



ATTORNEY GENERAL OF TEXAS
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September 18, 2012

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OR2012-07870A

Dear Ms. Villarreal-Reyna:

This office issued Open Records Letter No. 2012-07870 (2012) to the Texas Department of Insurance (the "department") on May 23, 2012. In correspondence dated July 13, 2012, you submitted to this office third-party information that you assert is responsive to the request for information, but that the department had failed to submit with its initial request for a ruling under the Act. Based on this, we have determined the prior ruling should be corrected for purposes of due process. *See* Gov't Code §§ 552.306, 552.352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2012-07870 and serves as the correct ruling. *See generally* Gov't Code § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 465229 (TDI ORR# 125536).

The department received a request for "all contract forms, disclosure forms, advertisements, application forms, documents involving change of policy ownership or beneficiary, and annual reports for the years 2007-2011" for twenty named companies. You state the department has released some of the requested information. You also inform us the department is redacting the e-mail addresses of members of the public in the submitted information under section 552.137 of the Government Code pursuant to the previous

determination in Open Records Decision No. 684 (2009).¹ You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You do not take a position as to whether the remaining submitted information is excepted from disclosure under the Act. However, you state, and provide documentation showing, you notified the following third parties of the department's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: Abacus Settlements; Berkshire Settlements; CMG Surety, LLC; Coventry First, LLC/Coventry First of Texas ("Coventry"); Credit Suisse Securities, LLC; Credit Suisse Life Settlements; FairMarket Life Settlements Corporation ("Fairmarket"); Habersham Funding, LLC ("Habersham"); Legacy Benefits Corporation ("Legacy"); Life Equity, LLC ("Life Equity"); Life Settlement Corporation DBA Peachtree Life Settlements; Life Settlements International LLC; Lotus Life; Magna Life Settlements and Maple Life Financial, Inc. ("Maple Life"); Portsmouth Settlement Company; Progressive Settlement Company, LLC; Q Capital Strategies, LLC; and Viasource Funding Group, LLC ("Viasource"). See Gov't Code § 552.305(d); see also Open Records Decision No. 542 at 3 (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 Coventry, Fairmarket, Habersham, Legacy, Life Equity, Maple Life, and Viasource objecting to the release of some of the information at issue. We have considered the submitted arguments and reviewed the submitted information.

Some of the requested information, including life settlement report and contract form information, was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2012-07767 (2012), 2012-01569 (2012), 2012-01339 (2012), 2012-00697 (2012), and 2012-00311A (2012).² As we have no indication the law, facts, and circumstances on which the prior rulings were based have changed, the department must continue to rely on Open Records Letter Nos. 2012-07767, 2012-01569, 2012-01339, 2012-00697, and 2012-00311A as previous determinations and withhold or release the information subject to those rulings in accordance with them. 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). Accordingly, we do not address the submitted arguments to withhold the information at issue in those rulings. However, we will address the arguments to withhold the submitted information that is not subject to any of those rulings.

¹Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including an 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.

²You inform us the Legacy information you submitted to this office on July 13, 2012 is not subject to any previous ruling.

We must next address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). The department received the request for information on March 8, 2012. Thus, the department's fifteen-business-day deadline under section 552.301(e) was March 29, 2012. However, the department did not submit some of the responsive information until April 20 and July 13, 2012. Therefore, the department failed to comply with the procedural requirements mandated by section 552.301(e) for this information.

A governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 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). The presumption that information is public under section 552.302 can generally be overcome by demonstrating the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Accordingly, because third-party interests are at stake, we will consider whether the information submitted on April 20 and July 13, 2012 must be withheld under the Act.

We next note, as discussed in part above, the department submitted to this office on March 22, April 20, and July 13, 2012, information that is responsive to the request for information. Thus, with the exception of the information subject to Open Records Letter Nos. 2012-07767, 2012-01569, 2012-01339, 2012-00697, and 2012-00311A and the information submitted to this office March 22, April 20, and July 13, 2012, we assume the department has released any remaining responsive information. If the department has not released any remaining responsive information, then it must do so immediately. *See* Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000); *see also* Gov't Code § 552.221(a) (officer for public information must "promptly" produce public information on application by any person to the officer).

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) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, only Coventry, Fairmarket, Habersham, Legacy, Life Equity, Maple Life, and Viasource have submitted to this office reasons explaining why the submitted information should not be released. We thus have no basis for concluding any portion of the remaining information at issue constitutes proprietary information of any of the remaining interested third parties, and the department may not

withhold any portion of the remaining information on that basis. *See* 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, 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.

The department asserts some of the submitted information is excepted from disclosure under section 552.107(1) of the Government Code, which protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.*, meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You explain the information you have marked under section 552.107 constitutes confidential communications between attorneys and employees of the department that were made in furtherance of the rendition of professional legal services. You also assert the communications were intended to be confidential and their confidentiality has been

maintained. After reviewing your arguments and the submitted information, we agree this information constitutes privileged attorney-client communications that the department may withhold under section 552.107.³

Habersham and Legacy assert some of the information at issue is excepted from disclosure under 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.” 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* ORD 552 at 2. 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. This office must accept a private person’s claim for exception as valid under that branch 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

³As our ruling is dispositive, we do not address your other argument to withhold this information.

⁴The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, 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 release of information would cause it substantial competitive harm).

We find Legacy has established the release of some of the information at issue would cause substantial competitive injury. Therefore, the department must withhold this information, which we have marked, under section 552.110(b). However, we find Habersham and Legacy have not shown any of the remaining information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov’t Code § 552.110(a). We also find Habersham and Legacy have made only conclusory allegations that release of the information at issue would cause them substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See id.* § 552.110(b). Therefore, the department may not withhold any of the remaining information pursuant to section 552.110.

We note the submitted information contains account and routing numbers subject to section 552.136 of the Government Code.⁵ Section 552.136 provides in part the following:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

⁵The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

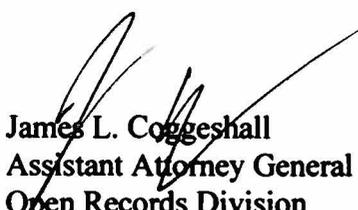
Id. § 552.136(a)-(b). The department must withhold the account and routing numbers we have marked under section 552.136 of the Government Code.

To conclude, the department must continue to rely on Open Records Letter Nos. 2012-07767, 2012-01569, 2012-01339, 2012-00697, and 2012-00311A as previous determinations and withhold or release the requested information at issue in accordance with those rulings. The department may withhold the information you have marked under section 552.107 of the Government Code. The department must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The department must release to the requestor the remaining information that is responsive to the request for information.

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,



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JLC/tch

Ref: ID# 465229

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