Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 10, 1997

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR97-0301

Dear Ms. Keller:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 103459.

The Texas Department of Insurance (the "department") received a request for four categories of information including: 1) TAIPA Quota Reports, 2) summary of vehicles in force from 1994 to the present, 3) full detail Quarterly Market Report experience for 1996 experience, and 4) residential property industry aggregate experience by zip code. You explain that some of the requested information has been released to the requestor. You claim, however, that some of the information included within item 3 above, insurance premium and cancellation information by company by zip code, may be proprietary in nature and protected from disclosure by the Government Code. Gov't Code § 552.007; Gov't Code § 552.305. You raise no exception to disclosure on behalf of the department, and make no arguments regarding the proprietary nature of the requested information. You have submitted for our review a representative sample of the insurance premium and cancellation information by company and by zip code.[1]

Since the property and privacy rights of third parties may be implicated by the release of the requested information here, this office notified the 205 insurance companies whose company information was requested. *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 that statutory predecessor

[1]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). This office has received 43 responses to the notification. They include: Allstate Insurance Group, American Fidelity Group (American Fidelity Insurance Company, American Fidelity Lloyds Insurance Company, Cimmarron Insurance Company), members of the American International Group, American Loyalty Insurance Company, American National Property and Casualty Company (American National General Insurance Company, Independent County Mutual Insurance Company), American States Insurance Group (American States Insurance Company, American Economy Insurance Company, American States Preferred Insurance Company, American States Insurance Company of Texas), Amica Mutual Insurance Company, Blue Ridge Insurance Company, Chubb Corporation Insurance Holding Company system (Federal Insurance Company, Pacific Indemnity Company, Vigilant Insurance Company, Chubb Lloyd's Insurance Company of Texas), Colonial Penn Insurance Company, Consumers County Mutual Insurance Company, Southern Farm Bureau Casualty Insurance Company, Texas Farm Bureau Mutual Insurance Company, Texas Farm Bureau Underwriters, Farmers Insurance Group (Texas Farmers Insurance Company, Mid-Century Insurance Company of Texas, Farmers Texas County Mutual Insurance Company, Truck Insurance Exchange and other members), Gainsco County Mutual Insurance Company, Germania Fire and Casualty Company, Green Tree Insurance Company, Hochheim Prairie Casualty Insurance Company, Hochheim Prairie Insurance Company, Home State County Mutual Insurance Company, Insured Lloyd's, ITT Hartford Insurance Group (Hartford Fire Insurance Company, Hartford Underwriters Insurance Company, Hartford Casualty Insurance Company, Hartford Insurance Company of the Midwest, Twin City Fire Insurance Company), Liberty Mutual Group of insurance companies, The Maryland (Maryland Casualty Company, Northern Insurance Company of New York, Assurance Company of America, Valiant Insurance Company, Maryland Insurance Company, National Standard Insurance Company), Met P&C (First General Insurance Company, Metropolitan General Insurance Company, Metropolitan Property and Casualty Insurance Company, Metropolitan Casualty Insurance Company, Metropolitan Group Property and Casualty Insurance Company, Metropolitan Lloyds Insurance Company of Texas), National General Insurance Company, Northern County Mutual Insurance Company, Northwestern County Mutual Insurance Company, Ohio Casualty Group of Companies (Ohio Casualty Insurance Company, West American Insurance Company, American Fire and Casualty Company, Ohio Security Insurance Company), Old American County Mutual Fire Insurance Company, Prudential Property and Casualty Insurance Company, Royal Insurance (Royal Insurance Company of America, Royal Indemnity Company, Globe Indemnity Company, Safeguard Insurance Company, Newark Insurance Company, American and Foreign Insurance Company), Republic Insurance Company, Republic Underwriters Insurance Company, Southern County Mutual Insurance Company, Southern Insurance Company, State Farm insurance companies, Travelers Group (Travelers Indemnity Company, Travelers Indemnity Company of Illinois, Charter Oak Fire Insurance Company, Automobile Insurance Company of Hartford, Aetna Personal Security Insurance Company, Standard Fire Insurance Company), Trinity Universal Group (Security National Insurance Company, Trinity Lloyd's Insurance Company, Trinity Universal Insurance Company, Trinity Universal Insurance Company of Kansas), United Services Automobile Association (USAA Casualty Insurance Company, USAA County Mutual Insurance Company), Vanguard Insurance Company, and Vanguard Underwriters Insurance Company.

Some of the companies involved did not respond to our notice; therefore, we have no basis to conclude that these companies' information is excepted from disclosure. *See* Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party 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), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. The premium and cancellation information concerning the companies that did not respond, must therefore, be released to the requestor.

In addition to arguing that the company-specific premium and cancellation information by zip code is excepted from disclosure, several of the responding companies contend that the information revealing the number of vehicles on policies in force by company and by zip code is confidential and should not be released. The department explains that it has released this information pursuant to department rule. 28 T.A.C § 5.206(h). The department does not seek to withhold this information from the requestor. Consequently, the department does not seek a decision from this office regarding release of this information. Gov't Code § 552.301; Gov't Code § 552.305 (governmental body may seek attorney general decision when third party privacy or property interests may be involved). This ruling, therefore, does not address the propriety of the release of the information revealing the number of vehicles on policies in force. *Cf. Morales v. Ellen,* 840 S.W.2d 519, 523 (Tex. App.--El Paso 1992, writ denied) (language of section 552.305(b) of the Government Code is permissive and third party need not seek relief from attorney general before claiming interest in courts).

Several of the responding companies also argue that sections 552.101, 552.104, and 552.112 of the Government Code except the requested information from disclosure. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." After reviewing the submitted materials and arguments, we do not believe that the requested information must be withheld based on a right of privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (common-law privacy); Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)) (constitutional privacy). Moreover, we do not find nor does any party point to a statute that would deem the information confidential. We conclude that the information may not be withheld based on section 552.101.

Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). The premium and cancellation information may not be withheld under section 552.104. Likewise, we do not believe that section 552.112 is applicable in this instance. The department does not seek to withhold the information at issue based on this section. In fact, the department insists that "[a]lthough [the department] may seek to withhold information covered by section 552.112, it is within [the department's] discretion to release such information." Gov't Code § 552.007; *see* Open Records Decision No. 522 (1989) at 4 (governmental body may decide not to raise permissive exceptions);

Open Records Letter No. 96-0165 (1996) at 3-4. The requested information may not be withheld pursuant to section 552.112.

Finally, each of the responding companies raises section 552.110 as an exception to disclosure of its information. Section 552.110 protects the property interests of private parties 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.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.[2]

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 for commercial and financial information. In *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C.

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[2]The 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 other 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.

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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. 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. *Id.* After reviewing the arguments of each company, we believe that the following companies have established that their companies' information is protected under the commercial or financial information prong of section 552.110: Allstate Insurance Group[3], American Fidelity Group, American National Property and Casualty Company, American States Insurance Group, Farmers Insurance Group, Met P&C, State Farm[4], and United Services Automobile Association. The department must withhold these companies' requested premium and cancellation information. We also find that the following companies have made a prima facie demonstration that their information must be protected as a trade secret: Blue Ridge Insurance Company, Colonial Penn Insurance Company, Consumers County Mutual Insurance Company, Gainsco County Mutual Insurance Company, Germania Fire and Casualty Company, Hochheim Prairie Casualty Insurance Company, Hochheim Prairie Insurance Company, Home State County Mutual Insurance Company, Insured Lloyd's, ITT Hartford Insurance Group, Liberty Mutual Group, National General Insurance Company, Northern County Mutual Insurance Company, Northwestern County Mutual Insurance Company, Old American County Mutual Fire Insurance Company, Prudential Property and Casualty Insurance Company, Republic Insurance Company, Republic Underwriters Insurance Company, Southern County Mutual Insurance Company, Southern Insurance Company, Travelers Group, Trinity Universal Group, Vanguard Insurance Company, and Vanguard Underwriters Insurance Company. The department must withhold these companies' requested premium and cancellation information.

The remaining companies who responded to our notification failed to demonstrate

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[3]Allstate asks this office to adopt the test articulated in *Critical Mass* for the commercial or financial information prong of section 552.110. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (en banc), *cert. denied*, 507 U.S. 984, 113 S.Ct. 1579 (1992). To make a determination here, we need not do so. *Critical Mass* held that commercial or financial information that is voluntarily provided to a governmental body by a third party is confidential when the information is the kind that would not customarily be released to the public by the third party. *Id.* at 879. The department explains that the information at issue was collected in the companies' Quarterly Market Report. The department states that this report is required by the department's Texas Private Passenger Automobile Statistical Plan. *See* Ins. Code art. 5.05; Ins. Code art. 21.69; Ins. Code art. 21.81 §§ 3, 5. We do not believe that we must address the adoption of the *Critical Mass* standard for voluntarily submitted commercial or financial information at this time. Open Records Decision Nos. 639 (1996) at 4 n. 2, 494 (1988) at 5.

[4]Although the requestor did not originally seek State Farm's premium and cancellation information, he has subsequently amended his request to include this information. Letter from Birny Birnbaum to Ken Lovoy, Texas Department of Insurance (December 16, 1996).

that their companies' premium and cancellation information must be withheld under section 552.110. These companies' information may not be withheld: American International Group, American Loyalty Insurance Company, Amica Mutual Insurance Company, Chubb Corporation Insurance Holding Company, Southern Farm Bureau Casualty Insurance Company, Texas Farm Bureau Mutual Insurance Company, Texas Farm Bureau Underwriters, Green Tree Insurance Company, The Maryland, Ohio Casualty Group, and Royal Insurance.

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,

Don Ballard

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 103459

Enclosures: Submitted document

cc: Mr. Birny Birnbaum
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(w/o enclosures)

All third party Insurance Companies