



ATTORNEY GENERAL OF TEXAS  
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October 2, 2003

Ms. Cynthia Villarreal-Reyna  
Section Chief  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2003-6981

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188695.

The Texas Department of Insurance (the "department") received a request for the homeowners insurance rate filings for seven named companies. You advise that the department will release the filings for State Farm and USAA. You inform us that some of the information at issue is the same information previously requested and ruled upon by this office in Open Records Letter No. 2003-2940 (2003). This information relates to Chubb Lloyd's ("Chubb"). You advise that the department is withholding some information and releasing some information in reliance on the previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

You claim that some of the requested information is excepted from disclosure under section 552.137 of the Government Code. You claim that the remaining requested information may be confidential, but make no arguments and take no position as to whether the information is excepted from disclosure. You inform this office, and provide documentation showing, that you have notified four interested third parties whose proprietary interests may be implicated by the request, of the department's receipt of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305

permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). We note that you have not submitted responsive information pertaining to Farmers Insurance Exchange ("Farmers") for our review. We therefore assume that the department has released responsive information pertaining to this company. If not, you must do so immediately. See Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances). We have considered the exceptions claimed and have reviewed the submitted information.

We note that some of the requested information has now been the subject of two previous requests for decisions to this office, which resulted in Open Records Letter Nos. 2003-6603 (2003) and 2003-6795 (2003). Specifically, this information consists of the rate filings of Allstate Insurance Company ("Allstate") and Travelers Lloyds of Texas Insurance ("Travelers"). We have no indication that the facts or circumstances on which these rulings were based have changed. Assuming this is the case, we conclude that you must rely on those rulings as previous determinations and withhold the information in Allstate's and Travelers' documents that we ruled was excepted from disclosure in accordance with Open Records Letter Nos. 2003-6603 and 2003-6795. See Open Records Decision No. 673.

Next, we note that some of the requested information has been designated as confidential and proprietary. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any agreement specifying otherwise.

We now turn to the arguments submitted by Chubb and Nationwide Lloyd's ("Nationwide"). Chubb claims that some of its information was sent to the department in response to the department's subpoena, and is not a public record pursuant to sections 36.158(a) and 36.159(a) of the Insurance Code. Section 36.158(a) provides that

A record or other evidence acquired under a subpoena under this subchapter is not a public record for the period the commissioner considers reasonably necessary to

- (1) complete the investigation
- (2) protect the person being investigated from unwarranted injury; or
- (3) serve the public interest.

Ins. Code § 36.158(a). Section 36.159(a) provides, in relevant part, that “A record subpoenaed and produced under this subchapter *that is otherwise privileged or confidential by law* remains privileged or confidential until admitted into evidence in an administrative hearing or a court.” (Emphasis added.) Ins. Code § 36.159(a).

The Commissioner of Insurance has not informed this office that he wishes to withhold any of the submitted information under section 36.158(a). Accordingly, we find that section 36.158(a) of the Insurance Code is inapplicable to the information at issue, and it may not be withheld on this basis. We also find that section 36.159(a) does not make information confidential; rather, this section maintains the confidentiality of information when that information is subpoenaed and produced under chapter 36 of the Insurance Code. Thus, none of Chubb’s information may not be withheld under section 36.159(a).

Furthermore, Nationwide claims that its information, submitted to the department pursuant to article 5.26-1 of the Insurance Code, is confidential under section 552.101 of the Government Code in conjunction with this provision and article 5.141 of the Insurance Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. Nationwide claims that newly enacted “[a]rticle 5.26-1 does not require the public disclosure of the information supplied.” Article 5.141 provides that “[i]nformation filed by an insurer with the department under this article that is confidential under a law that applied to the insurer before the effective date of this article remains confidential and is not subject to disclosure under Chapter 552, Government Code, except that the information may be disclosed as provided by Section 552.008, Government Code, relating to information for legislative purposes. . .”. Ins. Code art. 5.141 § 5(a). Nationwide does not specify any law that applied to it before the effective date of article 5.141 that made its information confidential. Furthermore, article 5.26-1 does not make information confidential. *See* Ins. Code art. 5.26-1; Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public). Therefore, none of the submitted information pertaining to Nationwide may be withheld from disclosure under section 552.101 of the Government Code.

Chubb and Nationwide both argue that their information is excepted from disclosure under section 552.110(a) of the Government Code. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “[c]ommercial 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[.]” Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>1</sup> *See Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *Open Records Decision No. 402 (1983)*.

Based on our review of the third parties' arguments and the submitted information, we find that Chubb and Nationwide have established a *prima facie* case that most of their information is excepted from disclosure under section 552.110(a) of the Government Code. We have received no arguments that rebut these third parties' claims as a matter of law. Therefore, with the exception of the information we have marked, the department must withhold the submitted information pertaining to Chubb and Nationwide pursuant to section 552.110(a).

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<sup>1</sup> The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (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)*.

We now address the department's claim in relation to the remaining submitted information. Section 552.137 of the Government Code provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
  - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;
  - (2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;
  - (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or
  - (4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.
- (d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78<sup>th</sup> Leg., R.S., ch. 1089, § 1, 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. We note, however, that section 552.137 does not apply to the work e-mail addresses provided of officers or employees of a governmental body, a website address or uniform resource locator, or the general e-mail address of a business. E-mail addresses within the scope of section 552.137(c) are also not excepted from disclosure under section 552.137. We agree that the types of e-mail addresses you have marked within the submitted information are excepted from disclosure under section 552.137(a). You inform

us that the department has not received affirmative consent to disclose the e-mail addresses. We therefore conclude that the department must withhold the types of marked e-mail addresses under section 552.137 of the Government Code.

In summary, the department must rely on the previous determinations in Open Records Letter Nos. 2003-2940, 2003-6603, and 2003-6795 in withholding the information at issue that this office ruled was excepted from disclosure in these rulings. The department must withhold the submitted information pertaining to Chubb and Nationwide under section 552.110, with the exception of the information we have marked. The types of e-mail addresses you have marked must be withheld under section 552.137. The remaining requested information must be released. 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 Dep't of Pub. 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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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

WMM/lmt

Ref: ID# 188695

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