ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 4, 2005

Ms. Ruth H. Soucy
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Texas Comptroller of Public Accounts
P.O. Box 13528
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OR2005-08056a

Dear Ms. Soucy:

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# 231482.

The Texas Comptroller of Public Accounts (the "comptroller") received a request for information pertaining to the following: (1) applications to the Texas Certified Capital Company (CAPCO) program; (2) a list of certified CAPCO participants; (3) how much money each CAPCO was allocated; and (4) insurers or other entities that are funding each CAPCO. The comptroller sought a ruling from this office as to whether the requested information was excepted from disclosure under the Act and, in response, this office issued Open Records Letter No. 2005-08056 (2005). We have reexamined our ruling in that decision and have determined that an error was made in its issuance. When this office determines that an error was made in the decisional process under sections 552.301 and 552.306 of the Government Code and that the error resulted in an incorrect decision, we will correct the previously issued ruling. As we have determined that Open Records Letter 2005-08056 (2005) is incorrect, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2005-08056 (2005) and serves as the correct ruling.

In response to this request for information, you inform us that some of the requested information has been provided to the requestor. While you claim no exceptions to disclosure on behalf of the comptroller, you inform us, and provide documentation showing, that you

notified eleven 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 have received and considered comments from Accent, ACP, Enhanced, Lonestar, Republic, Stonehenge, and Whitecap, and have reviewed the submitted information.

Initially, the comptroller informs us that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2005-07464 (2005). To the extent the information in the current request is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the comptroller must continue to rely on that ruling as a previous determination and withhold or release this information in accordance with Open Records Letter 2005-07464. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, 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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither Aegis, Spindletop, Waveland, nor Wilshire has submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of any of these third parties, and the comptroller may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

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[1]The 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"); Spindletop Ventures, L.L.C. ("Spindletop"); Stonehenge Capital Fund Texas, L.P. ("Stonehenge"); Waveland NCP Texas Venture, L.P. ("Waveland"); Whitecap Texas Opportunity Fund ("Whitecap"); and Wilshire Texas Partners I, L.L.C. ("Wilshire").

We next note that the submitted information contains social security numbers. Section 552.147 of the Government Code[2] provides that "[t]he social security number of a living person is excepted from" required public disclosure under the Act. Therefore, the comptroller must withhold the social security numbers contained in the submitted information under section 552.147.[3] However, employer identification numbers may not be withheld under section 552.147.

Accent, ACP, Enhanced, Lonestar, Stonehenge, and Whitecap assert that some of the information at issue is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." 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. 1958); *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); *see also Huffines*, 314 S.W.2d at 776. 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

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[2]Added by Act of May 23, 2005, 79th Leg., R.S., S.B. 1485, § 1, sec. 552.147(a) (to be codified at Tex. Gov't Code § 552.147).

[3]As we are able to resolve this under section 552.147, we do not address the other arguments for exception of the submitted social security numbers. We also note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

secret factors.[4] RESTATEMENT OF TORTS § 757 cmt. b (1939). 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). 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) excepts from disclosure "[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." 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 requested information. *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).

Having considered the asserted arguments and reviewed the information at issue, we find that Accent, ACP, Enhanced, Lonestar, and Whitecap have not shown that any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, the comptroller may not withhold any of the information at issue pursuant to section 552.110(a). We also find that Accent, ACP, Enhanced, Lonestar, Stonehenge, and Whitecap have made only conclusory allegations that release of the information at issue would cause these organizations substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. Thus, none of the information at issue may be withheld pursuant to section 552.110(b).

Accent, Lonestar, Republic, Stonehenge, and Whitecap assert that some of the submitted information is excepted under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of

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[4]The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret: (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).

legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). 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. *Id.* at 683. This office has found that the following types of information are excepted from required public disclosure under common law privacy: some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps); personal financial information not relating to the financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990); and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982). But common law privacy does not protect dates of birth, home addresses, or home telephone numbers of private citizens. *See, e.g.,* Attorney General Opinion MW-283 (1980) (public employee's date of birth not protected under privacy); Open Records Decision No. 455 (1987) (home addresses and telephone numbers of private citizens generally not protected under privacy); Open Records Decision Nos. 226 (1979) (social security numbers not protected under privacy). In addition, common law privacy protects the interests of individuals, not those of corporations and other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), *see also U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.–Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy).

We have marked the information that is confidential under common law privacy and that the comptroller must withhold under section 552.101. The remaining information is not highly intimate or embarrassing; therefore, this information is not confidential under common law privacy, and the comptroller may not withhold it under section 552.101 on that ground.

Section 552.101 also encompasses the doctrine of constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decision No. 455 at 4 (1987). The first type protects an individual's autonomy within "zones of privacy" which include matters related to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.* The second type of constitutional privacy requires a balancing between the individual's privacy interests and the public's need to know information of public concern. *Id.* The scope of information protected is narrower than that under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5; *see Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985). After review of the information at issue, we find that it does not contain information that is confidential under constitutional privacy; therefore, the comptroller may not withhold it under section 552.101 on that ground.

Republic asserts that some of the submitted information is excepted under section 552.137 of the Government Code. 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). *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 has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the comptroller must withhold the e-mail addresses we have marked under section 552.137.

Finally, we note that some of the remaining information is excepted under section 552.136 of the Government Code. Section 552.136(b) 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." The comptroller must withhold the account numbers we have marked under section 552.136.

To conclude, the comptroller must withhold social security numbers in the submitted information under section 552.147. It must also withhold the information marked under sections 552.101 in conjunction with common law privacy, 552.136, and 552.137. The comptroller must release the remaining information at issue.

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, 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); *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 Office of the Attorney General 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,

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Open Records Division

JLC/seg

Ref: ID# 231482

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