



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

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Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance, MC110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR96-0476

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 38877.

The Texas Department of Insurance (the "department") received four requests for copies of proposals submitted to the department for consideration as a statistical agent for certain lines of insurance. The department received proposals from three companies, Peterson Consulting Limited Partnership ("Peterson"), Insurance Services Office ("ISO"), and Policy Management Systems Corporation ("PMSC"). The department raises no exception to the disclosure of the requested information. *See Gov't Code § 552.305* (relieving governmental body of duty to submit reasons information is excepted from disclosure when third party's privacy or property interests are at stake). The department submitted to this office for our review copies of information each company marked as confidential.

This office notified the three companies of the requests for their proposal information. We informed each company that if it wishes to claim that any of the information is excepted from public disclosure, it must inform this office which exceptions apply and explain why each exception is applicable, with the caveat that failure to provide the information within fourteen days of receipt of the notice, will result in the conclusion of this office that the company has no privacy or property interest in the requested information.

One of the companies, PMSC, has not responded to our notification. Accordingly, we conclude that the department may not withhold from disclosure any portion of the proposals submitted by PMSC.

ISO and Peterson did timely respond to our notification. We will begin with the ISO information. ISO asserts that portions of its proposal, specifically, pages 14-16, 20-22, 23-33, 41-45 and exhibits 6.1, 6.2, 6.3, 6.4, and 7.1, are excepted from required public disclosure based on section 552.110 of the Government Code. You state that ISO also seeks to withhold from disclosure exhibits 3.1, 3.2 and 8.1, but ISO makes no such representation in its letter to us.

Section 552.110 excepts from disclosure “[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” Based on ISO’s arguments, we understand that ISO is asserting that the information at issue is a trade secret. We, therefore, need not address the commercial or financial information branch of section 552.110 in regard to the ISO information.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

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, . . . [but] 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). The Restatement also lists the following six factors to be considered in determining whether particular information constitutes 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 this information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757, cmt. b (1939).

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 private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. We conclude that ISO has established a prima facie case that the information at issue is a trade secret. Accordingly, the department may withhold from disclosure pursuant to section 552.110 of the Government Code the information ISO submitted on pages 14-16, 20-33, 41-45 and exhibits 6.1, 6.2, 6.3, 6.4, and 7.1. As ISO did not assert that exhibits 3.1, 3.2 and 8.1 are excepted from disclosure, we cannot conclude that the department may withhold those exhibits from public disclosure.

Turning to the Peterson information, counsel for Peterson argues that exhibit 3 and appendices A and D of its proposal are excepted from disclosure pursuant to section 552.110 of the Government Code. We conclude that Peterson's trade secret arguments establish that Appendix A warrants nondisclosure.

We also conclude, but on different grounds, that the department must not disclose exhibit 3, a 1995 balance sheet, and appendix D, consolidated balance sheets as of December 31, 1994 and 1993. We believe this information merits nondisclosure under section 552.110 as "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to

cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). In this case, we believe Peterson has established that the disclosure of exhibit 3 and appendix D is likely to cause substantial harm to its competitive position. Accordingly, that information is exempted from required public disclosure pursuant to section 552.110 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref.: ID# 38877

Enclosures: Submitted documents

cc: Ms. Kimberly A. Yelkin, P.C.
Akin, Gump, Strauss, Hauer & Feld, L.L.P.
1900 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701
(w/o enclosures)

Mr. Alex Gonzales
Hughes & Luce
111 Congress Avenue, Suite 900
Austin, Texas 78701
(w/o enclosures)

Mr. Terry Porter
Manager
Texas Insurance Checking Office
P.O. Box 15
Austin, Texas 78767-0015
(w/o enclosures)

Mr. John Paul Halvorsen
Counsel
Insurance Services Office, Inc.
7 World Trade Center
New York, New York 10048
(w/o enclosures)