



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2009

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

OR2009-16229

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# 361996 (TDI # 95915).

The Texas Department of Insurance (the "department") received a request for a specified utilization review application. You state the department has provided some of the responsive information to the requestor. You state the department will withhold social security numbers pursuant to section 552.147 of the Government Code.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.137 of the Government Code. In addition, you state that release of the submitted information may implicate the proprietary interests of Ryco MedReview ("Ryco"). Accordingly, you notified Ryco of the department's receipt of this request and of its right to submit arguments to this office as to why the requested information should not be released to the requestor. *See Gov't*

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. Gov't Code § 552.147(b). Based on this representation, we need not address your argument under section 552.101 of the Government Code in conjunction with section 59.001 of the Texas Occupations Code.

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 arguments from an attorney representing Ryco.² We have considered the submitted arguments and reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. The department argues a portion of the submitted information is confidential under section 4201.154 of the Insurance Code, which is encompassed by section 552.101.³ Section 4201.154 provides the following:

(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.

Ins. Code § 4201.154. You state the information you have marked consists of review procedures and screening criteria that are part of Ryco’s utilization review plan, and that this information is confidential under section 4201.154. Based on your representations and our review, we agree the information that you have marked is confidential pursuant to section 4201.154 of the Insurance Code and must be withheld under section 552.101 of the Government Code.

²In its brief, Ryco raises section 552.305 of the Government Code as an exception to disclosure. We note, however, that section 552.305 is not an exception to disclosure under the Act. Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private or proprietary while the governmental body is seeking an attorney general’s decision under the Act.

³Although the department also argues a portion of the submitted information is made confidential by the statutory predecessor of section 4201.154, section 4(I) of article 21.58A of the Insurance Code, we note this provision has been repealed. *See* Act of June 2, 1997, 75th Leg., R.S., ch. 1025, 1997 Tex. Gen. Laws 3797, 3799, *repealed by* Act of May 25, 2005, 79th Leg., R.S., ch. 727, § 18, 2005 Tex. Gen. Laws 1752, 2187.

Section 552.101 also encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure under common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we agree the department must withhold the personal financial information that you have marked under section 552.101 of the Government Code in conjunction with common law privacy.

We next address Ryco's arguments under section 552.110 of the Government Code. Section 552.110 of the Government Code 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). Section 552.110(a) protects the property 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). 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 [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). 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORD 232. This office must accept a claim that information subject to the Act is exempted 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. Open Records Decision No. 552 (1990). 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.*; *see also* Open Records Decision 661 at 5-6 (1999).

Upon review, we conclude Ryco has not demonstrated that any portion of its application for certification qualifies as a trade secret for purposes of section 552.110(a) of the Government Code. *See* ORD 552 at 5-6; *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939). We also find Ryco has not made the specific factual or evidentiary showing required under section 552.110(b) that the release of its application for certification would likely result in substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (statutory predecessor generally not applicable to information relating to organization and personnel, market studies, qualifications and experience, and pricing). Accordingly, the department may not withhold any portion of Ryco’s application for certification pursuant to section 552.110 of the Government Code.

The department notes the remaining information includes a personal e-mail address. Section 552.137 of the Government Code 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 address you have marked does not appear to be of the type

⁴The 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; (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.

specifically excluded by section 552.137(c), and you inform us the owner of the e-mail address at issue has not affirmatively consented to its release. Therefore, the department must withhold the e-mail address you have marked under section 552.137 of the Government Code.

In summary, the department must withhold the (1) review procedures and screening criteria you have marked under section 552.101 in conjunction with section 4201.154 of the Insurance Code; (2) personal financial information you have marked under section 552.101 in conjunction with common law privacy; and (3) e-mail address you have marked under section 552.137 of the Government Code. 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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 361996

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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