



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 7, 2008

Ms. Sara Shiplet Waitt
Legal Services Division
Texas Department of Insurance
P. O. Box 149104
Austin, Texas 78714

OR2008-01820

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 #301620.

The Texas Department of Insurance (the "department") received a request for all information pertaining to a specified company. You state that you are releasing some information to the requestor. You assert that portions of the submitted information are subject to section 552.136 of the Government Code. You also state that the release of the submitted questionnaires and their attachments, which were completed by third parties in response to a department investigation, may implicate third party proprietary interests. Pursuant to section 552.305 of the Government Code, you have notified Ideal Settlements ("Ideal") of the request and of that company's right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d); *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 to disclosure under the Act in certain circumstances). We have received correspondence from counsel for Ideal. We have considered Ideal's arguments and reviewed the submitted information at issue.

Initially, we note, and you acknowledge, that the department has not complied with the procedural requirements of section 552.301 of the Governmental Code in requesting this ruling. *See* Gov't Code § 552.301(b), (e). Pursuant to section 552.302 of the Government

Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302 of the Government Code); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information is confidential by another source of law or affects third party interests. *See* Open Records Decision No. 150 (1977). Both third party interests and section 552.136 of the Government Code can provide compelling reasons to overcome the presumption, so we will address the applicability of section 552.136 to the submitted information. We will also consider Ideal's arguments as to whether the submitted information is excepted under the Act.

Ideal asserts that the information at issue is excepted from disclosure pursuant to section 552.101 of the Government Code. This section encompasses information made confidential by other law. Gov't Code § 522.101. Section 11.204(19) of title 28 of the Texas Administrative Code provides that "compensation arrangements shall be confidential and not subject to the open records law." 28 T.A.C. § 11.204(19). We note that this regulation only applies to Health Maintenance Organizations ("HMOs"). Because Ideal is not an HMO, it has failed to demonstrate that section 11.204(19) of title 28 of the Texas Administrative Code applies to the submitted information.

Ideal raises sections 552.107 and 552.111 of the Government Code for portions of the information at issue. Section 552.107 protects information that comes within the attorney-client privilege, while section 552.111 protects information that comes within the attorney work product privilege. Ideal raises these sections for "any communications between or among [department] staff, department [attorneys], and/or the Commissioner regarding any legal issues surrounding this investigation." Based upon Ideal's arguments, it appears that Ideal asserts the attorney-client and the attorney work product privileges on behalf of the department. Only the department may assert these exceptions on its own behalf, and it did not raise section 552.107 or section 552.111 for any of the information at issue. Accordingly, no information may be withheld under sections 552.107 and 552.111.

Ideal also raises section 552.110 of the Government Code for the information at issue. 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. Gov't Code § 552.110.

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. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ 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).

Section 552.110(b) 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,

¹ 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).

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

Although Ideal makes general arguments under section 552.110(a), it has not explained in detail exactly what information constitutes a trade secret. Thus, none of the information at issue may be withheld pursuant to section 552.110(a). Furthermore, we find that Ideal has made only conclusory allegations that release of any of its information would result in substantial competitive harm. Ideal has not identified any specific information that, when released, would cause it substantial competitive harm. *See* Open Records Decision No. 661 (1999) (must show by specific factual evidence that substantial competitive injury would result from release of *particular* information at issue) (emphasis added). Thus, we conclude that none of the information at issue may be withheld pursuant to section 552.110(b).

We note that the department has marked insurance policy numbers to be withheld under section 552.136 of the Government Code. Section 552.136(b) states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Accordingly, the department must withhold the insurance policy numbers it has marked under section 552.136. The remaining information must be released 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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 Office of the Attorney General 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 301620

Enc. Submitted documents

c: Mr. James Rooney
President
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(w/o enclosures)