it has been shown 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 note 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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,

³The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

In advancing its arguments, we understand Coventry to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interests of Coventry in the information at issue.

Upon review, we find Coventry has demonstrated portions of its information constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code.⁴ However, we find Coventry has failed to demonstrate the release of any of its remaining information would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the department may not withhold any of Coventry's remaining information under section 552.110(b).

Upon review, we find Coventry has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find Coventry has not demonstrated the necessary factors to establish a trade secret claim for its information

⁴As our ruling is dispositive, we need not address Coventry's remaining arguments against disclosure of this information.

at issue. *See* ORD 402. Therefore, none of Coventry's information may be withheld under section 552.110(a) of the Government Code.

Section 552.101 of the Government Code also encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is intimate and embarrassing and of no legitimate public interest. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note the submitted information contains business ownership percentages. Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136(b) of the Government Code provides, "[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."⁵ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Thus, the department must withhold the insurance policy numbers we marked under section 552.136 of the Government Code.

In summary, for the responsive information that is identical to the information previously requested and ruled upon by this office, the department must continue to rely on Open Records Letter Nos. 2007-08610, 2010-01231A, 2011-08937A, 2011-11033, 2012-00311A, 2012-07767A, 2012-07870A, 2012-17087, and 2013-15283 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. The department must also rely on the Agreed Final Judgment that was issued as a result of Open Records Letter No. 2008-15078, and withhold or release the identical information in accordance with that agreement. The department must withhold the information we have marked under section 552.110(b) of the Government Code. The department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The department must withhold the insurance policy

⁵The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

numbers we marked under section 552.136 of the Government 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Lauren Dahlstein
Assistant Attorney General
Open Records Division

LMD/som

Ref: ID# 559458

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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