



January 5, 2000

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

OR2000-0013

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 131691.

The Department of Insurance (the "department") received a request for Special Reports by the National Association of Insurance Commissioners ("NAIC") received by the department since January 1, 1998. You have submitted representative samples of the information responsive to the request.¹ You advised that the requested information may be considered by NAIC to be proprietary information protected by section 552.110 of the Government Code and you accordingly notified NAIC of the request pursuant to section 552.305 of the

¹In reaching our conclusion, 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 No. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

act.² NAIC responded to the notice by submitting arguments to this office that the requested information is protected under section 552.110.

Section 552.110 of the act exempts from disclosure

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision [and]

(b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. A “trade secret”

may consist 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. 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

²We note that the department failed to request the decision of this office within ten business days of its receipt of the written request for information as required by section 552.301 of the Government Code. Section 552.302 provides that if a governmental body fails to make the submissions required by section 552.301, the information must be released unless there is a compelling reason for withholding it. Since you argue that the information at issue is confidential by law or affects third party interests such as to provide the bases of compelling reasons for withholding the information, we will consider the claims for withholding the information. *See Open Records Decision No. 150 (1977).*

There are six factors to be assessed in determining whether information qualifies as 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; and
- 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 No. 232 (1979). 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. 552 (1990). 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).

The requested information consists of issues of a publication NAIC distributes to its dues paying members, who are insurance regulatory officials, as part of the services NAIC provides. You assert that the requested information consists of "confidential and copyrighted documents," that NAIC's "privacy or property interests may be involved" and indeed would be irreparably harmed by release of the information," that the material at issue "includes information submitted by parties expecting that their confidentiality would be protected," and that "[i]ndividuals or entities reported on or mentioned in the [information] also may have their privacy interests affected by the public disclosure of these documents." You also contend that the recipients of the publications expect the information to be "non-public," and that "[t]o make the information public destroys its value and usefulness."

In our opinion, you have not shown that the information at issue may be withheld under the trade secret prong of section 552.110. Nor, in our opinion, have you presented "specific factual evidence that disclosure of the information would cause substantial competitive harm" to NAIC such that the information would fall within the scope of "commercial or

financial information” prong of section 552.110. Therefore, none of the information may be withheld under section 552.110.³

We note that you advise that the department is withholding portions of the requested information under section 5(a) of article 1.10D of the Insurance Code. Section 5(a) of article 1.10D reads as follows:

Any information or material acquired by the department that is relevant to an inquiry by the insurance fraud unit is not a public record for as long as the commissioner considers reasonably necessary to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest. The information or material is not subject to a subpoena by another governmental entity, except a valid grand jury subpoena, until released for public inspection by the commissioner or, after notice and a hearing, a district court determines that the public interest and any investigation by the commissioner would not be jeopardized by obeying the subpoena.

In Open Records Letter No. 95-1536 (1995), this office advised the department, with respect to section 5(a) of article 1.10D that

the department must withhold information from required disclosure pursuant to this provision when the following three requirements are met: (1) the information was acquired by the department or reveals information that was acquired by the department; (2) the information is relevant to an inquiry by the insurance fraud unit; and (3) the Commissioner decides the information must remain confidential for any of the reasons listed in the statute. *See* Open Records Decision No. 608 (1992). Thus, when all of these requirements are met, the department need not refer the matter to this office for a decision. *See* Gov’t Code § 552.301; *Houston Chronicle Publishing Co. v. Mattox*, 767 S.W.2d 695 (Tex. 1989).

³With respect to NAIC’s claim that the release of the information at issue would implicate privacy interests, we note that common-law privacy is treated for purposes of the act as an aspect of the exception to disclosure set out in section 552.101 of the Government Code, which protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including information coming within the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. Having reviewed the information at issue, it is our opinion that none of the information is protected by common-law privacy. *See, e.g.*, Open Records Decision No. 620 (1993) (company has no common-law privacy right in commercial information).

As we understand that the department has determined, in accordance with Open Records Letter No. 95-1536, that portions of information requested here are subject to section 5(a) of article 1.10D, we need not rule here with respect to that information. *See also*, Open Records Decision No. 608 (1992) (attorney general may not go beyond assertion of insurance commissioner that information is subject to section 5(a) of article 1.10D).

Finally, we note that you advise that the information responsive to the request is subject to copyright protection. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials unless one of the act's exceptions to required public disclosure applies to the information. Attorney General Opinion JM-672 (1987). Also, the requestor may make copies of copyrighted materials unassisted by the state. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2.

Thus, assuming the requested material is in fact copyrighted, you may allow the requestor to view it, and you may also allow him to reproduce the material without your assistance so long as such reproduction would not unreasonably disrupt the department's working conditions. *See* Attorney General Opinion JM-757 (1987). It will be the requestor's responsibility to adhere to the federal copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

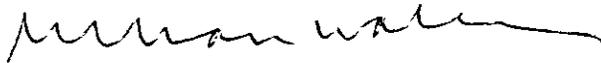
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



William Walker
Assistant Attorney General
Open Records Division

WMW/ljp

Ref: ID# 131691

Encl. Submitted documents

cc: Mr. Jack H. Taylor, Jr.
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(w/o enclosures)