



ATTORNEY GENERAL OF TEXAS

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OR2011-08937

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# 420056 (TDI Nos. 113638, 113869, and 115592).

The Texas Department of Insurance (the "department") received three requests from different requestors for certain viatical or life settlement provider annual reports.¹ You state you will release some information to the requestors. Although you take no position with respect to the public availability of the remaining 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 the interested third parties of the request and of their right to submit

¹We understand the department sought and received clarification from the requestors in your request numbers 113638 and 113869 regarding the requests. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

arguments to this office explaining why their submitted information should not be released.² *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 comments from Caldwell Funding Corporation stating it does not object to release of its information. We have also received arguments Coventry First LLC and Coventry First of Texas LLC (collectively, "Coventry"), FairMarket Life Settlements ("Fair"), Financial Life Services ("Financial"), Life Settlement Solutions ("Life"), Magna Life Settlements ("Magna"), Maple Life ("Maple"), Proverian Capital ("Proverian"), and RiverRock Partners ("RiverRock"). We have considered the submitted arguments and reviewed the submitted information.

We note the requestors in the department's request numbers 113638 and 113869 exclude from their requests the reports for Peachtree Life Settlements ("Peachtree"). In addition, the requestor in your request number 113869 excludes from her request the reports for J Chapman & Associates, JG Wentworth, Life Settlements International, and Lotus Life. Thus, the report for Peachtree is not responsive to the request in request number 113638, and the reports for J Chapman & Associates, JG Wentworth, Life Settlements International, Lotus Life, and Peachtree are not responsive to request number 113869, and the department need not release them in response to the requests. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

Next, we note, and you acknowledge, the department did not comply with its ten-business-day deadline under subsection 552.301(b) of the Government Code in requesting a decision with respect to request number 113869, or its ten- or fifteen-business-day deadlines under subsections 552.301(b) and (e) in requesting a decision with respect to request number 113638. *See id.* § 552.301(b), (e). The submitted information, therefore, is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *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). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). As such, we will consider whether any of the submitted information may be excepted under the Act due

²The notified third parties are: Caldwell Funding Corporation; Coventry First, LLC; Coventry First of Texas; Credit Suisse Life Settlements; D3G LLC; Fairmarket Life Settlements; Financial Life Services; Institutional Life Services; J Chapman & Associates; JG Wentworth; Life Settlement Corporation; Life Settlements International; Life Settlement Solutions; Longmore Capital LLC; Lotus Life; Magna Life Settlements; Maple Life Financial; Proverian Capital LLC; RiverRock Partners; SLG Life Settlements, LLC; South Coast Settlements; Spiritus Life, Inc.; Viasource Funding Group; and Wm. Page & Associates.

to third-party interests. We also note portions of the information are subject to section 552.137 of the Government Code, which provides a compelling reason to withhold information; thus, we will also address this exception for the submitted information.³

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 only received arguments from Coventry, Fair, Financial, Life, Magna, Maple, Proverian, and RiverRock. We, thus, have no basis for concluding that any portion of the submitted information constitutes proprietary information of any of the remaining third parties. 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 any of the remaining third parties.

Life argues its submitted information is not subject to the Act. The Act is applicable to "public information." See Gov't Code § 552.021. Section 552.002 of the Act provides "public information" consists of information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); see also Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). In this instance, Life submitted its information to the department as part of an annual report on life settlement transactions, as required by the department. 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). The department has submitted a copy of the information at issue to this office for review. Upon review, we find the submitted report constitutes "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" of the

³The 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).

department. *See* Gov't Code § 552.002(a). We, therefore, conclude Life's annual report is public information that is subject to the Act. Accordingly, we will consider Life's remaining arguments against disclosure of the submitted information.

Life also argues its submitted information is confidential because it was marked as "confidential" when submitted to the department. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W. 2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information at issue comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

RiverRock objects to release of its information pursuant to Open Records Letter Ruling No. 2009-08357 (2009). RiverRock states, since the previous ruling, the "laws, facts, and circumstances regarding these data [sic] have not changed." However, RiverRock's information was not at issue in Open Records Letter Ruling No. 2009-08357. Thus, the department may not rely on Open Records Letter No. 2009-08357 as a previous determination with respect to RiverRock's information. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Life raises section 552.101 of the Government Code for the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Life has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any of the submitted information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the department may not withhold any of the submitted information under section 552.101 of the Government Code.

Life and Magna also claim their information is excepted 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. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as

distinguished from exceptions that are intended to protect the interests of third parties. *See* 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), 522 (1989) (discretionary exceptions in general). As the department does not argue section 552.104 is applicable in this instance, we conclude none of Life's or Magna's information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Life asserts its submitted information is excepted from disclosure pursuant to section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Gov't Code § 552.112. Section 552.112 protects the interests of a governmental body, rather than the interests of third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (section 552.112 is permissive exception that governmental body may waive in its discretion). Therefore, because the department does not raise section 552.112, this section is not applicable to the requested information.

Coventry, Fair, Financial, Life, Magna, Maple, Proverian, and RiverRock raise section 552.110 of the Government Code for portions of their submitted information. 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. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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.⁴ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim 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 section 552.110(a) is applicable 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) 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 No. 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).

Coventry, Financial, Life, Magna, Maple, Proverian, and RiverRock contend some of their information is excepted under section 552.110(b) of the Government Code. Upon review,

⁴The 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 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).

we conclude Coventry, Financial, Life, Magna, Maple, Proverian, and RiverRock have established release of their pricing information would cause the companies substantial competitive injury. Coventry, Financial, Maple, and RiverRock have established release of their broker information would cause the companies substantial competitive injury. In addition, Coventry, Financial, Life, Maple, and RiverRock have established release of their service provider information, which we have marked, would cause the companies substantial competitive injury. Therefore, the department must withhold the information we have marked under section 552.110(b). Upon review, we find Coventry, Financial, Life, Magna, Maple, Proverian, and RiverRock have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause the companies substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications, and experience). We, therefore, conclude the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Coventry, Fair, Financial, Life, Magna, Maple, Proverian, and RiverRock state some of their remaining information consists of trade secrets under section 552.110(a) of the Government Code. Upon review, we find Coventry's, Fair's, Financial's, Life's, Magna's, and RiverRock's life expectancy information, which we have marked, constitutes trade secret information that must be withheld under section 552.110(a) of the Government Code. In addition, we find Fair's broker and pricing methodology, which we have marked, constitutes trade secret information that must be withheld under section 552.110(a). However, we determine Coventry, Fair, Financial, Life, Magna, Maple, Proverian, and RiverRock have failed to demonstrate any portion of their remaining information at issue meets the definition of a trade secret, nor have the companies demonstrated the necessary factors to establish a trade secret claim for their information. Accordingly, the department may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

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 addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the personal e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

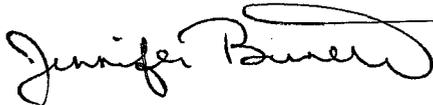
In summary, the department must withhold the information we have marked under section 552.110 of the Government Code. The department must also withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the

owners affirmatively consent to their public disclosure.⁵ The remaining responsive 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,



Jennifer Burnett
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Open Records Division

JB/dls

Ref: ID# 420056

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁵This office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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