



June 26, 2000

Mr. Martin Hubert
Deputy Commissioner
Texas Department of Agriculture
P.O. Box 12847
Austin, Texas 78711

OR2000-2445

Dear Mr. Hubert:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136020.

The Texas Department of Agriculture (the "department") received a request for information related to a loan guaranty made by the Texas Agriculture Finance Authority ("TAFA") involving Permian Sea Shrimp and Seafood, Ltd. ("Permian Sea") and the First National Bank of Monahans ("FNB"). Without taking a position on the release of the information, you state that Permian Sea's and FNB's proprietary interests may be implicated.¹ Pursuant to section 552.305 of the Government Code, the department notified Permian Sea and FNB of the request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). Permian Sea responded by asserting that portions of the requested information are excepted from disclosure under sections 552.101 and 552.110 of the Government Code.² We have considered Permian Sea's arguments and reviewed the submitted information.³

¹You also informed us that the requested information was previously the subject of a temporary restraining order in *First National Bank of Monahans v. Williams*, No. GN1001 (53rd Dist. Ct., Travis County, Tex. April 5, 2000). However, the restraining order has since been lifted. *First National Bank of Monahans v. Williams*, No. GN1001 (53rd Dist. Ct., Travis County, Tex. April 14, 2000).

²As FNB did not respond, we presume that it has no objection to release of the requested information.

³The department informs us that in response to a previous request, it released some of the information currently at issue here due to its belief that it could rely on a previous ruling, Open Records Letter No. 98-1028

We begin by noting that the submitted documents contain several social security numbers. Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Social security numbers and related records are excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if the social security number information was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). Therefore, if the social security numbers contained in the requested documents meet the criteria of section 405(c)(2)(C)(viii)(I), then they are confidential under this provision as encompassed by section 552.101. We have marked the social security numbers in the documents.

Next, we note that the submitted documents contain federal tax return information. Section 552.101 also excepts from disclosure information protected by other statutes. Federal tax return information, including employee W-4 forms, is confidential under federal law. 26 U.S.C. § 6103(a). Therefore, the department must withhold federal tax return information. We have marked this information.

We now turn to Permian Sea's contention that release of some of the requested information would violate constitutional and common law privacy rights. Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976).

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

(1998). That ruling specifically limited its application with the following language: "This ruling is limited to the particular records at issue under the facts presented to us in this request *and should not be relied upon as a previous determination* regarding any other records." (Emphasis added). Rather than relying on that determination, the department should have requested a new open records determination from this office for any subsequent request for information that was not specifically at issue in Open Records Letter No. 98-1028 (1998). *See* Gov't Code § 552.301. Further, Government Code section 552.007 prohibits the selective disclosure of information. Gov't Code § 552.007(b). As a general rule, if a governmental body releases information to one member of the public, the Public Information Act's exceptions to disclosure are waived unless the information is deemed confidential under the Public Information Act. Open Records Decision Nos. 490 (1988), 463 (1987). Although protection for information protected by the Act's permissive exceptions can be waived, protection for information deemed confidential by law ordinarily is not waived through "selective disclosure." *See* ORD Nos. 490, 463. Here, because the department previously released Permian Sea's information without asking for an attorney general decision and without affording Permian Sea an opportunity to raise exceptions to disclosure, the previous release did not serve to waive any of Permian Sea's current arguments for withholding the requested information.

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 protected under the common law doctrine of privacy; the information must concern the "most intimate aspects of human affairs." *Id.* at 5 (citing *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490 (5th Cir. 1985)).

The requested loan application contains personal financial information such as personal financial statements, personal credit history, and personal bank account numbers. In Open Records Decision No. 373 (1983), we concluded that such information can generally be considered highly intimate and embarrassing:

In our opinion, all financial information relating to an individual — including sources of income, salary, mortgage payments, assets, medical and utility bills, social security and veterans benefits, retirement and state assistance benefits, and credit history — ordinarily satisfies the first requirement of common law privacy, in that it constitutes highly intimate or embarrassing facts about the individual, such that its public disclosure would be highly objectionable to a person of ordinary sensibilities.

ORD 373 at 3. Of course, personal financial information does not meet the test for common law privacy unless it is also of no legitimate interest to the public. In Open Records Decision No. 373 (1983), we concluded that the determination of whether the public's interest in obtaining highly intimate and embarrassing information is sufficient to justify its disclosure must be made on a case-by-case basis. In this case, we believe that releasing the summary financial information contained in the document titled "Loan Guaranty Program Summary" ("loan summary") is sufficient to satisfy the legitimate public interest in how and to whom TAFE awards agricultural loan guaranties. This document contains the essential terms of the loan that TAFE has guaranteed. *See* Open Records Decision Nos. 600 (1992), 523 (1989). On the other hand, we do not believe that the public has a legitimate interest in the borrower's detailed personal financial statements, personal bank account numbers, or personal credit histories. *See* Open Records Decision Nos. 620 (1993), 600 (1992). We have indicated on the submitted application materials which detailed personal financial information the department should withhold under section 552.101. *See* Open Records Decision No. 385 (1983) (drawing distinction between basic facts regarding financial transaction between individual and governmental body, and background financial information which may be protected by common law privacy).

We point out that a corporation or other business entity does not have a common law right to privacy. See Open Records Decision No. 600 (1992). Thus, although the department must withhold detailed *personal* financial information to the extent it does not relate to TAFE's interest in the transaction between Permian Sea and FNB, the department may not withhold detailed *corporate or business* financial information from disclosure under common law privacy. Accordingly, the department may not withhold any of the loan summary under common law or constitutional privacy as encompassed by section 552.101.

Next, we turn to Permian Sea's claims that the requested information is excepted under both prongs of section 552.110. Section 552.110 protects the property interests of private parties 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. Permian Sea asserts the requested information consists of both trade secrets and commercial/financial information.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which defines a trade secret to be:

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 a single or ephemeral event 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 *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). When a governmental body takes no position with regard to the application of the trade secrets prong of section 552.110 to requested information, we accept a private entity's claim for exception as valid under that prong if that entity establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).

The 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).

In regard to Permian Sea's argument that the requested information contains its trade secrets, we conclude that Permian Sea has not made a *prima facie* case. Therefore, the department may not withhold any of the submitted information under the trade secrets prong of section 552.110.

The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 at 5-6 (1999).

Permian Sea has provided two affidavits prepared by one of its officers and a financial expert which, we conclude, establish that some of the submitted information would be beneficial to Permian Sea's competitors at Permian Sea's expense. Therefore, we conclude that release of detailed information revealing Permian Sea's financial information would cause substantial competitive injury to Permian Sea. Consequently, we have indicated on the submitted materials the types of financial information that the department must withhold under section 552.110(b). However, as stated earlier, we believe that the public has a legitimate interest in how and to whom TAFE awards agricultural loan guaranties, and we believe that this interest is served by releasing the summary financial information contained in the loan summary. Moreover, due to the extent of the legitimate public interest in the types of loans that TAFE chooses to guarantee, and the benefits gained by Permian Sea by virtue of TAFE guaranteeing its loan, we believe that Permian Sea's financial information, as contained in the loan summary only, is not excepted by section 552.110(b). *See* Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency); *see generally* Freedom of Information Act Guide & Privacy Act Overview at

136-138, 140-141, 151-152 (1995) (disclosure of prices is cost of doing business with government); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). Therefore, the only information that the department must withhold under section 552.110(b) is the information that we have marked in the general application materials and in the exhibits to the loan summary. The department must release the loan summary itself in its entirety.

Finally, much of the submitted information contains information governed by section 552.022. Specifically, several of the submitted documents constitute "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." Gov't Code § 552.022(a)(3). Information enumerated under section 552.022(a) is public information and is not subject to the exceptions found in the Public Information Act unless the information is expressly confidential under other law. Gov't Code § 552.022(a). Section 552.110(b) is an exception under the Act and is not other law that makes the requested information confidential. Therefore, information falling under section 552.022(a), despite its financial nature, must be released. We have marked information that the department must release under section 552.022(a)(3).

In summary, the department must withhold the social security numbers from disclosure if required to do so by section 552.101 in conjunction with federal law. The department must withhold the federal tax return information under section 552.101 in conjunction with federal law. The department must withhold information protected by common law privacy under section 552.101 and financial information protected by section 552.110(b). We have marked the submitted documents to indicate which information the department must withhold. The department must release the remaining information.

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.⁴

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

⁴We emphasize for clarity that this ruling only applies to the specific information that was submitted to this office in regard to this request for information. The department is not to rely on this ruling in regard to future requests for similar TAFE loan application materials if such information has not been previously submitted to and specifically ruled on by this office.

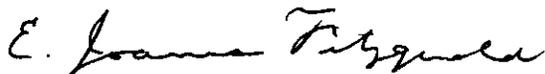
the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

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 Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

CHS/EJF/nc

Ref: ID# 136020

Encl. Submitted documents

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