



March 21, 2000

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

OR2000-1108

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133370.

The Texas Department of Insurance (the “department”) received a written request for the “private passenger rates and underwriting rules” of four named county mutual insurance companies: Viking County Mutual (“Viking”), Oak Brook County Mutual (“Oak Brook”), Colonial County Mutual (“Colonial”), and Farmers Texas County Mutual (“Farmers”). You inform us that the department does not possess any underwriting guidelines regarding Oak Brook. Furthermore, because you have not submitted to this office copies of the respective insurance companies’ automobile insurance rates, we assume the department has released the rates to the requestor. However, you have sought a decision from this office pursuant to section 552.305 of the Government Code as to whether the requested underwriting guidelines of the other companies are excepted from required public disclosure.

In accordance with section 552.305, you notified representatives of Viking, Colonial, and Farmers of the current records request for their underwriting guidelines and invited them to submit arguments to this office as to why the information at issue should not be released. Representatives of Colonial and Farmers timely responded to your notice. Colonial and Farmers contend that their respective underwriting guidelines of the other companies are excepted from required public disclosure pursuant to sections 552.101 and 552.110 of the Government Code.

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Both Colonial and Farmers contend that their respective underwriting guidelines are made confidential under section 38.002 of the Insurance Code, which provides in pertinent part:

(a) The department of the office of public insurance counsel may obtain a copy of an insurer’s underwriting guidelines.

(b) Underwriting guidelines are confidential, and the department or the office of public insurance counsel may not make the guidelines available to the public.

This office has previously determined, however, that the predecessor statute to section 38.002, former article 1.24D of the Insurance Code, does not apply to county mutual insurance companies. *See* Open Records Decision No. 653 (1997). Article 17.22(a) of the Insurance Code provides:

County mutual insurance companies shall be exempt from the operation of all insurance law of this state, except such laws as are made applicable by their specific terms or as in this Chapter specifically provided. In addition to such other Articles as may be made to apply by other Articles of the Code, county mutual insurance companies shall be subject to:

(1) Subdivision 7 of Article 1.10 of this Code; and

(2) Articles 1.15, 1.15A, 1.24, 2.04, 2.05, 2.08, 2.10, 4.10, 5.12, 5.37, 5.38, 5.39, 5.40, 5.49, 21.21, and 21.49 of this Code.

In ORD 653, this office concluded that

[u]nder article 17.22(a), an insurance law applies to county mutual insurance companies in only two instances: (1) when the law itself so provides, or (2) when article 17.22(a) so provides. With regard to the first instance, we observe that [former] article 1.24D(a) is not made applicable to county mutual insurance companies by its own specific terms.<sup>1</sup> With regard to the second instance, article 17.22 lists the

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<sup>1</sup>For example, article 1.24D does not define “insurer” to include county mutual insurance companies. In contrast, article 1.24B of the Insurance Code makes that provision applicable to county mutual insurance law by defining “insurer” to include county mutual insurance companies.

Insurance Code provisions that apply to county mutual insurance companies. Article 1.24D, which makes confidential underwriting guidelines, is not on that list. [Footnote in original.]

ORD 653 at 2-3. Similarly, we note that section 38.002 is not made applicable to county mutual insurance companies by its specific terms, nor is section 38.002 listed among the provisions in article 17.22 as being applicable to county mutual insurance companies. Accordingly, we conclude that the underwriting guidelines at issue are not made confidential under section 38.002 and therefore may not be withheld under section 552.101 of the Government Code.

As noted above, however, both Colonial and Farmers contend that their respective underwriting guidelines are excepted from public disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision, and (2) 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. Colonial and Farmers both contend, *inter alia*, that their respective underwriting guidelines constitute trade secret information.

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 at 2 (1990). 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 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). 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.<sup>2</sup> *Id.* 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 at 5-6 (1990).

After reviewing the arguments of Colonial and Farmers, we conclude that both of these companies have established a *prima facie* case that their underwriting guidelines constitute trade secret information. The department must withhold both companies' guidelines pursuant to section 552.110.

However, this office did not receive a response from Viking claiming an exception to disclosure. Consequently, this office has no basis on which to conclude that Viking's underwriting guidelines are excepted from required public disclosure. Because Viking has not established the applicability of an exception to disclosure, the department must release Viking's underwriting guidelines in their entirety.

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).

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<sup>2</sup>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 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KHH/RWP/ch

Ref: ID# 133370

Encl. Submitted documents

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