



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 20, 2010

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

OR2010-05657

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# 376550 (TDI No. 100924).

The Texas Department of Insurance (the "department") received a request for all documents filed by Commonwealth Insurance Company ("Commonwealth") since 2004 that the requestor has not yet received. You state some information will be released to the requestor. Although you take no position on the public availability of the submitted information, you state that the information at issue may implicate the interests of third parties. Accordingly, you submit documentation showing that you notified Commonwealth and J.S. Cheng & Partners, Inc. ("Cheng") of the request for information 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) (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 comments from Commonwealth. 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 Cheng. We, thus, have no basis for concluding that any portion of the submitted information constitutes the proprietary information of Cheng. *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 Cheng.

Initially, Commonwealth asserts the request is overbroad and requests that the department or this office seek clarification from the requestor. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). A governmental body has a duty to make a good faith effort to relate a request for information to information that the governmental body holds. *See* Open Records Decision No. 561 (1990). Moreover, a governmental body may not refuse to comply with a request on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976) (cost or difficulty in complying with predecessor of Act does not determine availability of information); Open Records Decision No. 497 (1988). In this case, the department has not sought clarification from the requestor and has submitted responsive information for our review. We consider the department to have made a good faith effort to identify the information that is responsive to the request. Accordingly, we will consider Commonwealth's remaining arguments against disclosure of the submitted information.<sup>1</sup>

Commonwealth appears to claim that some of its information is confidential under sections 401.057 and 401.058 of the Insurance Code.<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either

---

<sup>1</sup>We note that Commonwealth seeks to withhold its agency agreements, three-year business plans, trust fund agreements, premiums, social security numbers, and access device information. However, we note that the department has not submitted this information for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested or representative sample if information is voluminous). We further note that although Commonwealth raises section 552.305 of the Government Code, this section is not an exception to disclosure under the Act; rather, it is a procedural provision permitting a governmental body to decline to release information that may implicate a person's privacy or property interests for the purpose of requesting a decision from this office as provided under the Act. *See* Gov't Code § 552.305; ORD 542.

<sup>2</sup>Commonwealth cites to the former article 1.15 of the Insurance Code, which was codified as sections 401.057 and 401.058 in 2005. Act of 2005, 79th Leg., R.S., ch. 727, § 1, secs. 401.057 and 401.058, 2005 Tex. Gen. Laws 1765, 1766. Therefore, we will address Commonwealth's arguments under sections 401.057 and 401.058.

constitutional, statutory, or judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 401.051 of the Insurance Code requires the department, or an examiner appointed by the department, to visit each insurance carrier and examine the carrier’s financial condition, ability to meet liabilities, and compliance with the laws affecting the conduct of the carrier’s business. Ins. Code § 401.051(a), (b). In connection with this examination process, section 401.057 provides in part:

(b) In conducting an examination under this subchapter, the department shall use audits and work papers that the carrier makes available to the department and that are prepared by an accountant or accounting firm meeting the qualifications of Section 401.011. The department may conduct a separate audit of the carrier if necessary. Work papers developed in the audit shall be maintained in the manner provided by Sections 401.020(b) and (c).

(c) The carrier shall provide the department with:

(1) the work papers of an accountant or accounting firm or the carrier;  
and

(2) a record of any communications between the accountant or accounting firm and the carrier that relate to an audit.

...

(e) Information obtained under this section is confidential and may not be disclosed to the public except when introduced as evidence in a hearing.

*Id.* § 401.057(b),(c),(e). Additionally, section 401.058 states:

(a) A final or preliminary examination report and any information obtained during an examination are confidential and are not subject to disclosure under [the Act].

(b) Subsection (a) applies if the examined carrier is under supervision or conservatorship. Subsection (a) does not apply to an examination conducted in connection with a liquidation or receivership under this code or another insurance law of this state.

*Id.* § 401.058. Commonwealth asserts that some of its submitted information is confidential under sections 401.057 and 401.058. Pursuant to section 552.303 of the Government Code, this office notified the department by letter dated April 15, 2010, that we needed additional information explaining whether the submitted information was obtained by the department

pursuant to chapter 401 of the Insurance Code. *See id.* § 552.303(c) (attorney general may give written notice to governmental body that additional information is necessary to render a decision). The department has informed this office that the submitted information was not obtained during the course of an examination under chapter 401 of the Insurance Code. Thus, we find section 401.057 and section 401.058 are not applicable in this instance. Accordingly, the department may not withhold any of the submitted information under section 552.101 of the Government Code on that basis.

Commonwealth also argues that the information at issue implicates privacy interests. Common-law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). Common-law privacy protects the interests of individuals, however, and not those of business and governmental entities. *See Open Records Decision Nos. 620* (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy). Commonwealth has not demonstrated that any of the information at issue is protected by common-law privacy. Likewise, Commonwealth has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of the submitted information confidential under section 552.101. Therefore, the department may not withhold any portion of the submitted information on that basis under section 552.101.

Commonwealth also raises section 552.102(a) of the Government Code for a portion of its information. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ *ref’d n.r.e.*) (addressing statutory predecessor). In this instance, the information at issue is related to a private entity, Commonwealth. Therefore, the department may not withhold any portion of Commonwealth’s information under section 552.102(a) of the Government Code.

Next, Commonwealth asserts that portions of its information are excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the department, not the proprietary interests of private parties such as Commonwealth. *See Open Records Decision No. 592* at 8 (1991) (discussing statutory predecessor). In this instance, the department does not raise section 552.104 as an exception to disclosure. Therefore, the

department may not withhold any of the submitted information under section 552.104 of the Government Code.

Commonwealth also asserts that portions of its information are excepted under section 552.110 of the Government Code. 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 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; *see* 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 exception 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. *See* 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. *See* ORD 661.

Commonwealth argues that portions of its information constitute protected trade secrets. We find Commonwealth has failed to demonstrate how any portion of the submitted information meets the definition of a trade secret, nor has Commonwealth demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* Open Records Decision Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, the department may not withhold any of the submitted information pursuant to section 552.110(a) of the Government Code. Commonwealth has also failed to provide specific factual evidence demonstrating that release of any of the information at issue would result in substantial competitive harm to the company. *See* ORD 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). Accordingly, the department may not withhold any of the submitted information pursuant to section 552.110(b) of the Government Code.

Finally, Commonwealth asserts that portions of its information are excepted from disclosure pursuant to section 552.125 of the Government Code. Section 552.125 excepts from disclosure “[a]ny documents or information privileged under the Texas Environmental,

Health, and Safety Audit Privilege Act” (the “TEHSAP”). Gov’t Code § 552.125. Section 5 of the TEHSAP, article 4447cc, V.T.C.S., provides in part:

(a) An audit report is privileged as provided in this section.

(b) Except as provided in Sections 6, 7, and 8 of this Act, any part of an audit report is privileged[.]

V.T.C.S. art. 4447cc, § 5(a)-(b); *see id.* §§ 3(a)(1), 4 (defining “audit report”). Section 6 of the TEHSAP provides in part:

(b) Disclosure of an audit report or any information generated by an environmental or health and safety audit does not waive the privilege established by Section 5 of this Act if the disclosure:

...

(3) is made under a claim of confidentiality to a governmental official or agency by the person for whom the audit report was prepared or by the owner or operator [of a regulated facility or operation].

*Id.* § 8(b)(3). Section 6 further provides:

(d) Information that is disclosed under Subsection (b)(3) of this section is confidential and is not subject to disclosure under Chapter 552, Government Code. A public entity, public employee, or public official who discloses information in violation of this subsection is subject to any penalty provided in Chapter 552, Government Code.

*Id.* § 6(d). Section 8 of the TEHSAP provides, however, that “[t]he privilege described in this Act does not apply to . . . a document, communication, datum, or report or other information required by a regulatory agency to be collected, developed, maintained, or reported under a federal or state environmental or health and safety law[.]” *Id.* § 8(a)(1).

Commonwealth contends that its information is privileged under the TEHSAP and is therefore excepted from disclosure under section 552.125 of the Government Code. However, Commonwealth has not demonstrated that any portion of its information constitutes an environmental or health and safety audit, or any information generated by an environmental or health and safety audit. Thus, we conclude no portion of Commonwealth’s information is privileged under section 5 of the TEHSAP. Accordingly, the department may not withhold any portion of Commonwealth’s information under section 552.125 of the Government Code.

We note the remaining information contains personal e-mail addresses that are subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purposes 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). *Id.* § 552.137 (a)-(c). We have marked e-mail addresses in the remaining information that are not of a type specifically excluded by subsection (c). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.<sup>4</sup>

Finally, we note that 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 copyrighted. 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 copyrighted materials, 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 e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure. The remaining information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.

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](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

---

<sup>3</sup>The 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).

<sup>4</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137, without the necessity of requesting an attorney general decision.

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,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 376550

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Lee D. Thibodeaux  
Fulbright & Jaworski, L.L.P.  
For Commonwealth Insurance Company  
1301 McKinney, Suite 5100  
Houston, Texas 77010-3095  
(w/o enclosures)

Mr. Joe S. Cheng, F.C.A.S.  
J. S. Cheng & Partners, Inc.  
Suite 706, Don Mills  
1500 Don Mills Road  
Ontario, Canada M3B 3K4  
(w/o enclosures)