



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2010

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal & Regulatory Affairs Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2010-06901

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# 379327 (TDI# 100802).

The Texas Department of Insurance (the "department") received a request for the 2008 annual reports submitted by each viatical settlement provider, excluding the requestor's company. You state that some responsive information has been released to the requestor. You take no position as to whether the submitted information is excepted from disclosure, but you state that release of this information may implicate the proprietary interests of Life Equity LLC. ("Life Equity"). Accordingly, you notified Life Equity of this request for information and of the 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 correspondence from Life Equity. We have reviewed the submitted arguments and the submitted information.

Initially, we must address the department's obligations under the Act. Pursuant to section 552.301(b), the governmental body must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving a request for information. *See Gov't Code § 552.301(a), (b)*. In addition, under section 552.301(e), the governmental body must submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that

would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You inform us that the department received this request on February 5, 2010. However, you did not request a ruling from this office or submit the information required by section 552.301(e) until March 10, 2010. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider whether or not the information at issue is excepted under the Act.

Life Equity asserts that its information is protected under section 552.110 of the Government Code, which protects the proprietary interests of private parties with respect to 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.” 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).

This office will 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. *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information at issue meets the definition of a trade secret, and the necessary factors have been demonstrated to establish a trade secret claim.¹ *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. *Id.*; Open Records Decision No. 661 (1999).

Life Equity contends that the information contained in the submitted 2008 Annual Report is excepted under section 552.110(b). Life Equity argues that release of the purchase amount of each policy, the net death benefit purchased, the net amount paid to the owner, and the

¹The 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 other 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).

estimated total premiums to keep the policy in force for the mean life expectancy would cause the company substantial competitive injury. Life Equity asserts that “[t]his information provides all of the key elements needed for anyone, especially a competitor, to easily ascertain Life Equity’s proprietary pricing model used to purchase life insurance policies.” We note, however, that the submitted information does not include the purchase amount of each policy or the estimated total premiums to keep the policy in force.²

Having considered Life Equity’s arguments and reviewed the information at issue, we find that Life Equity has demonstrated that release of the net death benefit purchased and the net amount paid to the owner would reveal its pricing model and cause it substantial competitive injury. Life Equity also argues that “one familiar with the viatical settlement provider industry could use the information contained in the [r]eport[s]” to determine the names of the insured individuals from whom Life Equity has purchased policies. We, therefore, understand Life Equity to argue that the insured individuals would constitute its customer list and that this information is also protected under section 552.110(b). We note that the names and other identifying information of the insured individuals are not contained in the submitted information.³

Therefore, the department must withhold the net death benefit purchased and the net amount paid to the owner under section 552.110(b). As for the remaining information, we find that Life Equity has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information would cause it substantial competitive harm. Accordingly, the department may not withhold any of the remaining submitted information under section 552.110(b) of the Government Code. *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), *509 at 5 (1988)* (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative).

Upon review, we determine that Life Equity has failed to demonstrate that any portion of the information at issue meets the definition of a trade secret, nor has Life Equity demonstrated the necessary factors to establish a trade secret claim for this information. *See RESTATEMENT OF TORTS § 757 cmt. b (1939)* (information is generally not trade secret

²Life Equity is required to provide the department with the submitted annual report pursuant to section 3.1705 of title 28 of the Texas Administrative Code. Section 3.1705 does not require disclosure of the purchase amount of each policy. *See* 28 T.A.C. § 3.1705.

³Section 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).

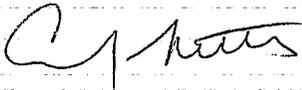
unless it constitutes "a process or device for continuous use in the operation of the business"). Thus, no portion of the submitted information may be withheld under section 552.110(a) of the Government Code.

Accordingly, the department must withhold the net death benefit purchased and the net amount paid to the owner under section 552.110(b) of the Government Code. The remaining submitted 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 379327

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)