



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 1, 2010

Ms. Sara Shiplet Waitt
Texas Department of Insurance
Senior Associate Commissioner
Legal and Regulatory Affairs, MC 110-1A
P.O. Box 149104
Austin, Texas 78714-9104

OR2010-01231A

Dear Ms. Shiplet Waitt:

This office issued Open Records Letter No. 2010-01231 (2010) on January 26, 2010. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on January 26, 2010.

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# 376384 (TDI# 97663).

The Texas Department of Insurance (the "department") received a request for a copy of the Viatical Settlement Provider Annual Reports for 2008 submitted by each viatical settlement provider, excluding Life Equity, L.L.C. You state you have released some information to the requestor. Although the department takes no position on whether the submitted information is excepted from disclosure, you state that release of this information may implicate the

proprietary interests of third parties.¹ Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received arguments from representatives of SLG, Coventry, Fairmarket, Habersham, Wentworth, Legacy, Proverian, and Riverrock. We have considered the submitted arguments and reviewed the submitted information.

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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Axis, Independent, and Magna. Thus, we have no basis for concluding that any portion of the submitted information constitutes the proprietary information of Axis, Independent, and Magna. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the department may not withhold any of the submitted information based on the proprietary interests of Axis, Independent, and Magna. As no arguments are made against the disclosure of these third parties' information, it must be released to the requestor.

Habersham asserts that the submitted information is excepted under section 552.101 of the Government Code, which 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 submitted documents contain information that Habersham provided to the department pursuant to section 3.1705 of title 28 of the Texas Administrative Code. *See* 28 T.A.C. § 3.1705 (identifying information of viatical providers and brokers as well as viatical settlement agreement information must be submitted to department); *see also* Ins. Code § 1111.003(a) (department commissioner shall adopt reasonable rules relating to life settlements and relating to viatical settlements). Habersham asserts that this information is confidential under section 3.1714 of title 28 of the Texas Administrative Code, which provides that "[a] viatical or life

¹The third parties are Axis Thought Capital ("Axis"), BAC Life Settlements (now Structured Life Group, LLC) ("SLG"), Coventry First of Texas ("Coventry"), Fairmarket Life Settlements ("Fairmarket"), Habersham Funding ("Habersham"), Independent Funding ("Independent"), J.G. Wentworth Life Settlements ("Wentworth"), Legacy Benefits Corporation d/b/a Legacy Settlements Corporation ("Legacy"), Magna Life Settlements ("Magna"), Proverian Capital ("Proverian"), and Riverrock Partners ("Riverrock").

settlement provider, provider representative, or broker shall not release any viator's, life settlor's, or owner's confidential information to any person[.]" 28 T.A.C. § 3.1714(c); *see also* Ins. Code § 1111.003(b)(7) (rules adopted by department commissioner must include rules governing maintenance of appropriate confidentiality of personal and medical information). By its terms section 3.1714(c) prohibits a viatical or life settlement provider from releasing confidential information it solicited or obtained from viators, life settlors, or owners, except under certain circumstances. However, section 3.1714(c) does not address what the department can or cannot do with such information. *See* 28 T.A.C. § 3.1714(c). Therefore, Habersham has failed to establish that the submitted information, when in the possession of the department, is confidential under section 3.1714 of title 28 of the Texas Administrative Code. *See* Open Records Decision No. 478 (1987) (as general rule, statutory confidentiality requires express language making information confidential). Consequently, the department may not withhold the submitted information under section 552.101 of the Government Code on that ground.

Habersham also asserts that this information is confidential under section 552.101 in conjunction with section 3.1716(e) of title 28 of the Texas Administrative Code, which provides:

The department may seek information made confidential by §3.1714 of this subchapter (relating to Confidentiality) through use of subpoenas issued pursuant to Insurance Code Article 3.50-6A, §3, Article 1.10D, Chapter 36, or through use of a written request for information made pursuant to Insurance Code §38.001. Confidential information obtained by the department shall remain confidential pursuant to the terms of either Insurance Code Chapter 38 or Article 1.10D, §5.

28 T.A.C. § 3.1716(e). However, we find that section 3.1716(e) does not make information confidential; rather, this section maintains the confidentiality of information when that information is provided to the department pursuant to a subpoena or written request for information. Further, as stated above, we note that the information at issue in this instance was provided by Habersham pursuant to section 3.1705 of title 28 of the Texas Administrative Code and not pursuant to a subpoena or written request by the department. *See id.* § 3.1705. Thus, none of Habersham's information may be withheld under section 3.1716(e).

SLG and Legacy argue that their respective reports are excepted from disclosure under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This section, however, is a discretionary exception that only protects the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied); Open Records Decision Nos. 592 (1991) (statutory

predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government). As the department does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the submitted information. Therefore, the department may not withhold any of the submitted information pursuant to section 552.104.

Riverrock, Habersham, Proverian, Wentworth, Coventry, Fairmarket, and Legacy claim that their respective reports are 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: (1) trade secrets and (2) 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 must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *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. 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).

Riverrock, Habersham, Proverian, Wentworth, Coventry, Fairmarket, and Legacy claim that their respective reports are excepted from disclosure under section 552.110 of the Government Code. After reviewing the submitted reports and the submitted arguments, we understand Wentworth to argue that the insured individuals would constitute its customer list and that this information is protected under section 552.110(a). However, we note that the names and other identifying information of the insured individuals are not contained in the submitted information.² Thus, upon review, we find that only Proverian’s life expectancy provider information and Fairmarket’s pricing methodology and broker information, which we have marked, constitute trade secret information that must be withheld under section 552.110(a) of the Government Code. As for the remaining information, we conclude that Riverrock, Habersham, Coventry, Wentworth, Proverian, Fairmarket, and Legacy have failed to establish a *prima facie* case that any of the remaining information is a trade secret

²Section 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).

protected by section 552.110(a). *See* ORD 402. Thus, the department may not withhold any of the remaining information under section 552.110(a) of the Government Code.

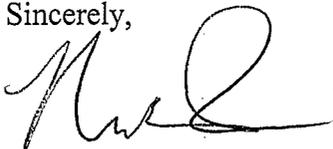
After reviewing the submitted information and Riverrock, Habersham, Proverian, Coventry, Wentworth, and Legacy's arguments, we find that they have established that release of a portion of their submitted information would cause substantial competitive injury to the companies. We find that Riverrock, Habersham, Proverian, Coventry, Wentworth, and Legacy have established that release of their pricing information and broker information would cause them substantial competitive injury. Therefore, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code. We find, however, that Riverrock, Habersham, Proverian, Coventry, Wentworth, and Legacy have made only conclusory allegations that release of the remaining submitted information would cause the companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Accordingly, the department must withhold only the information we have marked that reveals Riverrock, Habersham, Coventry, Proverian, Wentworth, and Legacy's broker and pricing information under section 552.110(b) of the Government Code.

In summary, the department must withhold the information we have marked under section 552.110(a) of the Government Code. 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 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,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/jb

Ref: ID# 376384

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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