



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 14, 2008

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

OR2008-02107

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# 302214.

The Texas Department of Insurance (the "department") received a request for complaints filed with the department pertaining to two named individuals and three named entities. The requestor also seeks twenty-six specified complaints. You state that you will provide the requestor with portions of the requested information. We understand you to claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.111, 552.130, and 552.137 of the Government Code. You also state that release of portions of the submitted information may implicate the proprietary interests of HealthSmart Preferred Care, Inc. ("HealthSmart"), Valley Risk Consulting ("Valley Risk"), and the Law Office of Ricardo Godinez ("Ricardo"). Accordingly, you inform us that you notified each of the third parties of the request and of its right to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (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 to disclosure in certain circumstances). We have received arguments from HealthSmart. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, that the department failed to meet its obligations under section 552.301 of the Government Code. *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 requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Although the department claims an exception to disclosure under section 552.111 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 552.007; Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). Thus, your claim under section 552.111 does not provide a compelling reason for non-disclosure, and the department may not withhold any of the submitted information under that exception. However, third-party interests are at stake, and the department raises sections 552.101, 552.130, and 552.137, all of which can provide compelling reasons to withhold portions of the submitted information. Thus, we will consider the department's argument regarding these exceptions, as well as any arguments raised by the third parties.

An interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Valley Risk or Ricardo explaining how the release of the submitted information would affect their proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of Valley Risk or Ricardo, and the department may not withhold any portion of the submitted information on that basis. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case that information is trade secret).

HealthSmart claims that the submitted information pertaining to it is not responsive to this request. HealthSmart states that it "can find no reasonable connection between the documents in question and any of the entities which are the subject of the request." We note that a governmental body must make a good-faith effort to relate a request to information that it holds. *See* Open Records Decision No. 561 at (1990) (construing statutory predecessor). In this instance, the department has the responsibility to submit to our office information that it deems responsive to the request for information. The department has submitted the

information at issue to our office and informed our office that this information is contained in one of the case files at issue. Therefore, we find that the department has made a good-faith effort to relate the request to the information the department maintains. Thus, we will address HealthSmart's remaining argument against disclosure of the submitted information.

Section 552.130 of the Government Code excepts from disclosure information that "relates to . . . a motor vehicle operator's or driver's license or permit issued by an agency of this state [or] a motor vehicle title or registration issued by an agency of this state." Gov't Code § 552.130. Accordingly, the department must withhold the Texas motor vehicle record information it has marked, in addition to the information we have marked, under section 552.130 of the Government Code.

You assert that some of the submitted information is excepted under section 552.137 of the Government Code. Section 552.137 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 id.* § 552.137(a)-(c). We note that subsection (c) specifically excludes an e-mail address "provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public. *Id.* at § 552.137(c)(4). We have reviewed the information that you have marked under section 552.137, and agree that a portion of the information, which we have marked, must be withheld under 552.137 of the Government Code, unless the members of the public to whom this information pertains consent. However, we find that the remainder of this information is subject to subsection 552.137(c), and the department may not withhold it under section 552.137.

We note that a portion of the submitted information is subject to section 552.136.¹ Section 552.136 of the Government Code 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." *Id.* § 552.136. Upon review, we find that the department must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

HealthSmart claims that its information is excepted from disclosure under section 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *Id.* § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

and privileged or confidential by statute or judicial decision. *See id.* § 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 [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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. This office must accept a claim that information subject to the Act is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (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).

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, 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 National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

HealthSmart objects to the release of its information under section 552.110. Upon review of the submitted information and arguments, however, we find that HealthSmart has made only generalized allegations and has failed to demonstrate that any portion of its information meets the definition of a trade secret. In addition, HealthSmart has not demonstrated the necessary factors to establish a trade secret claim for its information. Therefore, the department may not withhold any portion of the submitted information under section 552.110(a).

HealthSmart has established, however, that release of some of its information would cause it substantial competitive injury; therefore, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code. For the remaining information at issue, we find that HealthSmart has made only conclusory allegations that the release of its remaining information would result in substantial damage to its competitive position. Thus, HealthSmart has not demonstrated that substantial competitive injury would result from the release of the remaining information at issue. Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Finally, HealthSmart asserts that its information is protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department must withhold the Texas motor vehicle record information it has marked, in addition to the information we have marked, under section 552.130 and the insurance policy numbers we have marked under section 552.136. The department also must withhold the e-mail addresses we have marked under section 552.137, unless the relevant members of the public consent to their release.² The department must withhold the information we have marked under section 552.110(b). The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.³

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

²We note that the submitted information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

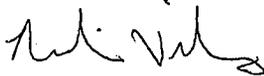
³As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/jh

Ref: ID# 302214

Enc. Submitted documents

c: Mr. Mitch Satterwhite
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(w/o enclosures)