



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

July 10, 1996

Ms. Christine T. Rodriguez
Staff Attorney
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR96-1116

Dear Ms. Rodriguez:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40230.

The Texas Department of Insurance (the "department") received a request for information concerning viatical settlement rules or findings. The department has released some of the requested information to the requestor. However, the department has several applications for certificates of registration as a viatical settlement company or broker, and you are concerned that these applications may contain information that implicates the proprietary interests of the applicants. You submitted the applications at issue to this office for our review.

Pursuant to section 552.305, we notified the third party applicants of the request for information and of their opportunity to claim that the information in the applications at issue is exempted from disclosure. We received responses from the following:

1. Mr. William E. Kelley, Executive Director, Viatical Association of America;
2. Ms. Alison Kennamer of Rodriguez, Colvin & Chaney, L.L.P., representing Legacy Benefits Corporation;
3. Ms. Kimberly A. Yelkin of Akin, Gump, Strauss, Hauer & Feld, L.L.P., representing Viaticus, Inc.;

4. Ms. Sally L. Crawford of Jones, Day, Reavis & Pogue, representing The Viaticum Fund, Inc.;
5. Mr. Kenneth Klein, President, National Capital Benefits Corporation, also representing two wholly-owned subsidiaries, American Life Resources Corporation and Living Benefits, Inc.;
6. Mr. Stephen L. Keller, President, Kelco, Inc.;
7. Mr. Robert Thomajan, President, Eterna Benefits L.L.C.; and
8. Mr. Brian T. Casey of Morris, Manning & Martin, L.L.P., representing Portsmouth Settlement Company I, Inc.

These third parties claim that portions of the applications are excepted from disclosure under sections 552.101 and 552.110 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." For information to be protected from public disclosure by the common-law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) the information is *not of legitimate concern to the public*. 540 S.W.2d at 685. The court considered intimate and embarrassing information such as that relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Kelco, Inc. contends that common-law privacy protects the names, addresses, and social security numbers of its employees contained in section 26 of its application. We disagree. Names, addresses, and social security numbers are not the types of information that are protected by common-law privacy. *See e.g.*, Open Records Decision No. 600 (1992). Therefore, the department may not withhold this information from the application of Kelco, Inc.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of

Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted). The following third parties have demonstrated that releasing the following portions of their applications would cause them substantial competitive harm:

1. Legacy Benefits Corporation; p. 3 of the Application; Schedule A, p. 2 only; Schedule B in its entirety;
2. The Viaticum Fund, Inc.; all forms used to enter into viatical settlements with viators, collectively referred to as "loan documents," and marked by this office;
3. Kelco, Inc.; section 16.2, pp. 14-15 of the Application;
4. Portsmouth Settlement Company I, Inc.; pp. 2-4 of the Application; Addendum A to the Application; pp. 2-3 of the Viatical Settlement Company Report; Exhibits 15-1, 15-2, and 20-1.¹

Accordingly, the department must withhold this information from public disclosure under the commercial or financial information prong of section 552.110.

Three third parties made no arguments under the commercial or financial information prong of section 552.110, but rather argued that portions of their applications constitute trade secrets. 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 (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

¹Some of these third parties also contend that these portions of their applications constitute trade secrets. Because we conclude that this information is excepted from disclosure under the commercial or financial information prong of section 552.110, we need not address their trade secret arguments with respect to this information.

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) (emphasis added). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² 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 have reviewed the trade secret arguments presented by the following third parties, and we conclude that the following portions of their applications constitute trade secrets:

1. Viaticus, Inc.; Attachment 2, but not including p. 1; Attachments 6-4 through 6-8; Attachment 5;
2. National Capital Benefits Corporation; section 2 of each the three Viatical Settlement Company Reports it submitted to the department;
3. Eterna Benefits, L.L.C.; p. 3 of the Viatical Settlement Company Report.

²The 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 (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

The department must withhold this information from public disclosure under the trade secret prong of section 552.110. These third parties also argued that information entered in sections 14, 15, 16, and 26 of their applications constitutes trade secrets. We disagree, because the information contained in these sections does not fit within the Restatement's definition of trade secret.

We are resolving this matter with an 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 should 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,



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KEH/ch

Ref: ID# 40230

Enclosures: Submitted documents

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