



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2012

Ms. Kathy Wilson
Director
Office of Agency Counsel
Legal Section
General Counsel Division
Texas Department of Insurance
P.O. Box 149104, MC-110-1A
Austin, Texas 78714-9104

OR2012-18459

Dear Ms. Wilson:

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# 471234 (TDI ORR # 131195).

The Texas Department of Insurance (the "department") received a request for information concerning "which Tier 1 counties Group 176, Group 200 and Group 212 currently provide" new and renewal windstorm coverage.¹ You claim some of the submitted information is excepted from disclosure under section 552.137 of the Government Code.² You also inform us release of the submitted information may implicate the proprietary interests of Farmers Insurance Exchange ("Farmers Insurance"), Fire Insurance Exchange ("Fire Insurance"), State Farm Lloyds of Texas ("SFLT"), Texas Farmers Insurance Company ("TFIC"), United Services Automobile Association ("United Services"), and USAA Texas Lloyds Company

¹We note the department sought and received clarification of the request. See Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²Although you do not raise section 552.137 of the Government Code in your brief, we understand you to raise this exception based on your markings.

("UTLC"). Accordingly, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We received comments from Farmers Insurance, Fire Insurance, TFIC, United Services, and UTLC. We have considered the submitted arguments and reviewed the submitted information.

We note 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, SFLT has not submitted comments to this office explaining why the submitted information should not be released. Therefore, we have no basis to conclude SFLT has a protected proprietary interest in the submitted 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 the submitted information based upon the proprietary interests of the SFLT.

United Services and UTLC claim some of their information is not responsive to the request for information. We note a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the department has reviewed its records and determined the submitted information is responsive to the request. Thus, we conclude the department has made a good-faith effort to relate the instant request to information within its possession or control. Accordingly, we will determine whether the submitted information must be released to the requestor.

United Services and UTLC raise section 552.101 of the Government Code for some of their 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, USAA and UTLC have not pointed to any law that would make any of their 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 United Service's or UTLC's information may be withheld under section 552.101 of the Government Code.

Farmers Insurance, Fire Insurance, TFIC, United Services, and UTLC claim 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.³ 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

³The 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 (1939); see Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.

Farmers Insurance, Fire Insurance, and TFIC raise section 552.110(a) for some of their information. Upon review, however, we find these companies have failed to establish a *prima facie* case that any of their information meets the definition of a trade secret, nor have the companies 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, none of the submitted information may be withheld under section 552.110(a) of the Government Code.

Farmers Insurance, Fire Insurance, TFIC, United Services, and UTLC claim some of their information is protected under section 552.110(b). However, upon review, we find these companies have made only conclusory allegations that release of their information would cause the companies substantial competitive injury, and have not made a factual or evidentiary showing in support of such allegations. *See* Gov’t Code § 552.110; ORD 661 at 5-6 (business entity must show specific factual evidence that substantial competitive injury would result from release of particular information at issue). Thus, the department may not withhold any of the submitted information under section 552.110(b) of the Government Code.

The department has marked some of the submitted information under section 552.137 of the Government Code, which 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).⁴ *See* Gov’t Code § 552.137(a)-(c). Upon review, we find the e-mail addresses we have marked are not of the types specifically excluded by section 552.137(c) of the Government Code. *See id.* § 552.137(c). Therefore, the department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless their owners affirmatively consent to their disclosure. However, we find the remaining information you have marked under this section does not consist of e-mail addresses. Accordingly, the department may not withhold any of the remaining information under section 552.137 of the Government code. As no further exceptions to disclosure are raised for the remaining information, the department must release it.

⁴The 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).

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# 471234

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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