



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 2, 2008

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2008-13545

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# 323605.

The Texas Department of Insurance (the "department") received a request for information pertaining to four applications for certification as an Independent Review Organization ("IRO"). You state that you will release some of the requested information. You indicate that you are redacting social security numbers pursuant to section 552.147 of the Government Code.¹ You claim that portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. You state that the release of some of the submitted information may implicate the proprietary interests of third parties. Accordingly, pursuant to section 552.305 of the Government Code, you have notified the following interested third parties of the request and of their right to submit arguments to this office: Applied Assessments, LLC ("Applied Assessments"); U.S. Decisions, Inc. ("U.S. Decisions"); CompPartners, Inc. ("CompPartners"); and I-Resolutions, Inc. ("I-Resolutions"). See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental

¹Section 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.

body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered CompPartners' comments.

We 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 information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Applied Assessments, U.S. Decisions, or I-Resolutions explaining why the requested information should not be released. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. See *id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret) 542 at 3 (1990). Accordingly, we conclude that the department may not withhold any portion of the submitted information on the basis of any proprietary interests that these companies may have in the information.

CompPartners claims that some of its information is excepted from disclosure under section 552.110 of the Government Code, which protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). 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.1958); see also ORD 552 at 2. 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); see also *Huffines*, 314 S.W.2d at 776. 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). The following are the six factors that the Restatement gives 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; 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 Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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. ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CompPartners states only that "some of the requested information involves a proprietary or property interest on the part of CompPartners and therefore is exempt from disclosure under [the Act]." After reviewing its arguments and the submitted information, we find that CompPartners has failed to demonstrate the applicability of section 552.110 of the

Government Code to the submitted information. Accordingly, we conclude that no portion of the submitted information may be withheld under section 552.110 of the Government Code.

The department and CompPartners raise section 552.101 of the Government Code for portions of the submitted information. Section 552.101 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. You claim that some of the submitted information is confidential pursuant to section 4202.009 of the Insurance Code, which provides as follows:

Information that reveals the identity of a physician or individual health care provider who makes a review determination for an independent review organization is confidential.

Ins. Code § 4202.009. You state that some of the submitted information includes lists containing the identities of the physicians "that will be part of the panel providing review determinations." Based on your representations and our review, we agree that the information you have marked is confidential under section 4202.009 of the Insurance Code, and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 4201.154 of the Insurance Code, which provides as follows:

(a) A utilization review agent's written screening criteria and review procedures shall be made available for:

- (1) review and inspection to determine appropriateness and compliance as considered necessary by the commissioner; and
- (2) copying as necessary for the commissioner to accomplish the commissioner's duties under this code.

(b) Any information obtained or acquired under the authority of this section, Section 4201.153, and this chapter is confidential and privileged and is not subject to [the Act], or to subpoena except to the extent necessary for the commission to enforce this chapter.

Id. § 4201.154. You explain that the information you have marked consists of review procedures and screening criteria that are part of utilization review plans, and that this information is confidential under section 4201.154. Based on your representations and our review, we agree that the information that you have marked is confidential under section 4201.154 of the Insurance Code and must be withheld under section 552.101 of the Government Code.

Section 552.101 also encompasses section 59.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 59.001. You indicate that the social security numbers contained in the submitted information were obtained in connection with the issuance of an occupational or professional license. Based on this representation, we conclude that the social security numbers you have marked are confidential under section 59.001 of the Occupations Code and must be withheld from disclosure under section 552.101 of the Government Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate and embarrassing. *See* Open Records Decision Nos. 545 (1990), 523 (1989) (public employee's withholding allowance certificate, designation of beneficiary of employee's retirement benefits, direct deposit authorization, and employee's decisions regarding voluntary benefits programs, among others, protected under common law privacy). After reviewing the submitted information, we find that portions of the information are confidential based on the common-law right to privacy. Accordingly, except as we have marked for release, the department must withhold the information you have marked, as well as the additional information we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, the department and CompPartners raise section 552.137 of the Government Code for portions of the submitted information. 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* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You state that no consent has been given for the release of any of the e-mail addresses at issue. Accordingly, the department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code.

In summary, in conjunction with section 552.101 of the Government Code, the department must withhold: (1) the information you have marked under section 4202.009 of the Insurance Code; (2) the information you have marked under section 4201.154 of the Insurance Code; (3) the social security numbers you have marked under section 59.001 of the Occupations Code; and (4) the information you have marked, as well as the additional information we have marked, under common-law privacy, except as we have marked for release. The department must withhold the e-mail addresses you have marked under section 552.137 of the Government Code. 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 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,



Bill Dobie
Assistant Attorney General
Open Records Division

WJD/jh

Ref: ID# 323605

Enc. Submitted documents

cc: Mr. Ross Crutchfield
P.O. Box 120965
Arlington, Texas 76012
(w/o enclosures)

Ms. Eleanor Marciniak
CompPartners, Inc.
18881 Von Karman Avenue Suite 900
Irvine, California 92612
(w/o enclosures)

Ms. Cara McCormick
I-Rersources, Inc.
71 Court Street
Belfast, Maine 04915
(w/o enclosures)

Ms. Peter McCormick
U.S. Decisions, Inc.
71 Court Street
Belfast, Maine 04915
(w/o enclosures)

Mr. Justin Meadlin
Applied Assessments, L.L.C.
2533 N. Carson Road, Suite E-293
Carson City, Nevada 89706
(w/o enclosures)