



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2009

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

OR2009-05410

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# 340703 (TDI# 87807).

The Texas Department of Insurance (the "department") received a request for the most recently filed underwriting guidelines for six named companies. Although you take no position with respect to the requested information, you claim releasing the submitted information may implicate the proprietary interests of the following third parties: AssuranceAmerica Insurance Company ("AAIC"), Deerbrook Insurance Company ("Deerbrook"), Infinity County Mutual Insurance Company ("Infinity"), Liberty County Mutual Insurance Company ("Liberty"), Oak Brook County Mutual Insurance Company ("Oak Brook"), and Progressive County Mutual Insurance Company ("Progressive"). Accordingly, you state, and have provided documentation showing, you notified these companies of the request and of their 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) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments on behalf of Deerbrook, Liberty, Oak Brook, and Progressive. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of

this letter, neither AAIC nor Infinity has submitted any comments to this office explaining how release of their information would affect their proprietary interests. Therefore, these companies have not provided us with any basis to conclude that they have a protected proprietary interest in any of the submitted information. Accordingly, the department may not withhold any of AAIC's or Infinity's submitted information on that basis.

Next, we understand Oak Brook to argue that its submitted information is confidential under section 552.101 in conjunction with section 38.002 of the Insurance Code. Section 552.101 excepts from 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 another statute makes confidential. Section 38.002 of the Insurance Code relates to underwriting guidelines for personal automobile and residential property insurance, and provides in part:

(b) Each insurer shall file with the department a copy of the insurer's underwriting guidelines. The insurer shall update its filing each time the underwriting guidelines are changed. If a group of insurers file one set of underwriting guidelines for the group, they shall identify which underwriting guidelines apply to each company in the group.

...

(d) The department or the office of public insurance counsel may disclose to the public a summary of an insurer's underwriting guidelines in a manner that does not directly or indirectly identify the insurer.

...

(f) The underwriting guidelines are subject to Chapter 552, Government Code.

Ins. Code § 38.002(b), (d), (f). Oak Brook states its submitted personal automobile insurance underwriting guidelines are subject to section 38.002. Section 38.002 of the Insurance Code is made specifically applicable to the underwriting guidelines of a county mutual insurance company. *See* Ins. Code § 38.002(a)(1) (defining "insurer" for purposes of Ins. Code § 38.002). We note that Oak Brook appears to be a county mutual insurance company. Oak Brook asserts that release of its information would violate section 38.002(d).

Statutory confidentiality under section 552.101 requires express language that makes certain information confidential or states that information shall not be released to the public. *See* Open Records Decision No. 478 at 2 (1987). Thus, for the purposes of section 552.101, a statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from a statutory structure. *See* Open Records Decision No. 658 at 4 (1998). Section 38.002 of the Insurance Code does not expressly provide for the confidentiality of the requested underwriting guidelines or any other information. *Compare* Ins. Code

§ 38.002(d) (“The department or the office of public insurance counsel may disclose to the public a summary of an insurer’s underwriting guidelines in a manner that does not directly or indirectly identify the insurer.”) *with id.* § 38.003(d) (“Underwriting guidelines are confidential, and the department or the office of public insurance counsel may not make the guidelines available to the public.”).¹ Furthermore, Oak Brook’s underwriting guidelines are not themselves implicitly confidential, for the purposes of section 552.101, merely because section 38.002(d) provides for the release of a de-identified summary of the guidelines. *See* Open Records Decision No. 525 at 4 (1989) (information cannot be withheld from public disclosure by negative implication simply because statute designates other specific information as public information). Therefore, having considered Oak Brook’s arguments, we conclude that the department may not withhold any of Oak Brook’s information under section 552.101 of the Government Code in conjunction with section 38.002 of the Insurance Code.

Next, Deerbrook, Liberty, Oak Brook, and Progressive claim their underwriting guidelines are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure 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.” *See* Gov’t Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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.

¹We note that section 38.003 “applies to all underwriting guidelines that are not subject to Section 38.002.” Ins. Code § 38.003(a).

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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.² Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, 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).

Deerbrook, Liberty, Oak Brook, and Progressive contend their underwriting guidelines qualify as trade secret information under section 552.110(a). Upon review of their arguments and information at issue, we find they have not demonstrated how the submitted underwriting guidelines meet the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Thus, the underwriting guidelines pertaining to Deerbrook, Liberty, Oak Brook, and Progressive may not be withheld under section 552.110(a).

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).

Deerbrook and Progressive also claim their information is excepted from disclosure under section 552.110(b). Based on their arguments and our review, we find Deerbrook and Progressive have provided no specific factual or evidentiary showing release of the submitted underwriting guidelines would cause the companies substantial competitive injury. Therefore, the department may not withhold any of Deerbrook's or Progressive's information under section 552.110(b).

We note the submitted information includes e-mail addresses subject to section 552.137 of the Government Code, which 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).³ See Gov't Code § 552.137(a)-(c). The e-mail addresses we have marked are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137, unless the owners of the addresses affirmatively consent to their release. See *id.* § 552.137(b). As no further exceptions to disclosure are raised, the remaining information must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/rl

³The 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).

Ref: ID# 340703

Enc. Submitted documents

cc: Requestor
(w/o enclosures)