



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 18, 2014

Ms. Kerri Lewis
General Counsel
Texas Real Estate Commission
P.O. Box 12188
Austin, Texas 78711-2188

OR2014-04583

Dear Ms. Lewis:

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# 517043 (Commission ORR ID #20131223.1).

The Texas Real Estate Commission (the "commission") received a request for the annual reports from the four specified home warranty companies for the last two years. You state the commission has released some of the requested information. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, although the commission takes no position with respect to the remaining requested information, you believe its release may implicate the proprietary interests of Affordable Home Protection Services, Inc. ("Affordable Home"), A Better Home Warranty Company, Inc. ("Better Home"), BPG Home Warranty Company ("BPG"), and First American Home Buyers Protection Corporation ("First American"). Accordingly, you state,

and provide documentation showing, you notified Affordable Home, Better Home, BPG, and First American of the request for information and of their rights to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from First American. We have considered the submitted arguments and reviewed the submitted information.

Initially, an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from Affordable Home, Better Home, or BPG. Thus, we have no basis to conclude Affordable Home, Better Home, or BPG have protected proprietary interests in the submitted information. *See id.* § 552.110(a)-(b); 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. Accordingly, the commission may not withhold any of the submitted information on the basis of any proprietary interest Affordable Home, Better Home, or BPG may have in the information.

Both the commission and First American raise section 552.101 of the Government Code. This section excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes, such as chapter 1303 of the Occupations Code. Subchapter E of chapter 1303 governs the general powers and duties of residential service companies. Section 1303.202 pertains to annual reports residential service companies must file and reads in relevant part:

(a) Not later than April 1 of each year, each residential service company shall file with the commission a report covering the preceding calendar year.

(b) The report must:

...

(3) include:

(A) a financial statement of the residential service company, including its balance sheet and receipts and disbursements for

the preceding year, certified by an independent public accountant;

(B) any material change to the information submitted under Section 1303.103;

(C) the number of residential service contracts entered into during the year, the number of contract holders as of the end of the year, and the number of contracts terminating during the year; and

(D) any other information that:

(i) relates to the performance and solvency of the residential service company; and

(ii) is necessary for the commission to perform its duties under [chapter 1303].

(c) Information provided by a residential service company under Subsection (b)(3)(D) is:

(1) confidential; and

(2) for the exclusive use of the commission.

Occ. Code § 1303.202(a), (b)(3), (c). You state the commission's annual report form requests significant information beyond that required by subsections 1303.202(b)(3)(A)-(C). You state the information you have indicated relates to the performance and solvency of the residential service company at issue and is necessary for the commission to perform its duties under chapter 1303. Based on your representations, we agree the information submitted in an annual report pursuant to section 1303.202(b)(3)(D) is confidential under section 1303.202(c). Accordingly, the commission must withhold the information you have marked and state was submitted in the annual reports by the residential company under section 552.101 of the Government Code in conjunction with section 1303.202(c) of the Occupations Code.

First American seeks to withhold portions of its information under section 552.101 of the Government Code in conjunction with the doctrine of common-law privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and

embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). However, we note an individual's name is not ordinarily private information subject to common-law privacy. *See* Open Records Decision No. 554 (1990). We also note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find First American has failed to demonstrate its information at issue is highly intimate or embarrassing and of no legitimate public concern. Therefore, the commission may not withhold the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

First American claims portions of its information are excepted under section 552.110(a) of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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 secret factors.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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).

Upon review, we find First American has failed to demonstrate any portion of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Therefore, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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."² Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the commission must withhold the account numbers we have marked under section 552.136 of the Government Code.

¹The Restatement of Torts lists the following six factors 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 other 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.137 of the Government Code 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). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the commission must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to disclosure.³

We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the commission must withhold the information you marked and state was submitted in the annual reports by the residential company under section 552.101 of the Government Code in conjunction with section 1303.202(c) of the Occupations Code. The commission must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy. The commission must withhold the information we marked under section 552.136 of the Government Code. The commission must withhold the information we marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to disclosure. The remaining information must be released; however, any information subject to copyright may only be released in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

³We note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold certain categories of information without the necessity of requesting an attorney general decision, including an e-mail address of a member of the public under section 552.137 of the Government Code.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/dls

Ref: ID# 517043

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Zachary Zaharek
Vice President, Senior Operations Counsel
First American Home Buyers Protection Corporation
200 Commerce
Irvine, California 92602
(w/o enclosures)

Ms. Ruth Craig
President
Affordable Home Protection Services, Inc.
2009 Ranch Road 620 North, Suite 340
Austin, Texas 78734
(w/o enclosures)

Ms. Nancy N. Kolter
A Better Home Warranty Company, Inc.
P.O. Box 1668
Roanoke, Texas 76262
(w/o enclosures)

Revell Fraser
BPG Home Warranty Company
4300 Alexander Drive, Suite 200
Alpharetta, Georgia 30022
(w/o enclosures)

