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January 5, 2010

Ms. Devon V. Bijansky
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OR2010-00109

Dear Ms. Bijansky:

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# 366212.

The Texas Real Estate Commission (the "commission") received a request for copies of the annual and semi-annual reports submitted by eleven named companies for the last two years. You state you have provided some responsive information to the requestor. You claim portions of the submitted information are excepted from disclosure under section 552.101 of the Government Code. You also state the release of the submitted information may implicate the proprietary interests of American Home Guardian, Inc. ("AHG"); Warrantech Home Service Company ("Warrantech"); Nations Residential Service, Inc. ("Nations"); Allied Warranty, L.P. ("Allied"); American Home Shield of Texas, Inc. ("American Home Shield"); Everything Residential, L.P. ("Everything Residential"); LandAmerica Home Warranty Company ("LandAmerica"); Fidelity National Home Warranty Company ("Fidelity"); First American Home Buyers Protection Corporation ("First American"); Old Republic Home Protection Company, Inc. ("Old Republic"); and Affordable Home Protection Services, Inc. ("Affordable Home Protection"). Accordingly, you state, and provide documentation showing, the commission notified the third parties of the request and of their right to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested

third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from Allied, Everything Residential, Old Republic, and Nations. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you did not submit any reports submitted by AHG, Warrantech, and Affordable for 2007 for our review. Further, you did not submit any reports submitted by AHG for 2008 for our review. Therefore, to the extent this information exists, we assume you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances). If you believe any portion of this information is confidential and may not lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

Next, we must address the commission's procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body receiving a request for information that the governmental body wishes to withhold pursuant to an exception to disclosure under the Act is required to submit to this office within fifteen business days of receiving the request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement or sufficient evidence showing the date the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). The request for information was received on October 12, 2009. The requestor amended his request on October 13, 2009, adding Affordable Home Protection's annual and semi-annual reports for the last two years and clarifying his request intended to seek Nations's reports for the last two years. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). The commission did not submit the responsive documents for our review until November 3, 2009. Consequently, the commission did not meet the fifteen-business-day deadline, with the exception of the information pertaining to Affordable Home Protection and Nations. Thus, we find the commission failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342 (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); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.101 of the Government Code is compelling and third-party interests are at stake in this instance, we will address this exception and the submitted arguments by the third parties. Additionally, we note portions of the submitted information are subject to sections 552.136 and 552.137 of the Government Code.¹ Because these exceptions are also compelling, we will address their applicability to the submitted information.

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. 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

¹The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(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. 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 eleven residential service companies 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 indicated was submitted in the annual reports by the eleven residential companies under section 552.101 in conjunction with section 1303.202(c).

In addition, you state the commission's rules require residential service companies to submit semi-annual reports, which require the same types of information that are provided in annual reports. *See* 22 T.A.C. § 539.137. You assert the information you have indicated in the annual reports that relate to the performance and solvency of the eleven residential service companies and is necessary for the commission to perform its duties under chapter 1303 is also protected under section 1303.202(c) when provided in response to semi-annual reports. For information to be confidential under section 552.101, the provision of law must explicitly require confidentiality. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential). Section 1303.202 pertains to annual reports only. *See* Occ. Code § 1303.202. Furthermore, subchapter E of chapter 1303 does not require residential service companies to file semi-annual reports. Therefore, no portion of the information submitted in response to the semi-annual reports may be withheld under section 552.101 on such basis.

Next, we note 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, we have not received comments from AHG, Warrantech, American Home Shield, LandAmerica, Fidelity, First American, and Affordable Home Protection. Although Nations and Everything Residential object to the release of their information, they raise no exceptions to disclosure under the Act. In addition, we understand Old Republic to claim the request for information was not proper under the Act because the requestor did not provide his mailing address. Old Republic states it was unable to comply with section 552.305(e) of the Government Code, which requires a third party that submits written comments to the attorney general to send a copy of those comments to the requestor. We note section 552.305(e) does not require a third party to mail a copy of its comments to a requestor's physical mailing address and nothing in the Act provides that a third party's inability to comply with section 552.305(e) excuses it from submitting to the attorney general any valid reasons under the Act as to why its information should not be released. *See id.* § 552.305. As AHG, Warrantech, American Home Shield, LandAmerica, Fidelity, First American, Affordable Home Protection, Nations, Everything Residential, and Old Republic have not submitted to this office any reasons explaining why their submitted information should not be released, these companies have failed to provide us with any basis to conclude they have protected proprietary interests in any of the submitted information. *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. Accordingly, we conclude the commission may not withhold any portion of the remaining information on the basis of any proprietary interest these companies may have in the information.

Allied raises section 552.110 of the Government Code for portions of its remaining annual report and for portions of its semi-annual reports. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets; and (b) commercial or financial information, the release of which would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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. 1957); *see also* ORD 552 at 2. 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure 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.*; *see also* ORD 661 at 5.

After reviewing the information at issue and the submitted arguments, we find Allied has failed to demonstrate that 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. Additionally, upon review, we determine Allied has made only conclusory allegations that release of the remaining information would

²The 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).

result in substantial damage to its competitive position. Thus, Allied has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the commission may not withhold any portion of the remaining information under section 552.110(b) of the Government Code.

Next, we note portions of the submitted information are subject to sections 552.136 and 552.137 of the Government Code and protected by copyright. Section 552.136 provides “[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.” Gov’t Code § 552.136(b); *see also* § 552.136(a) (definition of “access device number” includes account numbers). We have marked bank account and routing numbers, as well as insurance policy numbers. To the extent this marked information is not contained in the information being withheld from the annual reports pursuant to section 1303.202(c) of the Occupations Code, the commission must withhold it pursuant to section 552.136 of the Government Code.³

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 we have marked are not of types specifically excluded by section 552.137(c). Therefore, to the extent the marked e-mail addresses are not contained in the information being withheld from the annual reports pursuant to section 1303.202(c) of the Occupations Code, the commission must withhold them pursuant to section 552.137 of the Government Code, unless it receives affirmative consent to their release.⁴

Finally, we note some of the remaining information is 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 protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers, bank routing numbers, and insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

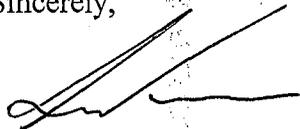
applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the commission must withhold the information you have indicated in the submitted annual reports under section 552.101 of the Government Code in conjunction with section 1303.202(c) of the Occupations Code. To the extent the bank account numbers, bank routing numbers, and insurance policy numbers we have marked are not contained in the information being withheld from the annual reports pursuant to section 1303.202(c) of the Occupations Code, the commission must withhold them under section 552.136 of the Government Code. Likewise, to the extent the personal e-mail addresses we have marked are not contained in the information being withheld from the annual reports pursuant to section 1303.202(c) of the Occupations Code, the commission must withhold them under section 552.137 of the Government Code, unless it receives consent to their release. The remaining information must be released, but any information that is protected by 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.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,



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ACV/eeg

Ref: ID# 366212

Enc. Submitted documents

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