



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2009

Mr. Robert Giddings
Assistant General Counsel
Texas Department of Banking
2601 North Lamar Boulevard
Austin, Texas 78705-4294

OR2009-11395

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# 352251.

The Texas Department of Banking (the "department") received a request for all documents relating to a named company.¹ You state that you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.130, 552.136, 552.137, and 552.147 of the Government Code. You also explain that the submitted information may contain proprietary information subject to exception under the Act. Accordingly, you have notified Richard J. Boudreau & Associates ("RJBA") of the request and of its right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d)*; Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and

¹ You inform us that the requestor clarified his request. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

reviewed the submitted information.² We have also considered arguments submitted by RJBA.

We note that you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any of the redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). As such, the information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the department should refrain from redacting any information that it submits to this office in seeking an open records ruling. Failure to do so may result in the presumption that the redacted information is public. *See* Gov't Code § 552.302.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes, including section 31.301 of the Finance Code. Section 31.301(a) provides the following:

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.

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.

Fin. Code § 31.301(a). You assert that the submitted information consists of documents directly or indirectly obtained by the department that concern the financial conditions and business affairs of RJBA or are otherwise related to the same. *See id.* § 31.301(a)(1). However, we note that section 31.301(a) makes confidential only 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. A “financial institution” is defined in section 31.002 as a bank, savings association, or savings bank. *See id.* § 31.002(a)(5); *see also id.* § 31.002(a)(2), (a)(46)-(47). RJBA states in its brief that it is a “law firm specializing in collection work.” *See id.* § 396.101 (stating that except as otherwise provided by chapter, private child support enforcement agency must register with the department to engage in child support enforcement in this state). You have not explained, and the submitted documents do not show, how RJBA qualifies as a financial institution for purposes of Chapter 31 of the Finance Code. Further, you do not indicate that the submitted documents relate to a present, former, or prospective shareholder, officer, director, affiliate, or service provider of a financial institution. Accordingly, none of RJBA’s information may be withheld under section 31.301 of the Finance Code.

Section 552.101 also encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 demonstrated. *Id.* at 681-82. 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 personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). Upon review, we find that the information we have marked is highly intimate or embarrassing and not of legitimate public concern. Therefore, the department must withhold the information we have marked under section 552.101 of the Government Code pursuant to common-law privacy.³ However, the remaining information is either not intimate or embarrassing or is of legitimate public interest and may not be withheld under section 552.101 in conjunction with common-law privacy.

You assert some of the remaining information is excepted under section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title, or registration issued by a Texas agency is excepted from public release. Gov’t Code. § 552.130(a)(1), (2). However, the remaining

³As our ruling is dispositive, we need not address your remaining arguments for this information.

information does not contain any information subject to section 552.130. Therefore, none of the remaining information may be withheld under this exception.

Section 552.136(b) of the Government Code 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.” *Id.* § 552.136. The department must withhold the account information we have marked in the remaining information under section 552.136 of the Government Code.

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). *See id.* § 552.137(a)-(c). The e-mail addresses at issue does not appear to be specifically excluded by section 552.137(c). Accordingly, the department 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 have affirmatively consented to their disclosure.

We next address RJBA’s claims for portions of the remaining information. RJBA objects to the release of certain information based on section 552.110(b) of the Government Code. Section 552.110(b) protects the proprietary interests of third parties by excepting from disclosure 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 id.* § 552.110(b). 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. *Id.*; Open Records Decision No. 661 (1999).

RJBA claims release of a portion of the information at issue would reveal competitive and financial information regarding RJBA. It claims this information could be used by its competitors to subject RJBA to unfair competition. Upon review of RJBA’s arguments and the submitted information, we conclude RJBA has made a specific factual or evidentiary showing that release of some of the information at issue would cause it substantial competitive harm. Therefore, the department must withhold the information we have marked pursuant to section 552.110(b) of the Government Code.⁴ Upon review, however, we find RJBA has not made the specific factual and evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause it substantial competitive harm. Accordingly, the department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

In summary, the department must withhold the information we have marked under section 552.101 of the Government Code pursuant to common-law privacy. The department

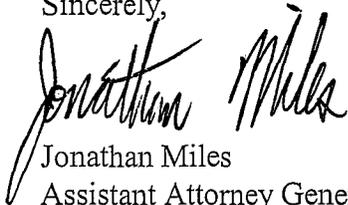
⁴As our ruling is dispositive for this information, we need not address RJBA’s remaining argument.

must also withhold the account numbers we have marked under section 552.136 of the Government Code and the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses have consented to their release. The department must withhold the information we have marked pursuant to section 552.110(b) of the Government Code. The remaining information must be released.

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 at (512) 475-2497.

Sincerely,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/cc

Ref: ID# 352251

Enc. Submitted documents

c: Requestor
(w/o enclosures)