



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2011

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

OR2011-14083

Dear Ms. Waitt:

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# 431275 (TDI# 117666).

The Texas Department of Insurance (the "department") received a request for certain annual reports submitted by life settlement providers. You state the department has released some of the requested information. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified Life Equity, L.L.C. ("Life Equity") and Life Trust, L.L.C. ("Life Trust") of the request and of their right to submit arguments to this office explaining why their 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 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 Life Equity and Life Trust. We have considered their arguments and reviewed the submitted information.

Initially, we note the department has submitted information that is not responsive to the request. The requestor seeks certain annual reports. Some of the submitted information does

not consist of annual reports. Therefore, this information, which we have marked, is not responsive. Our ruling does not address the public availability of information that is not responsive to the request, and the department is not required to release non-responsive information.

Next, we note Life Trust seeks to withhold information not submitted to this office by the department. Because this information was not submitted by the department, 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).

Life Equity asserts 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. *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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of a trade secret as well as the Restatement's list of six trade secret factors.¹ This office must accept a claim that

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;

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* Open Records Decision No. 552 at 5 (1990). 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. 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.

Life Equity argues the release of the purchase amount of each policy, the net death benefit purchased, the net amount paid to the owner, and the estimated total premiums to keep the policy in force for the mean life expectancy would cause its company substantial competitive injury. Life Equity explains “[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 the submitted information does not include the purchase amount of each policy.² Based on these representations and our review, we find Life Equity has established the release of the net death benefit purchased, the net amount paid to the owner, and the estimated total premiums to keep the policy in force for the mean life expectancy would reveal its pricing model and cause it substantial competitive injury. Life Equity also argues that someone familiar with the viatical settlement provider industry could use the information contained in the submitted report to determine the names of the insured individuals from whom Life Equity has purchased policies. We, therefore, understand Life Equity to argue the insured individuals constitute its customer list and that this information is also protected under section 552.110(b). We note the names and other identifying information of the insured individuals are not contained in the submitted

-
- (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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.

information.³ Therefore, the department must withhold the information we have marked under section 552.110(b) of the Government Code. As to the remaining information, we find Life Equity has not demonstrated how this information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b, ORD 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). Accordingly, the department may not withhold any of the remaining information under section 552.110(a) of the Government Code. Upon further review, we find Life Equity has not demonstrated how any of the remaining information constitutes commercial or financial information, the disclosure of which would cause it substantial competitive harm. Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.137 provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by subsection (c).⁴ Gov’t Code § 552.137(a)–(c). The department must withhold the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release.⁵

In summary, the department need not release information that is not responsive to the request. The department must withhold the information we have marked under section 552.110(b) of the Government Code and the e-mail address we have marked under section 552.137 of the Government Code, unless the owner of the e-mail address has affirmatively consented to its release. The department must release the remaining responsive information.

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).

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/agn

Ref: ID# 431275

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Jeremy J. Ray
Life Equity, L.L.C.
5611 Hudson Drive, Suite 100
Hudson, Ohio 44236

Mr. Jeffrey Kimmell
For Life Trust, L.L.C.
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017