



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

October 14, 1993

Peter Potemkin  
Executive Director  
Texas Workers' Compensation  
Insurance Facility  
8303 MoPac Expressway, Suite 310  
Austin, Texas 78759-8396

Open Records Decision No. 620

Re: Whether, under sections 552.101 or 552.110 of the Open Records Act, the Texas Workers' Compensation Insurance Facility may withhold from required public disclosure the guidelines it uses to determine the percentage of the estimated premium it will require an applicant to pay as a deposit, and related questions (RQ-354)

Dear Mr. Potemkin:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code.<sup>1</sup> Specifically, you have received a request for the following information:

1. Your criteria for determining whether a party applying for Workers' Compensation Coverage through the facility will be required to pay the total premium prior to the binding of said insurance or whether the party will be allowed to pay the same on a reporting basis, after their paying of the "Deposit Premium";
2. The workpapers, including, but not limited to: scratch sheets, file memorandum [*sic*], credit forms, created or used by the Facility in determining that Back Alley Productions, Inc. should not be allowed to pay in reporting installments, but should be required to pay the entire premium up front, including those actually bearing the calculations for Back Alley Productions, Inc.;

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<sup>1</sup>The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act, was repealed by the 73rd Legislature now is codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

3. The title of the person responsible for making such payment plan determinations and their qualifications to make such determinations, including their ability to make determinations based upon the criteria, including their abilities and qualifications to read and interpret Balance Sheets and Financial Statements;
4. Why Back Alley Productions, Inc. was turned down for a reporting basis payment plan; and
5. Why the Facility decided to enforce its scheme of requiring credit checks and/or sworn Balance Sheets of Financial Statements prior to its announced date for enforcement of March 1, 1992.

We note that the requestor is the attorney for Back Alley Productions, Inc. (the "company").

By way of background, you state that the Texas Workers' Compensation Insurance Facility (the "facility") is created pursuant to Insurance Code article 5.76-2. Pursuant to section 2.01, Insurance Code article 5.76-2, the facility is a nonprofit unincorporated association of insurance companies and other entities authorized to write workers' compensation insurance policies in this state. *See* Ins. Code art. 5.76-2, § 1.01(11) (defining "insurer"). One of the facility's purposes is to provide, through the employers' rejected risk fund, workers' compensation insurance coverage for employers that are in good faith entitled to insurance coverage but that are unable to procure or retain coverage through ordinary methods in the voluntary market. *Id.* § 2.02(2); *see id.* §§ 1.01(8) (defining "good faith"), (14) (defining "rejected risk"); 4.01 (articulating purpose of rejected risk fund). In accordance with section 2.11 of article 5.76-2, the facility is a governmental body only for purposes of the act,<sup>2</sup> as well as the Open Meetings Act, chapter 551, Government Code, formerly V.T.C.S. article 6252-17.

When an employer that is a rejected risk<sup>3</sup> applies to the facility for workers' compensation coverage and it appears that the employer is in good faith entitled to insurance through the rejected risk fund, the facility "shall calculate the deposit premium [required] in accordance with the classifications and rates promulgated by [the Texas Department of Insurance] and, on payment thereof, the facility shall designate a servicing

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<sup>2</sup>An employee's workers' compensation claim file in the facility's or a servicing company's possession is not subject to disclosure under the Open Records Act. Ins. Code art. 5.76-2, § 2.11; *see id.* § 1.01(15) (defining "servicing company").

<sup>3</sup>Insurance Code article 5.76-2, section 1.01(14) defines "rejected risk" as "an employer, other than an employer eligible for a small premium policy through the plan, that is in good faith entitled to insurance but is unable to procure or retain insurance through ordinary methods in the voluntary market."

company" which must issue workers' compensation insurance to the rejected risk. *Id.* § 4.02(b). The deposit premium can range from a percentage of the estimated premium to the entire estimated premium. *Id.* § 4.02(c). Section 4.02(d) expressly authorizes the facility to refuse to write insurance coverage on an applicant that is a credit risk<sup>4</sup> if the applicant does not pay or provide sufficient security for the total estimated premium and other charges before the policy is issued. The facility has developed underwriting guidelines to assist it in determining how much of the estimated premium it should require an applicant to pay as a deposit. The requestor seeks copies of the facility's underwriting guidelines as well as other information pertaining to a company that is a rejected risk applicant the facility required to pay the entire premium as a deposit on its workers' compensation insurance policy.<sup>5</sup>

The documents you have submitted for our review consist of the facility's underwriting standards, intra-agency memoranda, the company's application for workers' compensation insurance with The Employers' Rejected Risk Fund and supporting financial information, and the evaluation of the company's application. We first consider your argument that section 552.101 of the act exempts the requested information from required public disclosure. Section 552.101 exempts from disclosure to the public "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You do not cite any constitutional or statutory provisions under which any of the requested information is confidential. With regard to judicial decisions, however, you contend that the logic of Open Records Decision No. 523 (1989) applies in this situation, and therefore that section 552.101 exempts the financial information the company submitted in its application to the facility. Open Records Decision No. 523, which discussed common-law privacy rights, recognized a distinction between "the basic facts regarding a particular financial transaction between the individual and the public body," which section 552.101 does not exempt from disclosure, and "background financial information furnished to a public body about an individual," which section 552.101 exempts from disclosure. Open Records Decision No. 523 at 4-5 (quoting Open Records

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<sup>4</sup>Insurance Code article 5.76-2, section 1.01(4) defines "credit risk" as "a rejected risk who is unable to procure or retain insurance through ordinary methods in the voluntary market because the risk is in bankruptcy or is not creditworthy."

<sup>5</sup>You have submitted for our review copies of the information you believe to be responsive to the request. However, we do not find any documents responsive to the request numbered 3. We assume that documents responsive to number 3 either do not exist (*see* Open Records Decision No. 362 (1983) at 2 (stating that act does not require governmental body to make available nonexistent information)), or that you do not object to disclosure of the information. We limit our decision to those documents you submitted for our review.

Additionally, we note that the requests numbered 4 and 5 appear to be interrogatories, not requests for records. The Open Records Act does not require a governmental body to prepare answers to questions. Gov't Code § 552.227. The governmental body has an obligation to relate the request to information it holds, however. Open Records Decision No. 561 (1990) at 8.

Decision No. 373 (1983)). Significantly, however, Open Records Decision No. 523 limited the confidentiality of background financial information to that submitted by an *individual*, not a *corporation*. Corporations do not have a right to privacy. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), cited in *Rosen v. Matthews Const. Co.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990); see Open Records Decision No. 192 (1978) (stating that right of privacy protects feelings and sensibilities of human beings, and does not protect evaluation report on private college). Thus, while the financial information the company submitted to the facility is background financial information, the company has no right of privacy in it. We next consider your section 552.110 argument.

Section 552.110 of the act excepts from public disclosure "a trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 comprises two separate categories of information: (1) trade secrets and (2) commercial and financial information obtained from a person that is privileged or confidential pursuant to a statute or judicial decision. Open Records Decision Nos. 592 (1991) at 2; 552 (1990) at 2. You contend that the requested information constitutes a trade secret.

In making trade secret determinations under section 552.110, this office will accept a claim as valid if the claimant establishes a *prima facie* case for its assertion of trade secrets that is unrebutted as a matter of law. Open Records Decision No. 552 at 5. Whether a claimant makes a *prima facie* case depends on whether the claimant's arguments as a whole correspond to the criteria for trade secrets detailed in the Restatement of Torts and adopted by the Texas courts. *Id.* at 2-3. Section 757 of the Restatement of Torts defines "trade secret" as "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."<sup>6</sup> *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

You contend that we should consider the facility's underwriting guidelines to be a trade secret because the information is closely held and of great importance to the facility, "as [the guidelines] allow the Facility to evaluate the creditworthiness of an applicant." For the moment, we will assume that your assertion is true and that the guidelines are a "formula, pattern, device or compilation of information which is used in one's business," thereby satisfying the first prong of the definition of "trade secret" found in the Restatement of Torts. Even so, you do not explain how, nor do we believe that, the guidelines satisfy the second prong of the definition by providing you "an opportunity to

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<sup>6</sup>The Restatement lists six factors to be considered in determining whether information constitutes a trade secret. These factors are indicia of whether information constitutes a trade secret; depending on the information being considered, one factor alone may indicate that the information is a trade secret. RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision No. 552 (1990) at 3.

obtain an advantage over competitors who do not know or use" the underwriting guidelines. Indeed, we are unaware of any statutory or constitutional authority permitting the facility to compete with employers, workers' compensation insurance companies, or any other entities.<sup>7</sup> Thus, section 552.110 does not permit you to withhold from the requestor the facility's underwriting guidelines.<sup>8</sup>

In summary, you must release to the requestor all of the documents you submitted for our review.<sup>9</sup>

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<sup>7</sup>In rare cases, a statutory or constitutional provision specifically may authorize a governmental body to engage in competition with private enterprise. Open Records Decision Nos. 593 (1991) at 4; 153 (1977) at 3.

<sup>8</sup>You do not appear to contend that the "commercial or financial information" prong of section 552.110 protects any of the requested information. As we are unaware of any statute or judicial decision that protects any of the requested information as commercial or financial information, we conclude that the second prong of section 552.110 does not protect the requested information from required public disclosure.

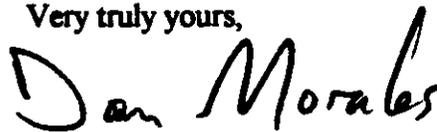
<sup>9</sup>Aside from the documents discussed in the text, you have submitted copies of intra-agency memoranda, notes to and from Morgan Insurance Agency, the workers' compensation insurance company the facility designated to service the company, and a worksheet on which the facility determined that the company should pay the entire premium as a deposit on the workers' compensation insurance coverage. You claim that section 552.111 of the act exempts these documents from disclosure to the requestor. Section 552.111 exempts "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In the past, this office interpreted section 552.111 to authorize a governmental body to withhold from required public disclosure information that consisted of advice, opinion, or recommendation used in the deliberative process. Open Records Decision No. 574 (1990) at 1-2. However, the Third Court of Appeals, in *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), recently held that section 552.111 "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath*, 842 S.W.2d at 413. Our office considered the *Gilbreath* court's construction of section 552.111 in Open Records Decision No. 615 (1993).

The information you have submitted is entirely factual and would not qualify for exemption from required public disclosure under section 552.111 even under this office's previous standard. We therefore decline to consider whether the information is exempted from required public disclosure under the narrower standard articulated in *Gilbreath* and Open Records Decision No. 615.

**S U M M A R Y**

Sections 552.101, 552.110, and 552.111 of the Open Records Act, chapter 552 of the Government Code, Acts 1993, 73d Leg., ch. 268, §§ 1, 46 (nonsubstantive codification of former article 6252-17a, V.T.C.S.), do not authorize the Texas Workers' Compensation Insurance Facility to withhold from required public disclosure the guidelines the facility uses to determine the percentage of the estimated premium it will require an applicant for workers' compensation insurance to pay as a deposit.

Very truly yours,



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