



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 11, 2011

Mr. Robert Giddings
Assistant General Counsel
Texas Department of Banking
2601 North Lamar Boulevard
Austin, Texas 78705

OR2011-11630

Dear Mr. Giddings:

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# 426676.

The Texas Department of Banking (the "department") received two requests for information, one for information related to two specified entities and one for information related to the same two entities and additional specified individuals and entities. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.112 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted representative sample of information.² We have also received comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We first address the department's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. The requestor argues the department did not comply with section 552.301 because it did not submit written

¹Although you also raise sections 552.111, 552.116, 552.117, 552.130, 552.137, and 552.147 of the Government Code, you have not presented arguments explaining how these exceptions apply to the submitted information, as required by section 552.301. Therefore, this ruling does not address those exceptions. *See* Gov't Code §§ 552.301(e)(1)(A), .302.

²We assume 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 those records contain substantially different types of information than that submitted to this office.

comments stating the reasons why the claimed exceptions apply that would allow the requested information to be withheld. *See* Gov't Code § 552.301(e)(1)(A). However, we note the department submitted such written comments to this office on June 8, 2011, within the fifteen-business-day deadline prescribed by section 552.301(e)(1). Thus, we find the department did not violate section 552.301(e)(1)(A).

The requestor next argues the department did not comply with section 552.301(e)(1)(D) because it did not submit all of the responsive information to this office for review, and the documents not submitted must therefore be released to the requestor. Pursuant to section 552.301(e), within fifteen business days of receipt of the request the governmental body must submit to this office, among other items, "a copy of the specific information requested . . . or representative samples[.]" labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). Thus, a governmental body is permitted to submit a representative sample of the information it seeks to withhold when seeking a decision from this office. In this instance, the department states it received the first request for information on May 24, 2011. Accordingly, the fifteen-business-day deadline fell on June 15, 2011. However, this office did not receive a representative sample of the responsive information until June 16, 2011. The department does not submit evidence establishing the information was deposited in interagency mail on or before June 15, 2011. *See id.* § 552.308(b) (deadline under the Act is met if state agency establishes document was deposited in interagency mail within deadline period). Therefore, while the department properly submitted a representative sample of the responsive information as permitted by section 552.301(e)(1)(D), we find such submission was not timely. Consequently, as to the information responsive to the first request, we find the department failed to comply with section 552.301 of the Government Code.

Therefore, pursuant to section 552.302 of the Government Code, the requested information responsive to the first request is presumed to be public and must be released unless a compelling reason exists to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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 section 552.302); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise section 552.112 of the Government Code for a portion of the information responsive to the first request, that is a discretionary exception that protects only a governmental body's interests and may be waived. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (section 552.112 is a discretionary exception that may be waived), *abrogated on other grounds by In re Bass*, 113 S.W.3d 735 (Tex. 2003); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). As such, it does not constitute

a compelling reason to withhold information for purposes of section 552.302. In failing to comply with section 552.301, the department has thus waived its claim under section 552.112 and may not withhold any information responsive to the first request under this exception. We note in waiving section 552.112 for the information responsive to the first request, the department also waives section 552.112 for this same information with respect to the second request. *See* Gov't Code § 552.007 (prohibiting selective disclosure of information); Open Records Decision No. 463 at 1-2 (1987). However, you also raise section 552.101 of the Government Code for this information. Because section 552.101 can provide a compelling reason to withhold information, we will address your arguments under this exception for the information responsive to the first request, in addition to your arguments for the remaining information that is responsive to only the second request.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information made confidential by other statutes, such as section 181.301 of the Finance Code. Section 181.301 provides in relevant part:

(a) Except as expressly provided otherwise by this subtitle or a rule adopted under Section 181.003(a)(1), the following are confidential and may not be disclosed by the banking commissioner or an employee of the department:

- (1) information directly or indirectly obtained by the department in any manner, including through an application or examination, concerning the financial condition or business affairs of a state trust company . . . other than the public portions of a report of condition or income statement; and
- (2) each related file or record of the department.

Fin. Code § 181.301(a). You indicate portions of the submitted information consist of documents obtained or created by the department that concern the financial conditions of a trust company. *See id.* You inform us no provision in or rule adopted under subtitle F of title 3 of the Finance Code would provide for the release of the information subject to section 181.301. *See id.* You also state that the submitted information was not obtained from a published statement or the public portion of a call report or profit and loss statement. *See id.* § 181.301(a)(1). Upon review, we find the information we have marked is confidential under section 181.301 of the Finance Code and must be withheld under section 552.101 of the Government Code.³ However, we find the remaining information

³Because our ruling as to this information is dispositive, we do not address your remaining argument against disclosure of a portion of this information.

does not concern the financial condition or business affairs of a trust company for purposes of section 181.301 of the Finance Code and may not be withheld on that basis.

Section 552.101 of the Government Code also encompasses section 31.301 of the Finance Code. Section 31.301 provides in relevant part:

(a) Except as expressly provided otherwise by this subtitle, Chapter 11 or 12, or a rule adopted under this subtitle, the following are confidential and may not be disclosed by the banking commissioner or an employee of the department:

(1) information directly or indirectly obtained by the department in any manner, including an application or examination, concerning the financial condition or business affairs of a financial institution or a present, former, or prospective shareholder, officer, director, affiliate, or service provider of a financial institution, other than information in a published statement or in the public portion of a call report or profit and loss statement; and

(2) all related files and records of the department.

Id. § 31.301(a). You indicate the remaining documents were obtained or created by the department and concern the financial condition or business affairs of a bank. *See id.* The submitted information reflects the bank at issue qualifies as a financial institution as defined by the Finance Code for purposes of section 31.301. *See id.* § 31.002(a)(25). You inform us that no provision in subtitle A of title 3 of the Finance Code, chapter 11 or 12 of the Finance Code, or rule adopted under subtitle A of the Finance Code would provide for the release of the information subject to section 31.301. *See id.* § 31.301(a). You also state the remaining information was not obtained from a published statement or the public portion of a call report or profit and loss statement. *See id.* § 31.301(a)(1). Upon review, we find the information we have marked is confidential under section 31.301 of the Finance Code and must be withheld under section 552.101 of the Government Code.⁴ However, we find the remaining information does not concern the financial condition or business affairs of a financial institution for purposes of section 31.301 of the Finance Code and may not be withheld on that basis.

You raise section 552.112 of the Government Code for a portion of the remaining information that is responsive to only the second request. Section 552.112 excepts from public disclosure “information contained in or relating to examination, operating, or

⁴Because our ruling as to this information is dispositive, we do not address your remaining argument against disclosure of a portion of this information.

condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.” Gov’t Code § 552.112. The remaining information at issue consists of an agreement and a memorandum that do not identify or relate to any specific entity. You do not explain how this information “relat[es] to examination, operating, or condition reports” prepared by the department. Therefore, the department may not withhold any of the remaining information under section 552.112.

We note you also raise section 35.012 of the Finance Code, section 3.111 of title 7 of the Texas Administrative Code, section 641 of title 18 of the United States Code, and section 309.6 of title 12 of the Code of Federal Regulations.⁵ However, you do not explain how these provisions apply to the information at issue, nor do you mark any information you wish to withhold on those bases. Therefore, this ruling does not address those provisions.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code in conjunction with sections 181.301 and 31.301 of the Finance Code. The remaining information, which is responsive to the second request, must be released to the second requestor.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/tf

⁵While you also raise section 261.70 of title 12 of the Code of Federal Regulations, this provision does not exist.

Ref: ID # 426676

Enc. Submitted documents

c: Requestor
(w/o enclosures)