



November 14, 2001

Mr. Steve Martin
Assistant General Counsel
Texas Department of Banking
2601 North Lamar Boulevard
Austin, Texas 78705-4294

OR2001-5271

Dear Mr. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 154855.

The Finance Commission (the "commission")¹ received a request for copies of proposals submitted by private parties to provide internal audit services to the commission, as well as the summary evaluation for each proposal. The requestor indicates that he would accept a tape recording of the summary evaluations if no written record exists. The commission takes no position concerning the confidentiality of the requested information. However, pursuant to section 552.305, you notified representatives of Arthur Andersen, LLP ("ArthurAndersen"), Rene Gonzalez, CPA ("Gonzalez"), Harderlivesay ("Harderlivesay"), Monday N. Rufus CPA ("Rufus"), and Rupert & Penhall, P.C. ("Rupert & Penhall") of the request for their information and invited these entities to submit arguments to this office as to why the information at issue should not be released. We received arguments only from Arthur Andersen. Therefore, we have no basis on which to conclude that the responsive information of Gonzalez, Harderlivesay, Rufus, and Rupert & Penhall is excepted from disclosure. It must therefore be released to the requestor except as noted below. Arthur Andersen contends that portions of its proposal are excepted from required public disclosure pursuant to section 552.110 of the Government Code. We have considered Arthur Andersen's arguments and have reviewed the submitted information.

¹We note that, according to the commission's website, "[t]he Finance Commission is responsible for overseeing and coordinating the Texas Department of Banking, the Savings and Loan Department, and the Office of the Consumer Credit Commissioner and serves as the primary point of accountability for ensuring that state depository and lending institutions function as a system, considering the broad scope of the financial services industry. The Finance Commission is the policy making body for those agencies *and is not a separate state agency.*" [Emphasis added].

Initially, we note that the commission does not claim that the rest of the requested information, namely, the summary evaluations for each proposal, are excepted from public disclosure. If the commission has information that is responsive to this part of the request, and it has not released that information, it must do so promptly. *See Gov't Code §§ 552.006, .301(a), .302.*

We next address Arthur Andersen's arguments under section 552.110. Section 552.110 protects: (a) trade secrets, and (b) 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).* The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

Upon review of Arthur Andersen's arguments and its proposal, we conclude that Arthur Andersen has established that its client list set forth in Appendix B of its proposal is excepted as a trade secret. *See* Open Records Decision Nos. 552 (1990); 437 (1986); 306 (1982); 255 (1980) (customer lists may be withheld under predecessor to section 552.110). We have marked the information to be withheld under section 552.110(a). We further conclude that

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Arthur Andersen has established that the release of the following information in its proposal would cause it substantial competitive harm, and therefore, this information is excepted under section 552.110(b): the information contained on page 6 of the proposal; the proposed fee structure in Article V of the Proposal; Appendix D in its entirety; and the information contained on pages 27 and 30 of the proposal.³

We also note that the submitted documents contain e-mail addresses of third parties that are excepted from public disclosure. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.⁴ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

- (a) 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 this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Section 552.137 requires the commission to withhold 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 has affirmatively consented to its release. As there is no indication that the members of the public have consented to their release, the commission must withhold the e-mail addresses of the third parties in the submitted documents under section 552.137 of the Government Code.

Finally, we note that the submitted information to be released contains social security numbers. Social security numbers may be withheld in some circumstances under

³We note that Arthur Andersen makes arguments to withhold certain information on pages 6-8 of its proposal and on pages 27-30 of its proposal, inclusive. The commission, however, did not submit pages 7, 8, 28, or 29 to our office for review. Therefore, this ruling does not address this information, and is limited to the information submitted as responsive by the commission. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

⁴House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. See Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

section 552.101 of the Government Code, which protects information that is confidential by law. A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Public Information Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

To summarize, the commission must withhold Arthur Andersen's client list as set forth in Appendix B of its proposal under section 552.110(a), and must withhold the information contained on page 6 of Arthur Andersen's proposal, the proposed fee structure in Article V of the Proposal, Appendix D in its entirety, and the information contained on pages 27 and 30 of the proposal, under section 552.110(b). E-mail addresses of third parties must be withheld under section 552.137. Social security numbers must be withheld under section 552.101 if they were obtained or maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 154855

Enc. Submitted documents

c: Mr. John Spann
Jefferson Wells International
100 Congress, Suite 1520
Austin, Texas 78701
(w/o enclosures)

Mr. Kevin S. Corbett
Arthur Andersen LLP
111 Congress Avenue, Suite 520
Austin, Texas 78701
(w/o enclosures)

Mr. Rene E. Gonzalez, CPA
Certified Public Accountants
212 Stumberg, Suite 208
San Antonio, Texas 78204
(w/o enclosures)

Mr. Staci Livesay
HarderLivesay
P.O. Box 201886
Austin, Texas 78720-1886
(w/o enclosures)

Mr. Monday M. Rufus, CPA
Certified Public Accountants & Consultants
7701 North Lamar, Suite 515
Austin, Texas 78752
(w/o enclosures)

Mr. Darrell E. Rupert, CPA/PFS./MBA
Managing Director
Rupert & Penhall, PC
10616 Manchaca Road
Austin, Texas 78748
(w/o enclosures)