



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

May 2, 2005

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714-9104

OR2005-03741

Dear Ms. Villarreal-Reyna:

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# 222223.

The Texas Department of Insurance (the "department") received a request for information regarding the worker's compensation rates of Texas Mutual Insurance Company ("Texas Mutual"). You claim that portions of the submitted information are excepted from disclosure under section 552.137 of the Government Code. You also state that the request may implicate the proprietary interests of Texas Mutual. Accordingly, pursuant to section 552.305 of the Government Code, you notified Texas Mutual of the request for information and of its right to submit arguments explaining why the requested information should not be released. *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 certain circumstances). We have considered the exception you claim and reviewed the submitted information. We have also considered arguments submitted to this office by Texas Mutual.

Initially, Texas Mutual asserts that the submitted information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). In this instance, Texas

Mutual is a corporate entity asserting a proprietary interest in the submitted information. As such, Texas Mutual may not avail itself of the protections of section 552.104. Since the department does not assert section 552.104, we find that the exception is inapplicable in this instance. *See* Open Records Decision No. 592 (1991) (governmental body may waive section 552.104).

Texas Mutual also claims that the submitted information is excepted from disclosure under section 552.112 of the Government Code. Section 552.112 excepts from public disclosure “information contained in or relating to examination, operation, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.” Gov’t Code § 552.112. Like section 552.104, section 552.112 protects the interests of a governmental body, rather than the interests of third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied). Because the department does not raise section 552.112, this section is not applicable to the requested information. *Id.*

Next Texas Mutual asserts that the requested information is confidential under section 552.101. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information made confidential by other statutes. Section 2(d) of article 5.76-3 provides:

Except as otherwise provided by this subsection, [Texas Mutual] is subject to the open meetings law, Chapter 551, Government Code, and the open records law, Chapter 552, Government Code. The board may hold closed meetings to consider and refuse to release information relating to claims, rates, the company’s underwriting guidelines, and other information that would give advantage to competitors or bidders.

Ins. Code art. 5.76-3, § 2(d). Texas Mutual states that the release of the requested information will give advantage to its competitors. Thus, according to the entity, the requested information is confidential under section 2(d) of article 5.76-3. In support of its assertion, Texas Mutual cites several informal letter rulings issued to the entity in which we agreed that the statute was applicable to its competitive information. In this instance, however, the request is not for records maintained by Texas Mutual, but for records the department maintains as a regulatory entity. Accordingly, we find that the submitted records are not confidential under section 2(d) of article 5.76-3 of the Insurance Code. *See generally* Open Records Decision No. 478 at 2 (1987) (language of confidentiality statute controls scope of protection).

Finally, Texas Mutual claims that the submitted information is excepted under section 552.110(b) of the Government Code, which protects “[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(b). This exception to disclosure requires a specific

factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Texas Mutual claims that the submitted records contain information that if released would “enable a person using other available public data to analyze and derive competitive information about” Texas Mutual; thus, causing the entity substantial competitive harm. After reviewing its arguments, we find that Texas Mutual does not make a persuasive factual or evidentiary showing that the release of these records will cause a substantial competitive harm to its marketplace interests. *See generally A & T Consultants, Inc. v. Sharp*, 904 S.W.2d at 676 (Tex. 1995) (stating that information may not be withheld on the grounds that someone could deduce confidential information from it in light of publicly known information). Accordingly, the department may not withhold any of the submitted information under section 552.110(b) of the Government Code.

The department claims that the submitted information contains an e-mail address that is excepted from disclosure under section 552.137. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code § 552.137(a)-(c)*. The e-mail address at issue is not of the type specifically excluded by section 552.137(c). Therefore, unless the individual to whom the e-mail address belongs consents to its release, the department must withhold it in accordance with section 552.137. As neither Texas Mutual nor the department have raised any other exceptions to disclosure, the remaining 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Jaelyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 222223

Enc. Submitted documents

c: Ms. Jennifer Chopra
Actuarial & Technical Solutions
3555 Veterans Memorial Hwy,
Suite A
Ronkonkoma, NY 11779
(w/o enclosures)

Mr. Russell Ray Oliver, President
Texas Mutual Insurance Company
221 W. 6th Street, Suite 300
Austin, Texas 78701
(w/o enclosures)