



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2008

Ms. Cynthia Villarreal-Reyna
Legal Services Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2008-16374

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# 328921.

The Texas Department of Insurance (the "department") received a request for a copy of the application for insurance Certificate of Authority for two named companies. You state you have released a portion of the requested information. We understand you to claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. You also state the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, the department notified KS Plan Administrators ("KS") and Fidelis Securus of Texas, Inc. ("Fidelis") of the request for information and of each company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from KS and Fidelis. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information contains e-mail addresses and insurance policy numbers. You inform us the requestor has agreed for the department to withhold information subject to sections 552.136 and 552.137. Thus, any of this information in the submitted documents is not responsive to the present request. Our ruling does not address this non-responsive information, and the department need not release it in response to the request.

Next, you have marked information in the submitted documents under section 59.001 of the Occupations Code. 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. 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.

Next, both the department and KS claim common-law privacy for portions of the submitted information. 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). However, this office has found, absent special circumstances, the names and addresses of members of the public are not excepted from required public disclosure under common-law privacy. *See* Open Records Decision No. 455 (1987). After reviewing the submitted information, we find portions of the information are highly intimate and not of legitimate public interest. Accordingly, the department must withhold the information you have marked under section 552.101 of the Government Code in conjunction with common-law privacy. For the remaining information at issue, neither the department nor KS has demonstrated how this information is highly intimate or embarrassing and not of legitimate public interest. Thus, no portion of this information may be withheld under section 552.101 in conjunction with common-law privacy.

We now turn to KS’s and Fidelis’s remaining arguments against disclosure of the remaining information. We note Fidelis has provided arguments to this office for information the department did not submit for our review. This ruling does not address information beyond what the department has submitted to us for review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific

information requested). Therefore, we do not address Fidelis's arguments for this information.

Fidelis asserts a portion of its submitted information is confidential under section 843.156 of the Insurance Code, which is also encompassed by section 552.101. Section 843.156 provides in relevant part as follows:

(d) On request of the commissioner [of insurance], a health maintenance organization shall provide to the commissioner a copy of any contract, agreement, or other arrangement between the health maintenance organization and a physician or provider. Documentation provided to the commissioner under this subsection is confidential and is not subject to the [Act].

Ins. Code § 843.156(d). This section makes confidential a contract, agreement, or other arrangement between a health maintenance organization and a physician or other health care provider that is requested by and provided to the department. Upon review of the submitted argument and the information at issue, however, we find Fidelis has not established the information at issue consists of a contract, agreement, or other arrangement between a health maintenance organization and a physician or other health care provider. Thus, we find Fidelis has failed to establish that the information at issue is confidential under section 843.156, and the department may not withhold any portion of this information under section 552.101 of the Government Code on that ground.

Fidelis also claims section 843.078 of the Insurance Code for its submitted information. Section 552.101 also encompasses section 843.078. Section 843.078 provides, in relevant part:

(l) An application for a certificate of authority must include a written description of the types of compensation arrangements, such as compensation based on fee-for-service arrangements, risk-sharing arrangements, or capitated risk arrangements, made or to be made with physicians and providers in exchange for the provision of or an arrangement to provide health care services to enrollees, including any financial incentives for physicians and providers. The compensation arrangements are confidential and are not subject to the public information law, Chapter 552, Government Code.

Id. § 843.078(l). Fidelis claims portions of its submitted information consist of compensation arrangements that are subject to section 843.078. Upon review of the information at issue, we find no portion of Fidelis's information consists of a compensation arrangement for purposes of section 843.078. Therefore, the department may not withhold any portion of Fidelis's information under section 552.101 in conjunction with section 843.078 of the Insurance Code. We note, however, a portion of KS's information

consists of a compensation arrangement required under section 843.078(l) to be provided to the department in its application for a certificate of authority. Thus, the department must withhold this information, which we have marked, under section 552.101 in conjunction with section 843.078(l) of the Insurance Code.

Next, both KS and Fidelis claim 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. Gov't Code § 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 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* ORD 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 exemption 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. *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).

Fidelis claims its submitted information is excepted from disclosure under section 552.110(a). Having considered the submitted arguments, we conclude Fidelis has failed to demonstrate that any of its submitted information constitutes trade secrets; thus, no portion of the information at issue may be withheld under section 552.110(a) of the Government Code.

KS and Fidelis claim section 552.110(b) for their remaining information. Upon review of the submitted arguments and information at issue, we find KS and Fidelis each have made only conclusory allegations that the release of their remaining information would result in substantial damage to their competitive position. Thus, KS and Fidelis have not demonstrated that substantial competitive injury would result from the release of the remaining information. Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

You claim portions of the submitted information 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, the department must withhold the information it has marked under section 552.101 in conjunction with section 59.001 of the Occupations Code. The department also must withhold the information it has marked under section 552.101 in conjunction with common-law privacy. The department must withhold the compensation arrangement we have marked under section 552.101 in conjunction with section 843.078 of the Insurance Code. The remaining information must be released, 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).

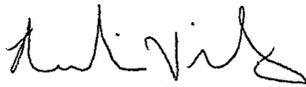
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

MJV/eeg

Ref: ID# 328921

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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