



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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Ms. Cynthia Villarreal-Reyna  
Section Chief, Agency Counsel  
Legal & Regulatory Affairs Division, MC-110-1A  
Texas Department of Insurance  
P.O. Box 149104  
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OR2010-09889

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# 385484 (TDI# 103604).

The Texas Department of Insurance (the "department") received a request for the 2009 viatical settlement annual reports received by the department. You state you will release some information to the requestor. Although you take no position with respect to the public availability of the requested information, you state release of this information may implicate the proprietary interests of third parties. You inform us, and provide documentation showing, pursuant to section 552.305 of the Government Code, the department has notified Eagil Life Settlements, L.L.C. ("Eagil"); Legacy Benefits Corp. d/b/a Legacy Settlements Corp. ("Legacy"); and Life Settlement Corp. d/b/a Peachtree Life Settlements ("Peachtree") of the request and of their right to submit arguments to this office explaining why their submitted information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from Eagil, Legacy, and Peachtree. We have considered the submitted arguments and reviewed the submitted information.

Eagil and Peachtree argue their submitted information was provided to the department with the expectation that it would be kept confidential. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through a contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987). Consequently, unless Eagil's and Peachtree's information falls within an exception to disclosure, it must be released, notwithstanding any agreement between the department and Eagil or Peachtree specifying otherwise.

Peachtree also asserts the requestor has no legitimate reason for requesting the information at issue. We note a requestor's motives are irrelevant to the question of whether requested information may be withheld from disclosure. *See* Gov't Code § 552.222(a)-(b); ORD 542 at 4. A governmental body must release the information to which a requestor seeks access unless the information falls within the scope of an exception to public disclosure under the Act. *See* Gov't Code § 552.221; Open Records Decision No. 664 (2000). We note a governmental body is not responsible for the use that may be made of information that it releases to the public. *See* Gov't Code § 552.204; Open Records Decision No. 508 at 3 (1988) (use that may be made of information does not control whether it falls within exception to disclosure).

Peachtree asserts 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 Peachtree 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). Peachtree asserts this information is confidential under section 3.1714 of title 28 of the Texas Administrative Code, which provides that "[a] viatical or life 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 settlers, or owners, except under certain circumstances. However, as Peachtree acknowledges, 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, Peachtree has failed to establish 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 any of the submitted information under section 552.101 of the Government Code on that ground.

Legacy argues its report is 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.

Eagil, Legacy, and Peachtree each raise 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: trade secrets and 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* Open Records Decision No. 552 at 2 (1990). 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.<sup>1</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* 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).

Eagil and Legacy contend portions of their information constitute trade secrets under section 552.110(a) of the Government Code. After reviewing the company's arguments and the information at issue, we conclude Eagil and Legacy have failed to establish a *prima facie* case that any of their responsive information is a trade secret protected by section 552.110(a). Thus, the department may not withhold any portion of the submitted information under section 552.110(a) of the Government Code.

Legacy and Peachtree seek to withhold portions of their information under section 552.110(b) of the Government Code. Upon review, we find Legacy has established the release of a portion of its pricing information and broker information would cause the company substantial competitive injury. Therefore, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Legacy and Peachtree have made only conclusory allegations that the

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<sup>1</sup> 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;
- (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).

release of the remaining submitted information would cause the companies substantial competitive injury, and they 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 Legacy's broker and pricing information 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](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,



Mack T. Harrison  
Assistant Attorney General  
Open Records Division

MTH/tp

Ref: ID# 385484

Enc. Submitted documents

c: Requestor  
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