



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 18, 2005

Mr. James G. Nolan
Open Records Counsel
Comptroller of Public Accounts
P. O. Box 13528
Austin, Texas 78711-3528

OR2005-07464

Dear Mr. Nolan:

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# 230689.

The Comptroller of Public Accounts (the "comptroller") received a request for "CAPCO Tax Credit Application[s], which were filed on the form AP-214." While you claim no exceptions to disclosure on behalf of the comptroller, you inform us, and provide documentation showing, that you notified ten interested third parties of the request for information and of each company's right to submit arguments to this office as to why its information should not be released to the public.¹ 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We

¹The following third parties were notified pursuant to section 552.305: Accent Texas Fund I, L.P. ("Accent"); Advantage Capital Partners, Texas ACP I, L.P. ("ACP"); Aegis Texas Venture Fund, L.P. ("Aegis"); Enhanced Capital Texas Fund, L.P. ("Enhanced"); Lonestar CAPCO Fund, L.L.C. ("Lonestar"); Republic Holdings Texas, L.P. ("Republic"); Stonehenge Capital Company, L.L.C. ("Stonehenge"); Waveland NCP Texas Venture, L.P. ("Waveland"); Whitecap Texas Opportunity Fund ("Whitecap"); and Wilshire Texas Partners I, L.L.C. ("Wilshire").

have received and considered comments from Accent, ACP, Republic, Stonehenge, and Whitecap, and have reviewed the submitted information.²

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Aegis, Enhanced, Lonestar, Waveland, and Wilshire failed to submit any comments to this office explaining how release of the requested information would affect each company's proprietary interests. Therefore, each of these companies has failed to provide us with any basis to conclude that it has a protected proprietary interest in any of the submitted information, and none of the information may be withheld on that basis. *See, e.g., id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

ACP states that it "do[es] not have any issue with the release of the [requested] Forms AP-214," but seeks to withhold "personal contact information for the insurance company executives contained therein, including names and daytime phone numbers . . . out of courtesy for those individuals." Similarly, Stonehenge requests that "(1) [the] Federal Employer Identification Number [the 'EIN'] of the Certified Investor; and (2) [t]he signature, printed name and title, and daytime phone of the individual executing the Allocation Request . . . be redacted prior to . . . disclosure [of the Form AP-214]." Neither ACP or Stonehenge raises any exceptions or provides any arguments that demonstrate that the information at issue is excepted from disclosure. Furthermore, we are not aware of any provision of law that makes this information confidential by law. Therefore, ACP's "personal contact information for the insurance company executives," and the EIN, signature, printed name, title, and daytime telephone number of the individual contained in Stonehenge's information must be released to the requestor.

Accent and Whitecap contend that customer information contained in the submitted documents is excepted from public disclosure under section 552.110(a) and (b).³

²We 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.

³We note that most of the information that Whitecap argues to withhold is not responsive to the instant request. We do not reach Whitecap's arguments with regard to the information not at issue in this case.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) 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. 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.); see also Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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). 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.⁴ *Id.* 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

⁴The 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).

Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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) 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. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After carefully reviewing the arguments of Accent and Whitecap and the information at issue, we find that release of its customer information would cause each company substantial competitive harm. Therefore, this information must be withheld pursuant to section 552.110(b).

We note that the remaining submitted information contains e-mail addresses of individuals. 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).⁵ *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that a member of the public to whom any e-mail address at issue pertains has affirmatively consented to the release of his e-mail address. The comptroller must, therefore, withhold the e-mail addresses under section 552.137 of the Government Code.

In summary, we have marked the information that the comptroller must withhold under section 552.110 of the Government Code. E-mail addresses must be withheld under section 552.137 of the Government Code. The remaining submitted 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

⁵Republic claims that an e-mail address contained in its information is excepted from disclosure under section 552.137.

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).

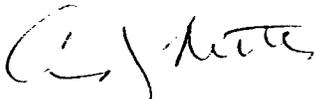
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



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Open Records Division

CN/krl

Ref: ID# 230689

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