



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

August 6, 2003

Mr. David Weaver
General Counsel
Texas State Securities Board
P.O. Box 13167
Austin, Texas 78711-3167

OR2003-5462

Dear Mr. Weaver:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185464.

The Texas State Securities Board (the "board") received a written request for all documents pertaining to Sharp Capital, Inc., Mauricio Gutierrez, and Emerging Markets Capital Advisors, Ltd. You contend that the requested information, a representative sample of which you submitted to this office, is excepted from required disclosure pursuant to section 552.101 of the Government Code.¹

Section 552.101 excepts from public disclosure information that is made confidential by law, including information made confidential by statute. You contend that some of the submitted records are made confidential under article 581-28 of Vernon's Texas Civil Statutes, which authorizes the board to obtain information in the course of investigations conducted under the Texas Securities Act (the "TSA"). Article 581-28 provides in pertinent part:

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect

¹In reaching our conclusion here, 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 No. 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.

the violation of this Act or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by this Act to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided, however, that all information of every kind and nature received in connection with an investigation and all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential by the Commissioner and shall not be disclosed to the public except under order of court for good cause shown. . . .

B. Confidentiality of Certain Registration-Related and Other Materials. To the extent not already provided for by this Act, any intraagency or interagency notes, memoranda, reports, or other communications consisting of advice, analyses, opinions, or recommendations shall be treated as confidential by the Commissioner and shall not be disclosed to the public, except under order of court, for good cause shown. The Commissioner may, at the Commissioner's discretion, disclose any confidential information in the Commissioner's possession to any governmental or regulatory authority or association of governmental or regulatory authorities approved by Board rule or to any receiver appointed under Section 25-1 of this Act. The disclosure does not violate any other provision of this Act or Chapter 552, Government Code.

V.T.C.S., art. 581-28(A), (B). You inform us that the board obtained the documents you submitted to this office under Tabs 1, 2, 3, and 6 in connection with an investigation to prevent or detect the violation of the TSA or a board rule or order. Based on your representation and our review of the submitted sample of information, we conclude that these documents are made confidential under article 581-28, V.T.C.S. Accordingly, the board must withhold these documents in their entirety pursuant to section 552.101 of the Government Code.

You also contend that other records coming within the scope of the records request, a representative sample of which you submitted under Tabs 4 and 5, are made confidential under Rule 6 of the Federal Rules of Criminal Procedure and thus must be withheld pursuant to section 552.101 of the Government Code. Rule 6(e) of the Federal Rules of Criminal Procedure provides:

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters

occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Fed. R. Crim. P. 6(e)(2). In addition, Rule 6(e)(3)(A)(ii) provides that disclosures otherwise prohibited by the general rule of secrecy may be made to “such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney’s duty to enforce federal criminal law.” *See id.* 6(e)(3)(A)(ii). You inform this office that the board obtained these records “from federal prosecutors relative to grand jury deliberations.” We therefore conclude that these records came into the possession of the board by operation of, or statutory exception to, the secrecy rule. *See id.* Accordingly, we conclude that Rule 6 of the Federal Rules of Criminal Procedure makes these records confidential in the hands of the board and that the records must be withheld in their entirety pursuant to section 552.101 of the Government Code.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/RWP/sdk

Ref: ID# 185464

Enc: Submitted documents

c: Mr. Zachariah Wolfe
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(w/o enclosures)