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ATTORNEY GENERAL OF TEXAS

July 17, 2015

Mr. Bob Davis
Office of Agency Counsel
Legal Section MC 110-1C
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2015-14612

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# 572055 (TDI #160656).

The Texas Department of Insurance (the "department") received a request for information pertaining to the residential rate filings, rates, and premiums of National Lloyds Insurance Company ("NLIC") since 2007.¹ You state the department is releasing some of the requested information. You state, although the department takes no position with respect to whether the submitted information is excepted from disclosure, its release may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the department notified NLIC and other third parties of the request for information and of their

¹You state the department sought and received clarifications of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if 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 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 request is clarified or narrowed). You also explain the department required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code, which you state the department received on May 4, 2015. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit). You explain the department subsequently sought and received further clarification of the request. *See id.* § 552.222(b); *City of Dallas*, 304 S.W.3d 380.

right to submit arguments stating why their 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 reviewed the submitted information and the arguments submitted by a representative of NLIC and by some of the other third parties.² We have also received and considered comments submitted by an attorney at the requestor's law firm. *See* Gov't Code § 552.304 (interested third party may submit comments stating why information should or should not be released).

Initially, you inform us by letter dated June 12, 2015, the department withdraws its request for a ruling regarding the information pertaining to insurance groups other than NLIC. You explain, and the requestor's law firm submitted comments to our office confirming, the requestor subsequently excluded from the request the information in a spreadsheet that pertains to insurance groups other than NLIC. Thus, this information is no longer responsive to the request. Therefore, this ruling does not address this non-responsive information or the comments submitted by the other third parties.³

NLIC argues its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets 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. *Id.* § 552.110. 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

²The department contends it failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301. However, because third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we need not reach this issue. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977). Thus, we will consider the arguments against disclosure of the information at issue.

³You explain the department will inform the other third parties that their information is no longer responsive to the request.

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 763 (Tex.), *cert. denied*, 358 U.S. 898 (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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude 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.*; 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).

NLIC contends its information is commercial or financial information, release of which would cause substantial competitive harm to NLIC. Upon review of NLIC’s arguments

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

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

under section 552.110(b) of the Government Code, we conclude NLIC has established the release of its rate information, which we have marked, would cause substantial competitive injury to NLIC. Accordingly, the department must withhold the information we have marked under section 552.110(b).⁵ However, we find NLIC 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. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the department may not withhold the remaining responsive information under section 552.110(b).

NLIC argues its information constitutes trade secrets. However, upon review, we find NLIC has failed to demonstrate its remaining information 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 the information at issue on the basis of section 552.110(a) of the Government Code.

Section 552.136 of the Government Code states, in part, “Notwithstanding any other provision of this chapter, 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.”⁶ Gov’t Code § 552.136(b); *see also id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, the department must withhold the insurance policy numbers we have marked under section 552.136.

The attorney at the requestor’s firm argues the department may release any sensitive or confidential information to the requestor because it will be protected by an agreed protective order issued by the 206th Judicial District Court of Hidalgo County, Texas. The agreed protective order only applies to information produced in the litigation and does not apply to information produced as a result of this open records request. Thus, the agreed protective order has no bearing on the present matter.

In summary, the department must withhold the information we have marked under section 552.110(b) of the Government Code and the insurance policy numbers we have

⁵As our ruling is dispositive, we need not address NLIC’s remaining argument against disclosure of this information.

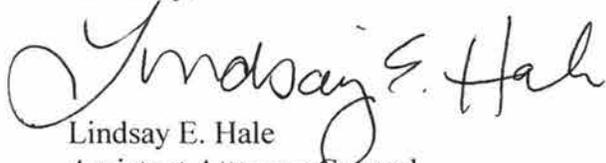
⁶The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

marked under section 552.136 of the Government Code. The department must release the remaining responsive 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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/dls

Ref: ID# 572055

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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