



September 29, 2000

Ms. Sara Shiplet Waitt  
Senior Associate Commissioner  
Legal and Compliance Division MC 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2000-3766

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# 139551.

The Texas Department of Insurance (the "department") received a request for property and casualty loss control evaluations for ten companies finalized by the department since June 1999. While the department has taken no position in regard to the release of the requested information, you have notified the ten companies of the request pursuant to section 552.305 of the Government Code. Only two of the ten companies, Chubb & Son ("Chubb") and Atlantic Mutual Companies ("Atlantic"), have submitted arguments objecting to release of their respective evaluations.<sup>1</sup> Each company claims that its evaluation is excepted from required public disclosure under sections 552.101 and 552.110. We have considered the exceptions these companies claim and reviewed the submitted information.<sup>2</sup>

We begin with Chubb's and Atlantic's arguments regarding section 552.101 in conjunction with section 9 of article 1.15 of the Insurance Code. Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or

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<sup>1</sup>In addition, a third company, Old Republic Insurance Company ("Old Republic"), submitted an objection to a portion of a letter from the department to Old Republic dated February 17, 1999 should the department consider that letter to be responsive to the request. Specifically, Old Republic objected to the release of the name of one of its clients. However, as the request is for information post-dating June 1999, this letter is not responsive to the request and was not submitted to this office for review. Moreover, the responsive information pertaining to Old Republic that was submitted to this office does not contain client names. Therefore, we understand Old Republic to have no objection to release of the submitted information.

<sup>2</sup>The submitted information consists entirely of "Evaluation and Loss Control" letters sent from the department to each of the ten companies. The only information at issue is the letters sent from the department to Chubb and to Atlantic.

by judicial decision.” Accordingly, section 552.101 encompasses confidentiality provisions such as those found in article 1.15 of the Insurance Code. Under that article, the department is required to visit each insurance carrier at least once every three years and examine its financial condition, ability to meet liabilities, and compliance with laws affecting the conduct of its business. V.T.C.S. art. 1.15, § 1; *see* Open Records Decision No. 640 (1996). In connection with this examination process, section 9 of article 1.15 provides:

A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law . . . . This section applies if the carrier examined is under supervision or conservation but does not apply to an examination conducted in connection with a liquidation or a receivership under this code or another insurance law of this state.

Both Chubb and Atlantic believe that the submitted information is confidential under this provision as encompassed by section 552.101.

However, the two letters at issue do not appear to fall under this provision or even this article. Both letters indicate that they were drafted pursuant to the provisions of articles 5.06-4 and 5.15-3 of the Insurance Code, both of which require certain insurers to submit loss control information to the department. *See* V.T.C.S. arts. 5.06-4(a), 5.15-3(a). Pursuant to an administrative rule promulgated by the department in regard to such loss control information:

Upon completion of the inspection, the inspector will prepare a written report to be provided to upper level management of the insurance company. The report will reflect the inspector’s observations, conclusions, and analyses of the adequacy of the company’s loss control information and services as required by the Insurance Code 5.06-4. When appropriate, recommendations for improvement will be part of the report.

28 T.A.C. § 5.303(5). The letters at issue appear to have been generated by the department pursuant to this rule and articles 5.06-4 and 5.15-3. There is no provision within these articles, and we know of no administrative rule, that makes these letters confidential. Therefore, we find that the letters at issue are not confidential under section 9 of article 1.15 of the Insurance Code as that provision is encompassed by section 552.101.

We turn now to Chubb’s and Atlantic’s arguments regarding section 552.110. Atlantic claims that the letter at issue concerning its loss control information contains trade secrets. Section 552.110(a) provides:

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.

Gov't Code § 552.110(a). A "trade secret"

may consist of 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). *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:

- (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).

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 party'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 at 5 (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). Having reviewed Atlantic's arguments and the information at issue, we conclude that Atlantic has not made a *prima facie* case that the information is protected under the trade secret aspect of section 552.110.

Both Chubb and Atlantic argue that the letters at issue contain information excepted under the financial or commercial information prong of section 552.110. Section 552.110(b) states:

(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 is excepted from the requirements of Section 552.021.

Gov't Code § 552.110(b). The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). We have reviewed the information at issue as well as both companies' arguments and find that neither company has adequately shown that the information falls under section 552.110(b). Therefore, the department may not withhold any of the submitted information under section 552.110.

In conclusion, because none of the submitted information is excepted under section 552.101 or 552.110, the department must release the submitted information to the requestor.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,



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Open Records Division

EJF\er

Ref: ID# 139551

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