

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

May 20, 2003

Ms. Grace E. Shin  
Assistant District Attorney  
Dallas County  
133 North Industrial Boulevard, LB 19  
Dallas, Texas 75207-4399

OR2003-3384

Dear Ms. Shin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180569.

The Dallas County District Attorney's Office (the "district attorney") received a request for copies of 248 specified items seized by the Garland Police Department on July 11, 2002, at the offices of Continental Wireless, Inc. ("Continental") in Garland, Texas. You indicate that the district attorney does not possess some of the information responsive to the request.<sup>1</sup> You claim that the remaining requested information is excepted from disclosure under section 552.101 of the Government Code. You have also notified Continental, the third party whose information is at issue in the current request, of its right to submit reasons for withholding the requested information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Continental has responded to the notice, asserting that some of the requested information is excepted from disclosure

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<sup>1</sup>The Public Information Act compels disclosure of public information that is in existence, but it does not require a government entity to prepare or assemble new information in response to a request. *See* Gov't Code § 552.002(a); *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 268 (Tex. Civ. App.—San Antonio 1978, writ dismissed) (ruling that government agency could not be required to make copies of documents no longer in its possession).

by section 552.110 of the Government Code. We have considered the exceptions claimed by both the district attorney and Continental and reviewed the submitted sample of information.<sup>2</sup>

### Section 552.301 Violations

At the outset, we address the district attorney's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents.

In this instance, the district attorney submitted much of the information at issue in DVD format. After attempts by this office to access and view the information on the two submitted DVDs, we determined that the DVDs are infected with viruses and that most of the information on the DVDs is corrupted and inaccessible. Therefore, this office contacted you via a series of phone calls in an attempt to have you submit the information contained on the DVDs in paper format. You explained that your office was able to access the information contained on the DVDs, but argued that the information at issue would fill 900 boxes and was therefore too voluminous to submit. However, the fact that it may be burdensome to provide the information at issue does not relieve a governmental body of its responsibility to comply with the Public Information Act (the "Act"). *Industrial Foundation v. Texas Insus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976); Open Records Decision No. 497 (1988).

Through the efforts of this office's computer experts, we were able to access and print a portion of the information contained in the submitted DVDs. Thus, this ruling will address whether any of that information is excepted from disclosure. However, we were unable to view or access much of the information on the DVDs. Section 552.301 of the Government Code requires the governmental body to submit the requested information to this office in a manner that permits us to decide whether the information is excepted from disclosure. By submitting infected DVDs containing corrupted and inaccessible information, you made it impossible for this office to review that portion of the information.

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<sup>2</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.— Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You claim that the information on the DVDs may be proprietary and confidential. However, because you have not submitted the specific information requested, we have no basis for finding it confidential. Thus, we have no choice but to order the release of the information contained in the two DVDs, with the exception of the information we were able to access and that we rule is confidential

We further note that although you initially stated that you did not possess the requested eight-millimeter back-up tape, you now state that it is in your possession. However, you also state that it is not in a viewable format and the district attorney does not possess the capabilities necessary to view it. Thus, you have chosen not to submit any information located on the tape to this office in any format. Therefore, we have no basis for finding the information contained in the eight- millimeter back-up tape confidential. *See Gov't Code § 552.352.* Thus, we have no choice but to order the information contained in the eight- millimeter back-up tape released per section 552.302 of the Government Code.

We now turn to the submitted arguments against disclosure.

### **Section 552.110**

Continental argues that items one through eight of the request consist of protected proprietary information that 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.* Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See Gov't Code § 552.110(a).* A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees.... A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 (1990). 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. *See* 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. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Based on our review of Continental's arguments, we conclude that Continental has established a *prima facie* case for trade secret with regard to the submitted customer lists. We have not received arguments to rebut Continental's claim as a matter of law. Therefore, the submitted customer lists, which we have marked, constitute trade-secret information and must be withheld under section 552.110(a). However, we conclude that Continental has not established that any of the remaining information constitutes trade secret information. Therefore, the remaining information may not be withheld under section 552.110(a).

We now turn to Continental's assertion that the submitted information contains confidential commercial and financial information. Continental argues that release of this information would give its competitor, Bearcom, a significant competitive advantage over Continental because: "(1) Bearcom would have access to most of Continental's information used to prepare and submit its bids and pricing to its customers; (2) Bearcom would gain access to various vendor sources and pricing information that it could not obtain anywhere else; and (3) Bearcom would then be able to utilize the information to underbid Continental and to compete with Continental for the purchase of products at lower price points than otherwise available to Bearcom." Upon reviewing Continental's arguments and the submitted information, we conclude that Continental has demonstrated that release of some of the information would cause Continental substantial competitive harm. Therefore, Continental may withhold those portions of the submitted information that we have marked under section 552.110(b). Continental has failed to establish the applicability of section 552.110(b) to the remaining information.

We now turn to the district attorney's arguments with respect to the remaining information.

### **Section 552.101**

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy. You contend that the submitted information contains information that is confidential under section 552.101. Section 552.101 encompasses common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental

or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. This office has concluded that financial information concerning an individual is in some instances protected by a common-law right to privacy. *See* Open Records Decision Nos. 545 (1990), 523 (1989). A previous opinion of this office states that “all financial information relating to an individual . . . ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.” Open Records Decision No. 373 at 3 (1983). Common-law privacy protects the rights of individuals, not corporations. *See* Open Records Decision Nos. 192 (1978), 620 (1993) (corporation has no common law privacy interest in its financial information); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). We have marked the type of information that is highly intimate and embarrassing and of no legitimate public interest for purposes of common-law privacy. We have also marked personal financial information that is confidential under section 552.101 and common-law privacy. You must withhold the information we have marked.

We note that the submitted documents contain W-4 forms that must be withheld under section 552.101. Employee W-4 forms are excepted from disclosure under section 552.101 in conjunction with section 6103(a) of title 26 of the United States Code. Open Records Decision No. 600 (1992). The district attorney must therefore withhold the W-4 forms, which we have marked, under section 552.101.

The submitted materials also include fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. They provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) “Biometric identifier” means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) “Governmental body” has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:
  - (A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information. Therefore, the district attorney must withhold the fingerprints in the submitted documents, which we have marked, under section 552.101 in conjunction with section 559.003 of the Government Code.

We note that the submitted information contains social security numbers. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. 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 the social security numbers in the submitted documents 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, you should ensure that no such information was obtained or is maintained by the district attorney pursuant to any provision of law, enacted on or after October 1, 1990.

#### **Section 552.136**

We further note that the submitted information contains account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled,

or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The district attorney must, therefore, withhold the marked account numbers under section 552.136.

### **Section 552.137**

Finally, we note that the submitted information contains e-mail addresses. Section 552.137 of the Government Code requires the district attorney 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. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The district attorney must, therefore, withhold e-mail addresses of members of the public under section 552.137. Thus, we have marked a representative sample of the types of e-mail addresses that must be withheld under section 552.137. We note that section 552.137 does not apply to a business’s general e-mail address or to a government employee’s work e-mail address.

### **Summary**

In summary, per section 552.302, you must release the information contained in the two DVDs, with the exception of the information we were able to access and that we rule is confidential. You must also release all of the information contained in the eight-millimeter back up tape per section 552.302. You must withhold the trade secret and commercial financial information that we have marked under section 552.110. You must withhold the information we have marked under section 552.101 and common-law privacy. You must withhold the W-4 forms and fingerprint information that we have marked under section 552.101. The submitted information contains social security numbers that may be confidential if they were obtained or maintained by the district attorney pursuant to any provision of law enacted on or after October 1, 1990. We have marked account numbers that must be withheld under section 552.136. You must withhold the types of e-mail addresses we have marked under section 552.137. The remaining information must be released to the requestor.

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 Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Jennifer E. Berry  
Assistant Attorney General  
Open Records Division

JEB/sdk

Ref: ID# 180569

Enc: Submitted documents

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AUG 03 2006

At 8:56A. M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. GV301907

BILL HILL, DISTRICT ATTORNEY OF	§	IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS	§	
Plaintiff,	§	
and	§	
	§	
CONTINENTAL WIRELESS, INC., GARY	§	
WEBER, AND RITA WEBER,	§	
Intervenors/Plaintiffs,	§	TRAVIS COUNTY, T E X A S
	§	
V.	§	
	§	
GREG ABBOTT, ATTORNEY GENERAL	§	
OF TEXAS,	§	
Defendant.	§	345 <sup>th</sup> JUDICIAL DISTRICT

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Bill Hill, District Attorney of Dallas County, Texas, Intervenors/Plaintiffs Continental Wireless, Inc., Gary Weber and Rita Weber (collectively, referred to as "the Webers"), and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, John Watson, was sent reasonable notice of this setting and of the parties' agreement that the District Attorney's Office must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, items 1, 2, 3, 4, 5, and 7, as more fully described in J. Alan Gray's letter to the Office of the Attorney General, dated March 18, 2003, contains trade secrets and commercial or financial information and, therefore, is excepted from disclosure by Tex. Gov't Code Ann. § 552.110.

2. The District Attorney's Office must withhold from the requestor the information described in Paragraph 1 of this Judgment as well as any other information that Letter Ruling OR2003-3384 held excepted from disclosure. The remaining information requested by Mr. Watson and held subject to disclosure by OR2003-3384 must be disclosed if the District Attorney's Office has not already done so.

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied, and this Agreed Final Judgment finally disposes of all claims between the parties and is a final judgment.

SIGNED this the 3 day of Aug., 2006.

PRESIDING JUDGE

APPROVED:

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