



ATTORNEY GENERAL OF TEXAS
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September 29, 2008

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OR2008-13302

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# 323028.

The Texas Department of Insurance (the "department") received a request for specified "data contained in carrier responses to [the department's] Annual Group Accident and Health Insurance Surveys from 2003 to 2006." You claim that some of the requested information is excepted from disclosure under section 552.137 of the Government Code. The department also believes that some of the requested information may implicate the proprietary interests of private parties. The department notified the interested third parties of this request for information and of their right to submit arguments to this office as to why information relating to these companies should not be released.¹ We received correspondence from United Healthcare Insurance Company, United Healthcare of Texas, Inc., Golden Rule Insurance Company, American Medical Security Life Insurance Company, and Pacificare Life Assurance Company (collectively, "United"); Connecticut General Life Insurance Company ("CGLIC"); New York Life ("NYL"); Principal Life Insurance Company ("Principal"); Unicare Life and Health Insurance Company ("Unicare"); and an additional third party. We have considered all of the submitted arguments and have reviewed the submitted information.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Gov't Code ch. 552 in certain circumstances).

Initially, United contends that some of the submitted information is not responsive to the request for information. 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). After reviewing the entire request for information, we find that the department has made a good-faith effort to relate the request for information to the responsive information that the department maintains. We therefore address the claimed exceptions with respect to this information.

Next, you acknowledge that the department failed to meet the deadlines prescribed by section 552.301 of the Government Code in requesting an open records decision from this office. *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. Information that is presumed public 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 Gov't Code § 552.302); Open Records Decision No. 319 (1982). In order to overcome the presumption that the requested information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. 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). Because third party interests are at stake, we will address whether the submitted information must be withheld to protect the interests of the third parties. Furthermore, because the applicability of section 552.137 of the Government Code can provide a compelling reason for non-disclosure, we will consider whether the department may withhold any of the submitted information under section 552.137.

We next note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have received comments only from CGLIC, NYL, Principal, Unicare, United, and an additional third party. None of the remaining third parties have submitted to this office any reasons explaining why their submitted information should not be released. Therefore, these remaining companies have failed to provide us with any basis to conclude that they have protected proprietary interests in any of the submitted information. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, 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), 542 at 3. Accordingly, we conclude that the department may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

CGLIC, Principal, Unicare, and United each raise section 552.110 of the Government Code. 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. *See* Gov't Code § 552.110(a)–(b). 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.); Open Records Decision Nos. 552 at 2, 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; *see also* Open Records Decision Nos. 319 (1982), 306 (1982), 255, 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552. 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. *See id.*; ORD 661; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Upon review, we find that CGLIC, Principal, Unicare, and United have made only conclusory allegations and have provided no specific factual or evidentiary showing to support their allegations that release of the information at issue would cause their companies substantial competitive injury. *See* Gov’t Code § 552.110; *see also, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, no portion of the submitted information pertaining to these companies may be withheld under section 552.110(b).

We also find that Principal, Unicare, and United have failed to demonstrate that any of the remaining information belonging to these companies constitutes a trade secret. Thus, no portion of the remaining information pertaining to these companies may be withheld under section 552.110(a).

Principal contends that its information is confidential under section 552.101 of the Government Code in conjunction with section 38.001(d) of the Insurance Code.² Section 38.001 provides in part:

(b) The department may address a reasonable inquiry to an insurance company, including a Lloyd's plan or reciprocal or interinsurance exchange, or an agent or other holder of an authorization relating to:

(1) the person's business condition; or

(2) any matter connected with the person's transactions that the department considers necessary for the public good or for the proper discharge of the department's duties.

...

(d) A response made under this section that is otherwise privileged or confidential by law remains privileged or confidential until introduced into evidence at an administrative hearing or in a court.

Ins. Code § 38.001(b), (d). We note that section 38.001(d) does not itself make any information privileged or confidential. Rather, section 38.001(d) provides that information furnished to the department that is otherwise privileged or confidential remains privileged or confidential until introduced into evidence at an administrative hearing or in a court. In order for section 552.101 to apply, a statute must contain language expressly making certain information confidential. *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1987), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the department may not withhold any portion of Principal's information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 38.001.

One of the third parties claims that all identifying information contained in its surveys is confidential under section 38.106 of the Insurance Code and must be withheld under section 552.101. Subchapter C of chapter 38 of the Insurance Code pertains to data collection and reporting relating to HIV and AIDS. Section 38.106 provides as follows:

(a) If the commissioner determines that information or reports submitted under this subchapter would reveal or might reveal the identity of an individual or associate an individual with a company, the commissioner shall

²Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential.

declare the information or reports confidential, and the information or reports may not be made available to the public.³

(b) Information made confidential under this section may be examined only by the commissioner and department employees.

(c) Data and information reported by an insurer under this subchapter are not subject to public disclosure to the extent that the information is protected under Chapter 552, Government Code. The data and information may be compiled into composite form and made public if information that could be used to identify the reporting insurer is removed.

Ins. Code § 38.106 (footnote added). Under subsection (a), if the commissioner determines that information or reports submitted under chapter 38 would or might reveal an individual's identity or associate an individual with a company, "the commissioner shall declare the information or reports confidential" and the department shall not release them to the public. *See id.* § 38.106(a). Thus, under subsection (a), the commissioner's determination as to whether the information is confidential controls. *Cf.* Open Records Decision No. 608 (1992) (construing former Insurance Code article 1.10D, section 5A, to authorize commissioner to decide whether information relevant to insurance fraud investigation is confidential). Here, the third party has not shown that the commissioner has determined that the information at issue would or might reveal the identity of an individual or associate an individual with a company. Nor has the third party shown that the commissioner has declared the information at issue to be confidential. Thus, the third party has failed to demonstrate that section 38.106(a) is applicable.

The third party also asserts that company-identifying information in all of the submitted surveys must be withheld pursuant to section 38.106(c). However, section 38.106(c) does not itself make any information privileged or confidential. *See* ORD 658 at 4, 478 at 2, 465 at 4-5. Rather, section 38.106(c) provides that data and information reported by an insurer under subchapter C may be withheld "to the extent that the information is protected" under the Act. *See* Ins. Code § 38.106(c). The third party has failed to demonstrate that an exception to required public disclosure under the Act applies. Furthermore, the requirement in subsection (c) that insurer-identifying information be removed applies to the department's compilation of the data and information into a "composite form" for public release. *See id.* §§ 38.106(c), 38.104. The information at issue is not the department's report of the compiled data but is information in the third party's completed survey. Thus, section 38.106(c) is inapplicable in this instance. Accordingly, the department may not withhold any portion of the submitted information from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 38.106 of the Insurance Code.

³Section 31.001 of the Insurance Code defines "commissioner" as the commissioner of insurance. *See* Ins. Code § 31.001(1).

Unicare and United argue that their information is confidential under section 552.101 in conjunction with section 31.05 of the Penal Code. Section 31.05 provides in pertinent part:

(b) A person commits an offense if, without the owner's effective consent, he knowingly:

- (1) steals a trade secret;
- (2) makes a copy of an article representing a trade secret; or
- (3) communicates or transmits a trade secret.

(c) An offense under this section is a felony of the third degree.

Penal Code § 31.05(b), (c). We have already determined that the information at issue does not constitute a trade secret. We also note that section 31.05 does not expressly make information confidential. As previously noted, confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the department may not withhold any portion of the submitted information of these companies from disclosure pursuant to section 31.05 of the Penal Code.

Finally, we address the claims of NYL, the department, and a third party under section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides as follows:

(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.

Gov't Code § 552.137. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. Most of the e-mail addresses at issue are not of a type specifically excluded by section 552.137(c). You inform us that the individuals to whom these e-mail addresses belong have not affirmatively consented to their public disclosure. Upon review, we agree that some of the information you have marked must be withheld under section 552.137. We have marked some additional e-mail addresses that the department must withhold under section 552.137. However, the remaining information that you have marked is not protected under section 552.137, and the department may not withhold it on that basis. We have marked the information that must be released.

Finally, we note that some of the materials at issue appear to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. 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 materials protected by copyright, 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, except for the information we have marked for release, the department must withhold the e-mail addresses you have marked, and the additional e-mail addresses that we have marked, in accordance with section 552.137 of the Government Code. The remaining submitted information must be released to the requestor, but any copyrighted information may only be released in accordance with copyright law.

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). If the governmental body does not file suit over 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 323028

Enc. Submitted documents

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Mr. Carl R. Henrickson
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Mr. James T. Morris
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