



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

This ruling has been modified by court action
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2012

Mr. Nick Lealos
Staff Attorney
Legal Section
General Counsel Division
Texas Department of Insurance
P.O. Box 149104, Mail Code 110-1A
Austin, Texas 78714-9104

**The ruling you have requested
has been amended as a result of
litigation and has been attached
to this document.**

OR2012-17701

Dear Mr. Lealos:

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# 469971 (TDI # 130754).

The Texas Department of Insurance (the "department") received a request for 18 categories of information related to two named individuals. You inform us the department is releasing some of the requested information and will redact information under sections 552.136 and 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).¹ You state some of the requested information will be withheld pursuant to the previous determination issued to the department in Open Records Letter No. 1999-1264 (1999)

¹We note Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain categories of information without the necessity of requesting an attorney general decision, including certain access device numbers under section 552.136 of the Government Code and an e-mail address of a member of the public under section 552.137 of the Government Code. However, the Texas legislature amended section 552.136 effective September 1, 2011, to allow a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(b)-(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* Thus, the statutory amendment to section 552.136 superceded Open Records Decision No. 684 on September 1, 2011. Therefore, a governmental body may only redact information subject to section 552.136 in accordance this section, not Open Records Decision No. 684.

(information is confidential that department represents to be work papers related to examination reports concerning carrier that is not in liquidation or receivership). See Open Records Decision No. 640 at 4 (1996) (department must withhold any information obtained from audit “work papers” that are “pertinent to the accountant’s examination of the financial statements of an insurer” under previous version of section 401.058 of Insurance Code). You claim some of the submitted information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code.² Additionally, you inform us release of some of submitted information may implicate the proprietary interests of Allstate, American General Life Insurance Company (“AIG”), Aon Benfield, Citi Assurance Services (“Citi”), Evergreen Life Limited (“Evergreen”), Farmers Insurance Group of Companies (“Farmers”), Fidelity & Deposit Company of Maryland, Forethought Life Insurance, Lloyd’s, The Variable Annuity Life Insurance Company, Principal Financial Group, State Farm Insurance (“State Farm”), Unitrin Direct Property & Casualty Company, Western National Life Insurance Company, and Willis Re. Accordingly, you notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. See Gov’t Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from AIG, Evergreen, and an attorney for Farmers. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that in a letter dated September 25, 2012, the department stated it wishes to withdraw its request for an open records decision with regard to the submitted information pertaining to State Farm because this information is not responsive to the request for information. Accordingly, the information at issue, which we have marked, is not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request.

You raise section 552.107 of the Government Code for some of the submitted information. Section 552.107(1) protects information coming within the attorney-client privilege. Gov’t Code § 552.107(1). 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. ORD 676 at 6-7. First, a governmental body must demonstrate that 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

²Although you also assert the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work-product privilege under Texas Rule of Civil Procedure 192.5, we note none of the information for which you claim these privileges is subject to section 552.022 of the Government Code. Thus, sections 552.107 and 552.111 of the Government Code are the proper exceptions to raise, respectively, for your attorney-client and work-product privilege claims in this instance. See *generally* Open Records Decision No. 676 (2002).

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). 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 that 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 inform us the submitted e-mails and draft documents you have marked under section 552.107(1) consist of communications between department attorneys and employees that were made for the purpose of providing legal advice to the department. You also inform us these communications were intended to be, and have remained, confidential. Based on your representations and our review, we conclude you have established the information at issue is protected by the attorney-client privilege. Therefore, the department may withhold the information you have marked under section 552.107(1) of the Government Code.³

You also raise section 552.111 of the Government Code for some of the remaining information. This section excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. *See Open Records Decision No. 615 at 2 (1993)*. The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); *Open Records Decision No. 538 at 1-2 (1990)*.

In *Open Records Decision No. 615*, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined

³As our ruling for this information is dispositive, we need not address your remaining argument against its release.

section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *Arlington Indep. Sch. Dist. v. Tex. Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.); *see* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

This office has also concluded a preliminary draft of a document that is intended for public release in its final form necessarily represents the drafter's advice, opinion, and recommendation with regard to the form and content of the final document, so as to be excepted from disclosure under section 552.111. *See* Open Records Decision No. 559 at 2 (1990) (applying statutory predecessor). Section 552.111 protects factual information in the draft that also will be included in the final version of the document. *See id.* at 2-3. Thus, section 552.111 encompasses the entire contents, including comments, underlining, deletions, and proofreading marks, of a preliminary draft of a policymaking document that will be released to the public in its final form. *See id.* at 2.

You assert the remaining information you have marked under section 552.111 consists of communications between and among department employees related to "the handling of regulatory matters, recommended actions, and opinions and analyses of regulatory matters." You also assert some of this information consists of draft documents. Based on your representations and our review, we find the department may generally withhold the information we have marked under section 552.111 of the Government Code. However, although you state the draft documents we have marked under this section "may eventually be publicly disclosed[.]" you do not explain that these documents will be released to the public in their final form. Thus, if the draft documents we have marked under section 552.111 will not be released to the public in their final form, the department may not withhold them under section 552.111. Because we conclude the remaining information you have marked under section 552.111 does not consist of advice, opinions, or recommendations, or is purely factual in nature, the department may not withhold any of this information under section 552.111.

We note that 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only AIG, Evergreen, and Farmers have submitted comments to this office explaining why their information should not be released. We note this office received a letter from Citi on October 1, 2012, in which the company informed us that it may submit comments to this office explaining why its information should not be released. However, as of the date of this letter, this office has not received any comments from Citi explaining why its information should not be released. Therefore, we have no basis to conclude that Citi or the remaining third parties have a protected proprietary interest in the remaining information. *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 portion of this information based upon the proprietary interests of Citi or the remaining third parties.

Evergreen raises section 552.101 of the Government Code for some of its information. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. We note, however, Evergreen has not pointed to any law, nor are we aware of any, that would make any of its 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, none of Evergreen's information may be withheld under section 552.101 of the Government Code.

AIG, Evergreen, and Farmers assert section 552.110 of the Government Code for some of their 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, 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 trade secret as well as the Restatement's list of six trade secret factors.⁴ This office must accept a claim that 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 that section 552.110(a) is applicable unless it has been shown that 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. *See id.*; *see also* ORD 661 at 5.

AIG, Evergreen, and Farmers contend that some of their information consists of commercial and financial information that is excepted from disclosure under section 552.110(b). Upon review of these companies’ arguments and the information at issue, we conclude Farmers has established that some of its information constitutes commercial or financial information that would cause the company substantial competitive harm if released. Thus, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find AIG, Evergreen, and Farmers have made only conclusory allegations that release of the remaining information at issue would cause them substantial competitive injury, and have not made a factual or evidentiary showing in support

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

of such allegations. *See* Gov't Code § 552.110; ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Accordingly, the department may not withhold any of the remaining information under section 552.110(b).

Evergreen and Farmers also raise section 552.110(a) for some of their remaining information. However, we find these companies have not demonstrated how any of the information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. *See* RESTATEMENT OF TORTS § 757 cmt. b; ORDs 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), 319 at 3. Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

We note you have marked certain e-mail addresses for redaction in the remaining information under section 552.137 of the Government Code pursuant to Open Records Decision 684. Section 552.137 provides that "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).⁵ *See* Gov't Code § 552.137(a)-(c). Upon review, we have marked additional e-mail addresses in the remaining information that are not of the types specifically excluded by section 552.137(c) of the Government Code. *See id.* § 552.137(c). Accordingly, the department must withhold the e-mail addresses you have marked and we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their disclosure.

You inform us some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department may withhold the information you have marked under section 552.107(1) of the Government Code. The department may withhold the information we have marked under section 552.111 of the Government Code; however, the department

⁵The 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).

may not withhold the draft documents we have marked under section 552.111 of the Government Code if they will not be released to the public in their final form. The department must withhold the information we have marked under section 552.110(b) of the Government Code. The department must withhold the e-mail addresses you have marked and we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their disclosure. As no further exceptions to disclosure are raised for the remaining information, the department must release it; however, any information subject to copyright only may be released in accordance with copyright law.

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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

Ref: ID# 469971

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Farmers
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Jackson Walker
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Principal Financial Group
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Des Moines, Iowa 50392-0220
(w/o enclosures)

Lloyds
C/O Dewey & Leboeuf
125 West 55th Street
New York, New York 10019-5389
(w/o enclosures)

Unitrin Direct Property &
Casualty Company
CT Corporation System
350 North St. Paul Street
Dallas, Texas 75201
(w/o enclosures)

Forethought Life Insurance
Corporation Service Company
211 East 7th Street, Suite 620
Austin, Texas 78701-3218
(w/o enclosures)

State Farm Insurance
Ms. Margie Southard
8900 Amberglen Boulevard
Austin, Texas 78729-1110
(w/o enclosures)

Willis Re
One World Financial Center
3rd Floor
200 Liberty Street
New York, New York 10281
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Fidelity & Deposit Company of Maryland
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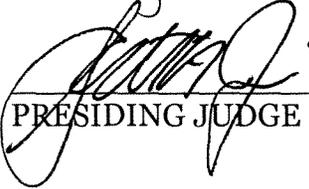
portions of the information at issue. The requestor was also informed of his right to intervene in the suit to contest the withholding of this information. A copy of the certified mail receipt is attached to this motion. The requestor has not filed a motion to intervene.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

1. Farmers, the Attorney General, Kitzman, and TDI have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to Tex. Gov't Code §552.110(b). Pursuant to Tex. Gov't Code §552.110(b), TDI must redact the marked portions of page 7 of Farmers' information. After redaction, page 7 must be released to the requestor. The remainder of the information at issue must be released or withheld in accordance with Attorney General open records letter ruling OR2012-17701.
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between Farmers, the Attorney General, Kitzman, and TDI and is a final judgment.

SIGNED the 11th day of August, 2014.



PRESIDING JUDGE

AGREED:



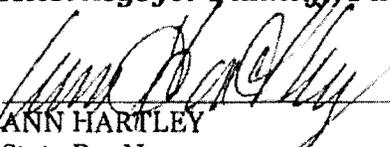
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**Attorney for Defendants, Eleanor Kitzman, Commissioner of Insurance
and Texas Department of Insurance**

Exhibit A

§ 552.110(b), but required it to release other commercial and financial information Farmers claims is proprietary. The Attorney General found that Farmers failed to meet its burden of showing that this other information met the definition of a trade secret and that Farmers' claim that it would suffer substantial competitive harm if such information was disclosed was speculative.

Farmers disputed the ruling and filed the above styled and captioned lawsuit to preserve its rights under the PIA.

Farmers submitted additional information to the Attorney General establishing that some of the other information at issue was commercial or financial information that is confidential under TEX. GOV'T CODE § 552.110(b). TDI and the Attorney General have reviewed Farmers' request and agree to the settlement.

TEX. GOV'T CODE § 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

Terms

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Farmers, the Attorney General, and TDI have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue are excepted from disclosure pursuant to TEX. GOV'T CODE § 552.110(b). Pursuant to TEX. GOV'T CODE § 552.110(b), TDI must redact the previously agreed upon marked portions of page 7 of Farmers' information. After redaction, page 7 must be released to the requestor. The remainder of the information at issue must be released or withheld in accordance with Attorney General

open records letter ruling OR2012-17701.

2. Farmers, TDI, and the Attorney General agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney. The agreed final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor.

3. The Attorney General agrees that he will also notify the requestor, as required by TEX. GOV'T CODE § 552.325(c), of the proposed settlement and of his right to intervene to contest Farmers' right to have TDI withhold the information.

4. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

5. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

6. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

7. Farmers warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that Farmers has against the Attorney General and/or TDI arising out of the matters described in this Agreement.

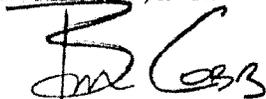
8. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release

claims that the Attorney General has against Farmers and/or TDI arising out of the matters described in this Agreement.

9. TDI warrants that its undersigned representative is duly authorized to execute this Agreement on behalf of TDI and its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the TDI has against Farmers and/or the Attorney General arising out of the matters described in this Agreement.

10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

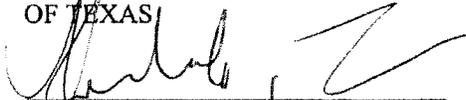
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TEXAS DEPARTMENT OF INSURANCE



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