



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2008

Ms. Cynthia Villarreal-Reyna
Section Chief
Agency Counsel Section
Legal Services Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2008-15187

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# 327021.

The Texas Department of Insurance (the "department") received a request for "the [2007] annual reports that are required of viatical and life settlement firms" for specified providers. You state that you have provided the requestor with some of the requested information. Although you take no position on the remaining requested information, you state it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, the department notified Life Equity LLC of this request for information and of its right to submit arguments to this office as to why the information should not be released.¹ Life Equity has submitted arguments under section 552.110 of the Government Code. We have considered 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 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Initially, we note, and you acknowledge, that the department has failed to comply with section 552.301 of the Government Code in requesting this decision. 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* Gov't Code § 552.302; *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); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake, we will address whether the submitted information must be withheld to protect the interests of Life Equity.

Life Equity asserts that its information is protected under section 552.110 of the Government Code, which protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret 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(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the “trade secrets” aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts

the claim as a matter of law.² *See* ORD 552 at 5. 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. *See* Open Records Decision No. 402 (1983).

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 information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Life Equity contends that the information contained in the submitted 2007 Annual Life and Viatical Settlement Company Report is excepted under section 552.110(b). Life Equity argues that release of the purchase amount of each policy, the net death benefit purchased, the net amount paid to the owner, and the estimated total premiums to keep the policy in force for the mean life expectancy would cause its company substantial competitive injury. Life Equity explains that “[t]his information provides all of the key elements needed for anyone, especially a competitor, to easily ascertain Life Equity’s proprietary pricing model used to purchase life insurance policies.” We note that the submitted information does not include the purchase amount of each policy.³ Having considered Life Equity’s arguments and reviewed the information at issue, we find that Life Equity has established that release of the net death benefit purchased, the net amount paid to the owner, and the estimated total premiums to keep the policy in force for the mean life expectancy would reveal its pricing model and cause it substantial competitive injury. Life Equity also argues that “one familiar with the viatical settlement provider industry could use the information contained in the [r]eport[s]” to determine the names of the insured individuals from whom Life Equity has purchased policies. We therefore understand Life Equity to argue that the insured

²The Restatement of Torts lists the following six factors 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;
- (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).

³Life Equity is required to provide the department with the submitted Annual Life and Viatical Settlement Company Reports pursuant to section 3.1705 of title 28 of the Texas Administrative Code. Section 3.1705 does not require disclosure of the purchase amount of each policy. *See* 28 T.A.C. § 3.1705.

individuals would constitute its customer list and that this information is also protected under section 552.110(b). We note that the names and other identifying information of the insured individuals are not contained in the submitted information.⁴ As for the remaining information, we find that Life Equity has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information would cause it substantial competitive harm. Accordingly, the department must withhold only the information we have marked that reveals Life Equity's pricing model under section 552.110(b) of the Government Code.⁵

Upon review, we determine that Life Equity has failed to demonstrate that any portion of the remaining information meets the definition of trade secret, nor has Life Equity demonstrated the necessary factors to establish a trade secret claim for this information. We therefore determine that Life Equity's remaining information is not excepted from disclosure under section 552.110(a) of the Government Code.

In summary, the department must withhold the information we have marked under section 552.110(b) 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

⁴Section 3.1705(e) states that "[i]n complying with the reporting requirements of this section, a viatical or life settlement provider, provider representative, or broker shall not include any confidential information, or in any other way compromise the anonymity of any viator, life settlor, or owner, or the viator's, life settlor's, or owner's family members, spouse, or significant other." 28 T.A.C. § 3.1705(e).

⁵As our ruling is dispositive, we need not address Life Equity's section 552.110(a) claim against disclosure of this information.

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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/jh

Ref: ID# 327021

Enc. Submitted documents

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