



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 17, 2016

Mr. Stanton Strickland
Deputy Commissioner - Legal Section
General Counsel Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2016-03785

Dear Mr. Strickland:

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# 598821 (TDI# 167430).

The Texas Department of Insurance (the "department") received a request for specified private-passenger automobile insurance rate, rule, and underwriting guideline filings.¹ You state the department has released some responsive information. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of ACCC Insurance Company ("ACCC"); Alinsco Insurance Company ("Alinsco"); Mercury County Mutual Insurance Company; MGA Insurance Company, Inc.; Old American County Mutual Insurance Company ("Old American"); and Safeway Insurance Company. Accordingly, you state, and provide documentation showing, 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 the Act in certain circumstances). We have received comments from ACCC and Alinsco. We have also received comments from Empower Managing General Agency, Inc. ("Empower") and

¹You inform us the requestor paid a deposit pursuant to section 552.263 of the Government Code on November 23, 2015. *See* Gov't Code § 552.263(e) (request considered received on date governmental body receives required deposit).

United Automobile Insurance Company (“United”) on behalf of Old American. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-26062 (2015). In that ruling, we determined the department may withhold Old American’s information at issue under section 552.104(a) of the Government Code, and must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously submitted and ruled on by this office, we conclude the department must continue to rely on Open Records Letter No. 2015-26062 as a previous determination and withhold or release the information in accordance with that ruling. *See* Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). To the extent the submitted information is not subject to Open Records Letter No. 2015-26062, we will address the arguments against release of the submitted information.

Next, 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, we have only received comments from ACCC, Alinsco, Empower, and United explaining why the information at issue should not be released. Therefore, we have no basis to conclude any of the other third parties 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 of the information at issue on the basis of any proprietary interest the other third parties may have in it.

Next, we note ACCC argues against the release of information that was not submitted by the department. This ruling does not address information that was not submitted by the department and is limited to the information the department has submitted for our review. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. ACCC and Alinsco state they have competitors. In addition, ACCC states release of some of its information at issue “would give an advantage to a competitor

or bidder by allowing such a party to compete with knowledge of details and processes used in ACCC's binding and handling of its business." Alinsco states its information is "generated from many years of company experience and from proprietary work-product" and "release of such documents would give an advantage to [the company's] competitors." After review of the information at issue and consideration of the arguments, we find ACCC and Alinsco have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information ACCC and Alinsco have indicated under section 552.104(a) of the Government Code.² Empower serves as Old American's managing general agent with respect to some of Old American's information. With regard to this information, Empower states Old American has competitors. Further, Empower states this information is "generated from many years of company experience and from proprietary work-product" and "release of such documents would give an advantage to [Old American's] competitors." After review of the information at issue and consideration of the arguments, we find Empower has established the release of this information would give advantage to a competitor or bidder. Thus, to the extent Empower serves as Old American's managing general agent with respect to Old American's information, the department may withhold this information under section 552.104(a) of the Government Code.

United serves as Old American's managing general agent with respect to Old American's remaining information. United asserts this information is excepted from disclosure under section 552.110(a) of the Government Code, which protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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

²As our ruling is dispositive, we do not address the other arguments to withhold this information.

Restatement's list of six trade secret factors.³ RESTATEMENT OF TORTS § 757 cmt. b. 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 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).

Upon review, we find United has failed to establish a *prima facie* case that any of Old American's remaining information meets the definition of a trade secret. We further find United has failed to demonstrate the necessary factors to establish a trade secret claim for any of this information. See 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 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Consequently, the department may not withhold any of Old American's remaining information under section 552.110(a) of the Government Code.

In summary, to the extent the submitted information is identical to the information previously submitted and ruled on in Open Records Letter No. 2015-26062, the department must withhold or release the information in accordance with that ruling. The department may withhold the information ACCC and Alinsco have indicated under section 552.104(a) of the Government Code. To the extent Empower serves as Old American's managing general agent with respect to Old American's information, the department may withhold this information under section 552.104(a) of the Government Code. The remaining 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.

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

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 598821

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Anthony Icenogle
For Empower Managing General Agency and Alinsco Insurance Company
Icenogle & Sullivan, PLLC
6805 Capital of Texas Highway North, Suite 220
Austin, Texas 78731
(w/o enclosures)

Ms. Shannon Hill
Old American County Mutual Fire Insurance Company
17304 Preston Road, Suite 1100
Dallas, Texas 75252
(w/o enclosures)

Mr. Ross E. Bennett, Jr.
ACCC Insurance Company
390 Benmar Drive, Suite 225
Houston, Texas 77060-2901
(w/o enclosures)

Mr. Robert Houlihan
Mercury County Mutual Insurance Company
1700 Greenbriar Lane
Brea, California 92821
(w/o enclosures)

Mr. Donald Alan Baker
MGA Insurance Company
3333 Lee Parkway, Suite 1200
Dallas, Texas 75219
(w/o enclosures)

Mr. Christopher Alan Skender
Safeway County Mutual Insurance
11612 RM 2244 #1-200
Austin, Texas 78738
(w/o enclosures)