



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 31, 2016

Mr. Stanton Strickland  
Deputy Commissioner  
Legal Division  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714

OR2016-24180

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# 632373 (TDI No. 175695).

The Texas Department of Insurance (the "department") received a request for the underwriting guidelines filed by a named company during a specified time period. Although the department takes no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of United Services Automobile Association ("USAA"). Accordingly, you state, and provide documentation showing, you notified USAA of the request for information and of its 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 USAA. We have considered the submitted arguments and reviewed the submitted information.

USAA argues that the submitted information is confidential under section 552.101 in conjunction with section 38.002 of the Insurance Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that another statute makes confidential. Section 38.002 of the Insurance Code relates to

underwriting guidelines for personal automobile and residential property insurance, and provides in part:

(b) Each insurer shall file with the department a copy of the insurer's underwriting guidelines. The insurer shall update its filing each time the underwriting guidelines are changed. If a group of insurers file one set of underwriting guidelines for the group, they shall identify which underwriting guidelines apply to each company in the group.

...

(d) The department or the office of public insurance counsel may disclose to the public a summary of an insurer's underwriting guidelines in a manner that does not directly or indirectly identify the insurer.

...

(f) The underwriting guidelines are subject to Chapter 552, Government Code.

Ins. Code § 38.002(b), (d), (f). Section 38.002 of the Insurance Code is made specifically applicable to the underwriting guidelines of an insurance company engaged in the business of residential property in this state. *See id.* § 38.002(a)(1) (defining "insurer" for purposes of section 38.002). USAA asserts release of the submitted information would violate section 38.002(d).

Statutory confidentiality under section 552.101 requires express language that makes certain information confidential or states that information shall not be released to the public. *See Open Records Decision No. 478 at 2 (1987)*. Thus, for the purposes of section 552.101, a statutory confidentiality provision must be express, and a confidentiality requirement will not be implied from a statutory structure. *See Open Records Decision No. 658 at 4 (1998)*. Section 38.002 of the Insurance Code does not expressly provide for the confidentiality of the requested underwriting guidelines or any other information. *Compare* Ins. Code § 38.002(d) ("The department or the office of public insurance counsel may disclose to the public a summary of an insurer's underwriting guidelines in a manner that does not directly or indirectly identify the insurer.") *with id.* § 38.003(d) ("Underwriting guidelines are confidential, and the department or the office of public insurance counsel may not make the guidelines available to the public.")<sup>1</sup> Furthermore, USAA's underwriting guidelines are not themselves implicitly confidential, for the purposes of section 552.101, merely because section 38.002(d) provides for the release of a de-identified summary of the guidelines. *See Open Records Decision No. 525 at 4 (1989)* (information cannot be withheld from public

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<sup>1</sup>We note that section 38.003 "applies to all underwriting guidelines that are not subject to Section 38.002." Ins. Code § 38.003(a).

disclosure by negative implication simply because statute designates other specific information as public information). Therefore, having considered USAA's arguments, we conclude that the department may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with section 38.002 of the Insurance Code.

Next, USAA asserts the submitted information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code 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 763, 776 (Tex. 1957). 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.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret

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<sup>2</sup>The 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).

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* ORD 661 at 5.

USAA asserts the submitted information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude USAA has established a *prima facie* case the submitted underwriting guidelines constitute trade secret information. Further, we find USAA has demonstrated the necessary factors to establish a trade secret claim. Therefore, the submitted underwriting guidelines must be withheld under section 552.110(a) of the Government Code.

USAA argues the remaining information consists of commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find USAA has not established any of the remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

We note the transmittal forms contain e-mail addresses that are subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the personal e-mail addresses in the remaining information under section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure.

In summary, the department must withhold the submitted underwriting guidelines under section 552.110(a) of the Government Code and the e-mail addresses we indicated under

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<sup>3</sup>The 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).

section 552.137 of the Government Code, unless the owner affirmatively consents to its public disclosure. 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.

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](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,



Sidney M. Pounds  
Assistant Attorney General  
Open Records Division

SMP/akg

Ref: ID# 632373

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)