



September 23, 1999

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

OR99-2686

Dear Ms. Waitt:

You have asked whether certain information is subject to required public disclosure under the Texas Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 127482.

The Texas Department of Insurance (the "department") received a request for "copies of five to ten additional property & casualty loss control exams . . . finalized sometime since October 1998." In response to the request, you submit to this office for review the information which you assert is responsive, consisting of ten "Property and Casualty Loss Control Examination" letters. You explain that some of the requested information may be proprietary in nature and protected from disclosure by section 552.110 of the Government Code. We have considered the exception and arguments you have raised and reviewed the submitted information.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified Petrosurance Casualty Company ("PCC), Vanliner Insurance Company, National American Insurance Company ("NAICO"), Virginia Surety Company, Inc., NAC Reinsurance Corporation, Medical Protective Company, Federated Mutual, American Mercury Insurance ("AMIC"), Columbia/HCA Healthcare Corporation ("Columbia"), and Empire Lloyds Insurance Company ("Empire") about the request for information.<sup>1</sup> 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

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<sup>1</sup>We note that information is not confidential under the Public Information Act simply because the party submitting it to a governmental body anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987).

Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances).

The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. Since five of the companies did not respond to our notification, we assume that the respective companies have no property or privacy interest in the information.<sup>2</sup> Furthermore, Empire responded to our notification by stating that “Empire . . . does not object to the release of the requested information.” Accordingly, we have no basis to conclude that the information is excepted from required public disclosure; therefore, the information about these companies may not be withheld under section 552.110. However, PCC, NAICO, AMIC, and Columbia, through their representatives, submitted briefs in support of the applicability of section 552.110 to the submitted “Evaluation of Loss Control” letters. Thus, we will consider whether the information at issue is excepted from disclosure under the claimed exception for PCC, NAICO, AMIC, and Columbia.

At the outset, we note that Columbia’s attorney asserts that the request is “an overly vague request.” However, the requestor has specifically asked for the “property & casualty loss control exams.” *See* Open Records Decision Nos. 563 (1990), 561 (1990) (when governmental body is presented with broad request for information, it should advise the requestor of types of information available so that the requestor may narrow or clarify the request). Furthermore, besides having submitted responsive information, the department has not argued that the request is broad. We also note that some of the arguments raised by PCC, AMIC, and Columbia, concerning third-party information, “customer lists,” and discovery provisions<sup>3</sup> do not appear to be relevant for the submitted records, since the only information at issue consists of the department’s letter to the respective companies, which in our opinion does not contain any specific information about the insureds.

Section 552.110 protects the property interests of private persons by excepting from disclosure two categories of information: (1) “[a] trade secret,” and (2) “commercial or

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<sup>2</sup>The five companies which did not respond to our notification are: Vanliner Insurance Company, Virginia Surety Company, Inc., NAC Reinsurance Corporation, Medical Protective Company, and Federated Mutual.

<sup>3</sup>Although PCC refers to articles 5.06-4 and 5.15-3 of the Insurance Code relating to discovery and admissibility of information, we note that “the fundamental purposes of the [Public Information] Act and of civil discovery provisions differ.” *See* Attorney General Opinion JM-1048 at 3 (1989). In addition, Columbia has argued that certain specific information is confidential pursuant to section 5.1713 of title 28 of the Texas Administrative Code. However, the responsive records do not appear to have any information protected under the cited provision.

financial information obtained from a person and privileged or confidential by statute or judicial decision.” This office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided by NAICO, AMIC, and Columbia. See Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information). However, pursuant to section 552.110, we have marked certain information within TDI’s letter to PCC, because their company has offered sufficient facts to show the applicability of the trade secret prong to references to PCC’s customers. See Open Records Decision Nos. 494 (1988) (customer lists may be withheld *only* if they meet six criteria of the Restatement of Torts and federal authority indicates that customer lists do not ordinarily constitute trade secrets), 402 (1983) (this office cannot conclude that information is trade secret unless the governmental body or third-party has provided evidence of the factors necessary to establish a trade secret claim). As for the remaining information in TDI’s letter to PCC, and the letters to NAICO, AMIC, and Columbia, we conclude that the submitted information is not excepted from disclosure under the trade secret prong of section 552.110.

We next consider whether the information at issue constitutes “commercial or financial information.” 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 for commercial and financial information. See *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Thus, this office relied on *National Parks*, 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.<sup>4</sup> However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110.<sup>5</sup> See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App. – Austin 1999, pet. filed). The briefs submitted on behalf of PCC, NAICO, AMIC, and Columbia do not cite to a statute or judicial decision

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<sup>4</sup>It is our understanding that the information at issue was submitted to the department pursuant to the the Insurance Code and provisions within title 28 of the Texas Administrative Code. Therefore, the information was required to be submitted. *Martin Marietta Corp. v. Dalton*, 974 F. Supp. 37 (D.D.C. 1997).

<sup>5</sup>We note that section 552.110 has been amended by the Seventy-sixth Legislature, effective September 1, 1999. Act of May 25, 1999, Seventy-sixth Legislature, R.S., S.B. 1851, § 7. Under the amendment, commercial or financial information will be excepted from disclosure if “it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” The amendment applies to requests for attorney general decisions made on or after September 1, 1999. *Id.* § 36.

that makes the submitted information privileged or confidential. Therefore, the requested information may not be withheld from disclosure under the commercial or financial information prong of section 552.110. Accordingly, we conclude that the requested information is not excepted from disclosure pursuant to section 552.110.

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,

A handwritten signature in black ink that reads "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/nc

Ref.: ID# 127482

Encl. Submitted documents

cc: Ms. Kathleen M. Donovan  
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