



July 8, 1999

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

OR99-1903

Dear Mr. Magee:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 125530.

The Texas Department of Insurance (the "department") received two open records requests for the responses of certain automobile insurance companies to inquiries the department made pursuant to article 1.24 of the Insurance Code regarding the use of "aftermarket" automobile parts. You do not contend that any of the information at issue is excepted from required public disclosure, but rather have requested an open records decision from this office pursuant to section 552.305 of the Government Code, which authorizes governmental bodies to rely on the arguments of a third party to demonstrate how the requested information implicates the party's privacy or proprietary interests, and thus, is excepted from required public disclosure.

In accordance with the practice this office established in Open Records Decision No. 575 (1990), this office notified representatives of Kemper Insurance Companies ("Kemper"), Farmers Insurance Group ("Farmers"), State Farm Insurance Companies ("State Farm"), and Travelers Indemnity Company ("Travelers") that we received your request for an open records decision regarding matters affecting their proprietary interests. In our notification, this office requested an explanation as to why the information at issue was excepted from public disclosure, with the caveat that unless we received such explanation, this office would instruct the department to disclose the information unless the information is otherwise excepted from required public disclosure.

More than five weeks have elapsed since we issued our notice to Kemper, which has failed to submit written comments.. Consequently, this office has no basis on which to conclude that any portion of Kemper's response to the department is excepted from public disclosure. The department must release this information to the requestors. A representative of Farmers responded to our notice and informed us that Farmers has no objection to the release of their response to the department's article 1.24 inquiry. The department therefore must release this information as well.

On the other hand, both State Farm and Travelers contend that their respective responses to the department are excepted from required public disclosure pursuant to section 552.110 of the Government Code. Section 552.110 excepts from required public disclosure “[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” Both State Farm and Travelers contend that their respective responses come under the protection of both categories. To be withheld as “commercial or financial information” for purposes of section 552.110, however, the information must be “privileged or confidential by statute or judicial decision.”

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts’ interpretation of exemption 4 of the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 1999 WL 314976 (Tex. App.—Austin May 20, 1999, no pet. h.). Because neither State Farm nor Travelers has cited to a statute or judicial decision that makes the commercial or financial information privileged or confidential, the department may not withhold any of the requested information under the commercial or financial information prong of section 552.110. Consequently, the information at issue will be excepted from public disclosure under section 552.110 only if it constitutes a “trade secret.”

A “trade secret” consists of “any formula, pattern, device or compilation of information which is used in one’s business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it.” RESTATEMENT OF TORTS § 757 cmt. b (1939). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret.<sup>1</sup> This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No.

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<sup>1</sup>These six factors are

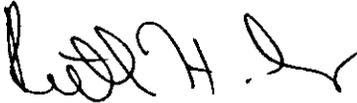
- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

Both State Farm and Travelers have attempted to explain how the six factors in determining whether information is a trade secret applies to their respective responses to the department. However, despite their claims of secrecy, there is nothing to indicate that the practices discussed in the responses are not generally known throughout the industry. Matters of general knowledge in an industry cannot be appropriated as a trade secret. *Wissman v. Boucher*, 240 S.W.2d 278 (Tex. 1951). Consequently, we conclude that the responses of State Farm and Travelers do not constitute "trade secrets" and that this information therefore must be released.

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.

Sincerely,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/RWP/eaf

Ref.: ID# 125530

Encl: Submitted documents

cc: Mr. Jerry Galow  
Watson, Bishop, London, Galow, P.C.  
106 East Sixth Street, Suite 700  
Austin, Texas 78701  
(w/o enclosures)

cc: Mr. Roy Smalley  
Legislative Director  
Texas Lone Star Collision Association  
Box 1199  
Addison, Texas 75001-1199  
(w/o enclosures)

- cc: Mr. Jack M. McGregor  
Senior Counsel  
Kemper Insurance Companies  
1 Kemper Drive  
Long Grove, Illinois 60049-0001  
(w/o enclosures)
- cc: Mr. Thomas T. Rogers  
Jackson Walker, L.L.P.  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
(w/o enclosures)
- cc: Mr. Robert L. Watkins  
Counsel  
State Farm Insurance Companies  
One State Farm Plaza  
Bloomington, Illinois 61710-0001  
(w/o enclosures)