



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 14, 2020

Mr. Everette Jobe  
Senior Counsel  
Texas Department of Banking  
2601 North Lamar Boulevard  
Austin, Texas 78705

OR2020-23131

Dear Mr. Jobe:

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# 843248 (File No. 20-197).

The Texas Department of Banking (the "department") received a request for information related to specified applications for state trust charters. You state the department does not maintain a portion of the requested information.<sup>1</sup> You also state the department will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state release of some of the submitted information may implicate the proprietary interests of Beneficient Company Group, LP ("Beneficient"). Accordingly, you state, and provide documentation showing, you notified Beneficient of the request for information and of the right 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 Beneficient. We have reviewed the

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<sup>1</sup> The Act does not require a governmental body to create or release information that did not exist when a request for information was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you state some of the submitted information, which you indicated, is not responsive to the instant request for information because it does not pertain to the specified applications. We also note additional submitted information, which we indicated, is not responsive to the instant request for information because it was created after the department received the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release such information in response to this request.<sup>3</sup>

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, which provides in relevant part:

(a) Except as expressly provided otherwise by this subtitle 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 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 Exhibit C consists of documents obtained or created by the department concerning the financial condition or business affairs of state trust companies that relate to state trust company charter applications. *See id.* You inform us no provision in Chapter 181 of the Finance Code or rule regarding confidentiality would provide for the release of the information at issue. You also state that the information at issue was not obtained from a published statement or the public portion of a report of condition or income statement. *See id.* § 181.301(a)(1). Finally, you state the information at issue is not contained in the portion of an application designated as public by Beneficient, the department, or a federal agency, and the information at issue is not contained in an official document required to be filed with the department to have legal effect. Upon

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<sup>2</sup> We 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.

<sup>3</sup> As we are able to make this determination, we need not address your arguments against disclosure of this information.

review, we find Exhibit C is confidential under section 181.301 of the Finance Code and must be withheld under section 552.101 of the Government Code.<sup>4</sup>

Beneficient raises section 552.104 of the Government Code for a portion of the remaining responsive information. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. See *Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. See Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code 552.104(a). Therefore, we do not address Beneficient’s arguments under section 552.104.

Section 552.110(c) of the Government Code excepts 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[.]” *Id.* § 552.110(c). Beneficient argues a portion of the remaining responsive information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Beneficient has demonstrated most of the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, with the exception of the information we indicated for release, the department must withhold the information we marked in Exhibit B and the remainder of Exhibit D under section 552.110(c) of the Government Code.<sup>5</sup> However, we find Beneficient has failed to provide specific factual evidence demonstrating the remaining responsive information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the department may not withhold any of the remaining responsive information under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” See *id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

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<sup>4</sup> Because our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

<sup>5</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

*Id.* § 552.110(a). Beneficient argues some of the remaining responsive information consists of trade secrets subject to section 552.110(b). Upon review, we find Beneficient has failed to provide specific factual evidence demonstrating any portion of the remaining responsive information at issue is a trade secret. Therefore, the department may not withhold any of the remaining responsive information under section 552.110(b) of the Government Code.

Section 552.101 of the Government Code also encompasses information made confidential by section 182.004 of the Finance Code, which provides in relevant part:

- (c) Rules adopted under this subtitle may specify the confidential or nonconfidential character of information obtained or prepared by the department under this section. Except as provided by Subchapter D, Chapter 181, or in rules regarding confidential information, the business plan of the applicant and the financial statement of a proposed officer, director, manager, or managing participant are confidential and not subject to public disclosure.

Fin. Code § 182.004(c). Beneficient argues a portion of the remaining responsive information is confidential under section 182.004 of the Finance Code. However, upon review, we find Beneficient has failed to demonstrate the applicability of section 182.004 of the Finance Code to the information at issue. In addition, Beneficient has not directed this office to any rules adopted by the department which would make the information at issue confidential. Therefore, the department may not withhold any portion of the remaining responsive information under section 552.101 of the Government Code in conjunction with section 182.004 of the Finance Code.

We note the remaining responsive information contains e-mail addresses that are subject to section 552.137 of the Government Code.<sup>6</sup> 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* Gov’t Code § 552.137(a)-(c). The e-mail addresses at issue are not excluded by subsection (c). Therefore, the department must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure.

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<sup>6</sup> The 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).

In summary, the department must withhold Exhibit C under section 181.301 of the Finance Code in conjunction with section 552.101 of the Government Code. With the exception of the information we indicated for release, the department must withhold the information we marked in Exhibit B and the remainder of Exhibit D under section 552.110(c) of the Government Code. The department must withhold the e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure. The department must release the remaining responsive information.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Deborah Southerland  
Assistant Attorney General  
Open Records Division

DS/jm

Ref: ID# 843248

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)