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ATTORNEY GENERAL OF TEXAS

February 22, 2022

Ms. Mary Dougherty  
Open Records Attorney  
Texas Department of Insurance  
P.O. Box 12030  
Austin, Texas 78711

OR2022-05191

Dear Ms. Dougherty:

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# 931645 (TDI# R013939).

The Texas Department of Insurance (the "department") received a request for information pertaining to a specified survey. The department claims the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, the department states release of the submitted information may implicate the proprietary interests of State Farm County Mutual Insurance Company of Texas ("State Farm"). Accordingly, the department states, and provides documentation showing, it notified State Farm 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 State Farm. We have considered the submitted arguments and reviewed the submitted information.

State Farm raises section 552.104 of the Government Code for a portion of its information. Section 552.104 excepts from disclosure information "if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future." Gov't Code § 552.104(a) (emphasis added). In

*Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov't Code 552.104(a). Therefore, we do not address State Farm's arguments under section 552.104 of the Government Code.

Section 552.110(c) of the Government Code excepts from disclosure "commercial 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[.]" *Id.* § 552.110(c). State Farm argues the submitted information consists of commercial or financial information subject to section 552.110(c). Upon review, we find State Farm has demonstrated some of the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the department must withhold the information we marked under section 552.110(c) of the Government Code.<sup>1</sup> However, we find State Farm has failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the department may not withhold any of the remaining information under section 552.110(c).

Section 552.110(b) of the Government Code states "information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret." *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). State Farm argues the remaining information consists of trade secrets subject to section 552.110(b). Upon review, however, we find State Farm has failed to provide specific factual evidence demonstrating any portion of the remaining information is a trade secret. Therefore, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses section 751.207 of the Insurance Code, which is part of the Insurance Market Conduct Surveillance Act and provides, in part, "[a] final or

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<sup>1</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

preliminary market conduct examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under [the Act].” Ins. Code § 751.207(a); *see id.* § 751.003(a)(6) (defining “market conduct examination”). Section 751.151 of the Insurance Code requires the department’s commissioner of insurance (the “commissioner”) to gather certain market information to perform a market analysis. *See id.* § 751.151; *see also id.* § 751.003(a)(3) (defining “market analysis”). If the commissioner determines further inquiry into a particular insurer or insurance practice is required, the commissioner may take certain market conduct actions provided in section 751.152(b) before conducting a targeted examination. *See id.* § 751.152(a). However, if the commissioner determines a market conduct action specified in section 751.152(b) is not appropriate, section 751.201 permits the commissioner to conduct a targeted examination. *See id.* § 751.201. If the commissioner conducts such an examination, the commissioner must create an examination report. *See id.* § 751.206. The department claims the remaining information is confidential under section 751.207. Upon review, however, we find the department has failed to demonstrate the information at issue consists of a final or preliminary market conduct examination report or information obtained during the course of an examination. Accordingly, the department may not withhold the remaining information under section 552.101 of the Government Code in conjunction with section 751.207 of the Insurance Code.

In summary, the department must withhold the information we marked under section 552.110(e) of the Government Code. The department must release the remaining information.

Finally, the department asks this office to issue a previous determination that would permit it to withhold certain information under section 552.101 of the Government Code in conjunction with section 751.207 of the Insurance Code without the necessity of requesting a decision from this office. We decline to issue such a previous determination at this time. Accordingly, 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

GAA/jm

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)