



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 1, 2016

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

OR2016-02405

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# 596164 (ORR# 167086).

The Texas Department of Insurance (the "department") received a request for information pertaining to a specified e-mail, project, and meeting. You indicate the department will withhold e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim some of the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.<sup>2</sup> Additionally, you state release of the submitted information may implicate the proprietary interests of two third parties. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

<sup>2</sup>Although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See* Open Records Decision Nos. 676 at 1-2 (2002).

their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, the department has not complied with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public and must be released unless there is a compelling reason to withhold it. *See id.* § 552.302; *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) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason may exist to withhold information when the information is made confidential by another source of law or affects third-party interests. *See* Open Records Decision No. 150 at 2 (1977). The department claims section 552.107 of the Government Code for the submitted information. However, this exception is discretionary in nature. It serves to protect a governmental body's interests and may be waived; as such, it does not constitute a compelling reason to withhold information. *See* Gov't Code § 552.007; Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, no portion of the submitted information may be withheld under section 552.107 of the Government Code. However, because section 552.101 of the Government Code and third-party interests can provide compelling reasons to overcome the presumption of openness, we will address the applicability of section 552.101 to the submitted information and will consider whether the information may be withheld based on the interest of any third party.

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. Section 552.101 encompasses section 964.070 of the Insurance Code, which provides, in part, the following:

(a) Any information filed by an applicant or captive insurance company under this chapter is confidential and privileged for all purposes, including for purposes of [the Act]. . . . Except as provided by Subsections (b) and (c), the information may not be disclosed without the prior written consent of the applicant or captive insurance company to which the information pertains.

Ins. Code § 964.070(a); *see also id.* § 964.001(a)(2) (defining “captive insurance company”), (a)(3) (defining “captive management company”). You inform us all of the submitted

information pertains to the department's consideration of an applicant company's proposal under chapter 964 of the Insurance Code. You state, "Most of this information was submitted by the applicant company or by the captive management company who was working with [the department] on behalf of the applicant." You also argue any submitted information that was not submitted by the applicant or the applicant's agents would "reveal the content of the documentation submitted by those entities." You inform us none of the release provisions of section 964.070(b) and (c) apply in this instance. Based on your representations and our review, we find the department has demonstrated the applicability of section 964.070(a) of the Insurance Code to portions of the submitted information, which we have marked. Accordingly, the department must withhold the marked information under section 552.101 of the Government Code in conjunction with section 964.070(a) of the Insurance Code. However, we find you have not demonstrated the remaining information consists of documentation that was filed by the applicant or the applicant's agents under chapter 964 or reveals the contents of any such documentation. Accordingly, the department may not withhold the remaining information under section 552.101 of the Government Code in conjunction with section 964.070(a) of the Insurance Code.

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any third party explaining why the remaining information should not be released. Therefore, we have no basis to conclude any third party has a protected proprietary interest in the remaining information. *See id.* § 552.110; 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. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest any third party may have in the information.

In summary, the department must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 964.070(a) 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.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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 596164

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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