

Open Records Ruling Tracking Sheet

File Number: OR-798456-19	Issued as: <i>BBX</i> NOV 25 2019	Assigned To: Triage <i>BBX</i>
ID#: 798456	Date issued:	Date assigned: 09/26/2019

Addressee: Cheryn L. Netz Date received: 09/20/2019
 Entity: Securities Board, State Postmark Date:
 Gov't Body: Securities Board, State **45-day deadline: 11/25/2019**
 Entity's Phone #: () - 55-day deadline: 12/11/2019
 Entity's fax #: () - 15-day deadline: 09/30/2019 Late:
 Requestor: Aaron Borden 10-day deadline: 09/23/2019 Late:
 Requestor's Phone#: () - 10-day ltr. sent:
 Requestor's fax #: () - Ack. sent:
 Confidential 7-day ltr. sent:
 Press Office: 7-day ltr. due:
305 briefs due:

Description:
 JAW9: Request for all files, records, docs, correspondence, etc. re Natin Paul and/or World Class Capital Group (Holdings) Doc enclosed.

Attachments: *79944c* *804729* *100088* *803134* *803120* *801846* *806585* *BBX*

RV2	Drafter	Initials	Draft Due	Simple Due	EZ Due	Date Complete	RV Con	Re-Route	Issue? (Inits)
Y/N	RV 1	<i>BBX</i>	11/01/2019	10/10/2019	09/30/2019	<i>11/2</i>	Y/N	Y/N	<i>BBX</i>
Y/N	RV 2	<i>MLED</i>	11/19			<i>11/8</i>	Y/N	Y/N	<i>emaitok</i>
							Y/N	Y/N	

Ready to Close: *BBX 11/22/19*
initials/date

Signed: Initials: *BBX* Date: *11/25/19*
NOV 25 2019

Docs returned by mail on: _____ by: _____

Executive Approval: *SPN 11/22/19*

Exception: *101/581-28(A); 101/FOIA*
initials/date
1002 p-o





KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 25, 2019

Ms. Cheryn L. Netz
Assistant General Counsel
Texas State Securities Board
P.O. Box 13167
Austin, Texas 78711-3167

OR2019-33291

Dear Ms. Netz:

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# 798456.

The Texas State Securities Board (the "board") received two requests from the same requestor for all information pertaining to a named individual or a named entity prepared by or in possession of a named board employee, as well as all agreements between the named board employee and the federal government. You state the board is withholding certain information pursuant to Open Records Letter No. 2004-0239 (2004).¹ You also state the board has released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. Additionally, you state release of some of the submitted information may implicate the interests of the United States Department of Justice (the "DOJ") and the Federal Bureau of Investigation (the "FBI"). Accordingly, you state, and provide documentation showing, the board notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received

¹ Open Records Letter No. 2004-0239 is a previous determination issued to the board authorizing it to withhold information obtained by the board in connection with an investigation to prevent or detect a violation of the Texas Securities Act (the "TSA") or a board rule or order without requesting a ruling from this office.

comments from the FBI.² We have also received comments submitted by the requestor. *See id.* We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.³

Initially, the FBI argues some of the submitted information is not “public information” subject to disclosure under the Act. Section 552.002(a) of the Government Code defines “public information” as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;
or
- (3) by an individual officer or employee of a governmental body in the officer’s or employee’s official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body’s physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party, including an individual officer or employee of a governmental body in his or her official capacity, may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov’t Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Information is “in connection with the transaction of official business” if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on

² As of the date of this letter, this office has not received comments from the DOJ explaining why any of the submitted information should not be released.

³ 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.

behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov't Code § 552.002(a-1). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

The FBI asserts the information at issue is “not subject to [the Act] as it is not the property of the State of Texas.” However, we find the information was collected, assembled, or maintained in connection with the transaction of the board’s official business. Further, the board has submitted this information as being subject to the Act. Therefore, we conclude the information at issue is subject to the Act and the board must release it unless the information falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021, .301, .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. Article 581-28(A) of the Texas Securities Act (the “TSA”) provides, in pertinent part:

Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of [the TSA] or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by [the TSA] to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided, however, that all information of every kind and nature received in connection with an investigation and all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential by the Commissioner and shall not be disclosed to the public except under order of court for good cause shown. . . .

V.T.C.S. art. 581-28(A) (citation omitted). You state the information submitted as Exhibits C1 through C7 was made by the board in connection with an investigation to prevent or detect a violation of the TSA or board rule or order. Based on your representations and our review of the information at issue, we agree this information consists of internal notes, memoranda, reports, or communications made in connection with an investigation. Accordingly, the board must withhold Exhibits C1 through C7 under section 552.101 of the Government Code in conjunction with article 581-28(A) of the TSA.⁴

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

We understand the FBI to assert the remaining information is confidential under the deliberative process privilege found in section 552(b)(5) of the Freedom of Information Act ("FOIA"), section 552 of title 5 of the United States Code. Generally, FOIA applies only to federal agencies and does not apply to records held by state agencies. Open Records Decision No. 561 at 6 (1990). Section 552(b)(5) of FOIA protects "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]" See 5 U.S.C. § 552(b)(5). Information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. See, e.g., Attorney General Opinion MW-95; Open Records Decision No. 124 (1976).

However, this office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974); Open Records Decision Nos. 561, 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, section 552.101 requires a local government to respect the confidentiality imposed on the information by federal law." ORD 561 at 7.

The FBI states the remaining information is the property of the FBI and was provided to the board in the course of a joint investigation conducted by the board and the FBI. The FBI indicates that it considers the information at issue to be confidential under the deliberative process privilege found in section 552(b)(5) of title 5 of the United States Code. See 5 U.S.C. § 552(b)(5). Based on these representations and our review, we conclude the board must withhold the remaining information under section 552.101 of the Government Code in conjunction with federal law.

We note the requestor asserts a right of access to the information at issue pursuant to the ruling of the Fifth Circuit Court of Appeals in *United States v. Sealed Search Warrants*, 868 F.3d 385 (5th Cir. 2017). In *United States v. Sealed Search Warrants*, the Fifth Circuit extended the case-by-case approach it employs to assess the common-law qualified right of access to judicial records to include situations involving pre-indictment warrant materials. See 868 F.3d at 396. Upon review, we find this case does not establish a right of access to any information for purposes of the Act. Therefore, the requestor does not have a right of access to any portion of the information at issue pursuant to *United States v. Sealed Search Warrants*, and the board need not release any information to the requestor on that basis.

In summary, the board must withhold Exhibits C1 through C7 under section 552.101 of the Government Code in conjunction with article 581-28(A) of the TSA. The board must withhold the remaining information under section 552.101 of the Government Code in conjunction with federal law.

Finally, you request that this office issue a "previous determination" that would permit the board in the future to withhold from disclosure communications made by the board in connection with an investigation to prevent or detect a violation of the TSA, board rule, or order without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time. Accordingly, 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,



Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jxd

Ref: ID# 798456

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 2 Third Parties
(w/o enclosures)

Timeline and Brief Summary for ID# 798456

9/9/20, request received (received on 9/6 after hours, 9/9 next business day)

9/20/19, Board's first briefing—

- ORL 04-0239 PD: withholding records obtained in connection with an investigation under .101/581-28
- Arg. .101/581-28 for all info, which was “made by the TSSB pursuant to the Securities Commissioner’s duty to conduct investigations to prevent or detect a violation of the TSA, or a Board rule or order.”
- .101/Fed. R. Crim. Proc. Rule 6(e) for federal grand jury subpoenas (not submitted to our office, board does not have possession or custody of these records); disposition: because (1) info not submitted to our office, (2) board also asserts 581-28 for this info, and (3) a representative sample of info was submitted, we did not address this argument.
 - o The board asserts the requested subpoenas were prepared during the course of a federal criminal investigation, and are thus, confidential under Rule 6(e). Our office has previously withheld information under .101/FRCP 6 based on similar arguments. For examples of w/holding info under .101/FRCP 6, see 17-27080 (issued to Texas DMV) and 07-08243 (issued to DPS).
 - o If the board did have possession of the requested subpoenas and had submitted them to our office, we may find the subpoenas to be protected from disclosure under .101/20.02 of the Code of Criminal Procedure. Article 20.02(h) states a subpoena relating to a grand jury proceeding must be kept secret to the extent and for as long as necessary to prevent unauthorized disclosure. Here, the board states the records are held under seal by a federal grand jury “considering alleged criminal violations of federal law.” Because the info at issue *is* held by a federal grand jury that is presently *considering* criminal violations, our office may rule the subpoenas to be excepted from disclosure under .101/20.02, in this instance.
- .108 (asserted generally, no specified subsection): The board does not meet its burden under .108, based on its general argument and the fact that it does not state the info at issue pertains to a pending criminal investigation conducted by the board.
- .107(1) (for Ex. C-1, which consists of an e-mail between the board investigator, a DOJ employee, and FBI agents): The board raises .107 and .101/FRE 501 for this info, stating it was acting as the client when communicating with its lawyers (i.e. US attorneys). We would withhold this info under .107(1) as confidential communications between privileged parties.
- .107(2): The board asserts the responsive records include draft search warrant affidavits, copies of search warrant applications, affidavits and related search warrants. (this information was not submitted to our office). The board asserts this information was sealed by the court. The board did not submit a copy of the court order. However, based on later correspondence from the requestor, we note the order only sealed the search warrant. Additionally, because the information is no longer sealed, we would not withhold under .107(2).

9/27/19, Board second briefing— Board argues that all FBI records (including the federal grand jury subpoenas, all search warrant materials, and the preservation letter submitted as C-7) are subject to NDAs signed by ██████████. We would not grant this argument because GB cannot contract around the PIA.

10/4/19, Requestor's first briefing—

- Fails to demonstrate 581-28 because board is not investigating TSA violations
- Arguments under FRE 501 and FRCP 6(e) fail because info may not be withheld pursuant to federal rules of evidence or criminal procedure.
- FRCP 6(e) fails on merits because the board does not establish the requested info is before the grand jury and does not argue ██████████ is within the persons subject to the secrecy rule
- .108 claim fails because of conclusory assertions that release will interfere with board's investigative ability and release will have chilling effect
- .107(1) claim fails because the board has not established an atty-client relationship existed, the communications are confidential or made to facilitate the rendition of legal services
- .107(2) fails because no longer under seal
- NDAs argument fails because argument waived; do not provide basis for withholding info
- Asserts common-law right of access per *U.S. v. Sealed Search Warrants*.

10/16/19, Board's third briefing—

- Bolstering 581-28 argument: joint task force authorized; TSA violations investigated
- Conceding that search warrant affidavits no longer sealed, but board was unaware ?

10/16/19, additional request (for NDAs)— board does not raise any arguments pertaining to the requested NDAs, but notified the FBI of the request and its right to submit arguments

10/30/19, Requestor's second briefing—

- Records of a federal taskforce investigation not confidential under 581-28 because not authorized
- Again asserting the investigation did not involve an investigation of a TSA violation and re-asserting that ██████████ told the requestor the investigation did not involve TSA violations

10/30/19, FBI briefing (re: the NDA)—

- Per the agreement between the board and the FBI, all FBI records must be returned to the FBI on demand and the info is the property of the FBI
- The NDA is not subject to the PIA.
- Asserts .101 (generally) and .111, which we understand to be an argument under .101/FOIA 552(b)(5) (i.e. DPP).

12/17/19, Request for Reconsideration from Requestor—

- Arguing we did not consider "the unique circumstances at issue in this matter," and that we did not address the requestor's arguments in its briefing to this office
- Note: we addressed the asserted ROA explicitly; did not include superfluous language of specifically stating we considered each portion of requestor's 581-28 arguments and factual disputes are beyond our remit; did not address .107(2) sealed search warrant issue because the info was not submitted to our office and the board concedes that the info was unsealed

Brennan, Blake

From: Nottingham, Sean
Sent: Friday, November 22, 2019 8:18 AM
To: Shipp, Amy; Brennan, Blake; Gordon, Justin
Cc: Coffman, Meredith; Bega, Liz
Subject: RE: ID# 798456; 45-day: 11/25/19

Follow Up Flag: Follow up
Flag Status: Flagged

Approved.

From: Shipp, Amy <Amy.Shipp@oag.texas.gov>
Sent: Thursday, November 21, 2019 4:10 PM
To: Brennan, Blake <Blake.Brennan@oag.texas.gov>; Gordon, Justin <Justin.Gordon@oag.texas.gov>; Nottingham, Sean <Sean.Nottingham@oag.texas.gov>
Cc: Coffman, Meredith <Meredith.Coffman@oag.texas.gov>; Bega, Liz <Liz.Bega@oag.texas.gov>
Subject: RE: ID# 798456; 45-day: 11/25/19

OK.

From: Brennan, Blake <Blake.Brennan@oag.texas.gov>
Sent: Thursday, November 21, 2019 3:56 PM
To: Gordon, Justin <Justin.Gordon@oag.texas.gov>; Nottingham, Sean <Sean.Nottingham@oag.texas.gov>; Shipp, Amy <Amy.Shipp@oag.texas.gov>
Cc: Coffman, Meredith <Meredith.Coffman@oag.texas.gov>; Bega, Liz <Liz.Bega@oag.texas.gov>
Subject: ID# 798456; 45-day: 11/25/19

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

The following file is ready for issuance. The draft ruling is attached.

ID# 798456: The Texas State Securities Board (the "board") received two requests from the same requestor for: (1) all info pertaining to Natin Paul (the requestor's client) or World Class Capital Group prepared by or in possession of board investigator [REDACTED] and (2) all agreements between [REDACTED] and the federal government, including any NDAs. The board states it is withholding certain info pursuant to ORL 2004-0239. Fn: ORL 2004-0239. The board states it has released some info to the requestor. The board raises .101/581-28(A), .101/FRCP rule 6(e), .101/NDA b/t [REDACTED] and the FBI, .101/FRE 501, .107(2), and .108 for Exhibits C1-C7. The board also states release of the remaining info may implicate the interests of the DOJ and the FBI, both of which were notified. We received comments from the FBI. Fn: have not received comments from the DOJ (all internal mail checks complete). We have also received comments from the requestor. Fn: representative sample.

Info: pertains to an investigation by a joint taskforce (comprised of the FBI and the board) into the misappropriation and commingling of investors' funds by the requestor's client's real estate investment firm (i.e. World Class Capital Group/World Class Holdings)

- Info for which board raises .101/581-28(A): C1— e-mail from [REDACTED] to DOJ attorneys and FBI agents re: investigation; C2—opening data sheet for investigation; C3— e-mail from board's director of enforcement to employees with attached opening data sheet; C4— investigative worksheet; C5— screenshot of database

inquiry, re: investigation; C6— enforcement action report; C7— preservation letter prepared by RS and sent to Apple

- Info for which board does not raise any arguments: submitted NDA b/t RS and FBI

Note: The board states exhibits C1-C7 cannot be released because RS and the FBI have NDAs stating the info to which RS has access is the property of the US government and may not be released to any unauthorized party. Because the info at issue is confidential under 581.28(A), we are not addressing this argument.

FBI arguments: The FBI asserts the NDAs at issue are not subject to the Act because they are the property of the FBI. The FBI also raises .101 and .111. We are understanding the FBI to assert .101/FOIA (552(b)(5)) for the info at issue.

.304 requestor comments:

- The requestor asserts 581-28 is not applicable because: the board is not investigating TSA violations, RS is working as part of the task force and thus it is not a board investigation, and the board is broadly interpreting 581-28. The board rebuts all of these arguments.
- The requestor asserts .107(2) is not applicable because the court has since granted leave to disclose the sealed search warrant; the board, in a supplemental brief, states it was unaware of the order, but concedes the order sealing the records at issue has since been rescinded. The search warrant at issue was not submitted to our office.
- The requestor asserts a common-law right of access to the requested info pursuant to *US v. Sealed Search Warrants*, 868 F.3d 385 (5th Cir. 2017). This case dealt with an individual moving to unseal PC affidavits that supported pre-indictment search warrants. The court considered the scope of the qualified common law right of access to judicial records, and considered other circuits' application of the right to pre-indictment warrant materials. The Fifth Circuit extended its case-by-case approach to determining whether an individual has a right of access to include situations involving pre-indictment warrant materials.

.002: The FBI asserts the info at issue is "not subject to [the Act] as it is not the property of the State of Texas." However, we find the info is maintained in connection with the transaction of the board's official business, and the board has submitted this info to our office as being subject to the Act. Thus, the info is subject to the Act.

.101/581-28(A): The board states the info submitted as Exhibits C1 through C7 was made by the board in connection with an investigation to prevent or detect a violation of the TSA or board rule or order. We agree the info at issue consists of internal notes, memoranda, reports, or communications made in connection with an investigation. Thus, the board must withhold Exhibit C1 through C7 under .101/581-28(A). Fn: dispositive.

.101/FOIA (552(b)(5)): We understand the FBI to raise .101/FOIA (552(b)(5) deliberative process privilege). The FBI indicates the remaining info, which consists of NDAs, is the property of the FBI and was provided to the board in the course of a joint investigation conducted by the board and the FBI. The FBI informs this office it considers the info at issue to be confidential under the DPP found in 5 USC 552(b)(5). Thus, the board must withhold the remaining information under .101/FOIA.

ROA arg: The requestor asserts an ROA to the requested info pursuant to *US v. Sealed Search Warrants*. In this case, the Fifth Circuit extended the case-by-case approach it employs to assess the common-law qualified ROA to judicial records to include situations involving pre-indictment warrant materials. This case does not establish an ROA to any info for purposes of the Act, and the board need not release any info to the requestor on that basis.

PD Denial: The board requests a PD permitting it to withhold from disclosure communications made by the board in connection with an investigation to prevent or detect a violation of the TSA, board rule, or order w/o the need of requesting a ruling from our office. We decline to issue such a PD at this time.

STATUS SHEET

11/25/2019

Mail Id number: 798456
File number: OR-798456-19
ORQ:
Date Written: 09/20/2019
Date Received: 09/20/2019
Date Acknowledge:
Date File Opened: 09/26/2019
Date ORQ Opened: 00/00/0000
Assign To: BBX
Status: CLOSED
Sub_Status: ORL
Status Date: 11/25/2019
Issued as: OR19-33291
Billing Code: AGCY0312
Billing Name: Securities Board, State
Planned Response: ORL

Last Name: Netz
First Name: Cheryn L.
Title: Asst. Gen. Counsel
Entity: SECURITIES BOARD, STATE
Address: P.O. Box 13167

City: Austin
State: TX
Zip Code: 78711-3167

Cross Reference:
Routed to:
Routed On: 11/25/2019

Description: JAW9: Request for all files, records, docs, correspondence, etc. re Natin Paul and/or World Class Capital Group (Holdings) Doc enclosed.

Legal Issue:

Edit Comments:

Exceptions:

REF: ID # 798456

AARON P BORDEN
MEADOWS & COLLIER, LLP
901 MAIN ST, STE 3700
DALLAS, TX 75202

3RD PARTIES

ALAN BUIE
UNITED STATES DEPARTMENT OF JUSTICE
903 SAN JACINTO BLVD, STE 334
AUSTIN, TX 78701

JASON R CAMMACK
ASSOCIATE DIVISION COUNSEL
FEDERAL BUREAU OF INVESTIGATION
5740 UNIVERSITY HEIGHTS
SAN ANTONIO, TX 78249-1835

Brennan, Blake

From: Brennan, Blake
Sent: Thursday, November 21, 2019 3:54 PM
To: Open Records Division
Subject: Final .304 Brief Check; ID# 798456

Thanks again for checking.

From: Brennan, Blake <Blake.Brennan@oag.texas.gov>
Sent: Tuesday, November 12, 2019 9:36 AM
To: Open Records Division <OpenRecordsDivision@texasattorneygeneral.gov>
Subject: .304 Brief Check; ID# 798456

ID# 798456

GB: Texas State Securities Board

Requestor: Aaron Borden (counsel for Natin Paul and World Class Capital Group)

Request: all info pertaining to Natin Paul or World Class Capital Group prepared by or in possession of a named board investigator, and all agreements between the named board investigator and the federal government, including any NDAs

I'm looking for **.304 briefing** from: the **US Department of Justice**.

We have received comments from the FBI.

Thanks for checking.

See yellow flag add Bustamante sentence to opening P.D is part of docs, send back to GB (in 9/20 brief) + address GB's 107(2) argument.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

not addressing 107(2) b/c GB concedes no longer sealed + info not out. to court of use

state fed. grand jury subpoenas are also responsive, but GB does not have such info so not sub; not Bustamante b/c request is to board (note: since, MI doesn't have and didn't create such info, usual responsive)

nope: D is a copy of an order sealing the requested search warrant affidavits + application (ie: support for GB's 107(2) arg)

[DATE]

Ms. Cheryn L. Netz
Assistant General Counsel
Texas State Securities Board
P.O. Box 13167
Austin, Texas 78711-3167

OR2019-

Dear Ms. Netz:

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# 798456.

The Texas State Securities Board (the "board") received two requests from the same requestor for all information pertaining to a named individual or a named entity prepared by or in possession of a named board employee, as well as all agreements between the named board employee and the federal government. You state the board is withholding certain information pursuant to Open Records Letter No. 2004-0239 (2004).¹ You also state the board has released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.107, and 552.108 of the Government Code. Additionally, you state release of some of the submitted

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information may implicate the interests of the United States Department of Justice (the "DOJ") and the Federal Bureau of Investigation (the "FBI"). Accordingly, you state, and provide documentation showing, the board notified these third parties of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). We have received comments from the FBI.² We have also received comments submitted by the requestor. *See id.* We have considered the submitted arguments and reviewed the submitted information, portions of which consist of representative samples.³

Initially, the FBI argues some of the submitted information is not "public information" subject to disclosure under the Act. Section 552.002(a) of the Government Code defines "public information" as information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body;

(2) for a governmental body and the governmental body:

² As of the date of this letter, this office has not received comments from the DOJ explaining why any of the submitted information should not be released.

³ 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.

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information;
or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party, including an individual officer or employee of a governmental body in his or her official capacity, may be subject to disclosure under the Act if a governmental body owns, has a right of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987). Information is "in connection with the transaction

of official business” if the information is created by, transmitted to, received by, or maintained by a person or entity performing official business or a government function on behalf of a governmental body and the information pertains to official business of the governmental body. *See* Gov’t Code § 552.002(a-1). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

The FBI asserts the information at issue is “not subject to [the Act] as it is not the property of the State of Texas.” However, we find the information was collected, assembled, or maintained in connection with the transaction of the board’s official business. Further, the board has submitted this information as being subject to the Act. Therefore, we conclude the information at issue is subject to the Act and the board must release it unless the information falls within an exception to public disclosure under the Act. *See id.* §§ 552.006, .021, .301, .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. Article 581-28(A) of the Texas Securities Act (the “TSA”) provides, in pertinent part:

Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect

the violation of [the TSA] or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by [the TSA] to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided, however, that all information of every kind and nature received in connection with an investigation and all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential by the Commissioner and shall not be disclosed to the public except under order of court for good cause shown. . . .

V.T.C.S. art. 581-28(A) (citation omitted). You state the information submitted as Exhibits C1 through C7 was made by the board in connection with an investigation to prevent or detect a violation of the TSA or board rule or order. Based on your representations and our review of the information at issue, we agree this information consists of internal notes, memoranda, reports, or communications made in connection with an investigation. Accordingly, the board must withhold Exhibits C1 through C7 under section 552.101 of the Government Code in conjunction with article 581-28(A) of the TSA.⁴

⁴ As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

We understand the FBI to assert the remaining information is confidential under the deliberative process privilege found in section 552(b)(5) of the Freedom of Information Act ("FOIA"), section 552 of title 5 of the United States Code. Generally, FOIA applies only to federal agencies and does not apply to records held by state agencies. Open Records Decision No. 561 at 6 (1990). Section 552(b)(5) of FOIA protects "inter-agency or intra-^{hard hyphen} agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]" See 5 U.S.C. § 552(b)(5). Information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential in the hands of a federal agency. See, e.g., Attorney General Opinion MW-95; Open Records Decision No. 124 (1976).

However, this office has repeatedly held that the transfer of confidential information between governmental agencies does not destroy the confidentiality of that information. Attorney General Opinions H-917 (1976), H-836 (1974); Open Records Decision Nos. 561, 414 (1984), 388 (1983), 272 (1981), 183 (1978). These opinions recognize the need to maintain an unrestricted flow of information between state agencies. In Open Records Decision No. 561, we considered whether the same rule applied regarding information deemed confidential by a federal agency. In the interests of comity between state and federal authorities and to ensure the flow of information from federal agencies to Texas governmental bodies, we concluded "when information in the possession of a federal agency is 'deemed confidential' by federal law, such confidentiality is not destroyed by the sharing of the information with a governmental body in Texas. In such an instance, section

552.101 requires a local government to respect the confidentiality imposed on the information by federal law." ORD 561 at 7.

The FBI ^{states} ~~indicates~~ the remaining information is the property of the FBI and was provided to the board in the course of a joint investigation conducted by the board and the FBI. The FBI ^{indicates} ~~informs this office~~ that it considers the information at issue to be confidential under the deliberative process privilege found in section 552(b)(5) of title 5 of the United States Code. See 5 U.S.C. § 552(b)(5). Based on these representations and our review, we conclude the board must withhold the remaining information under section 552.101 of the Government Code in conjunction with federal law.

We note the requestor asserts a right of access to the information at issue pursuant to the ruling of the Fifth Circuit Court of Appeals in *United States v. Sealed Search Warrants*, 868 F.3d 385 (5th Cir. 2017). In *United States v. Sealed Search Warrants*, the Fifth Circuit extended the case-by-case approach it employs to assess the common-law qualified right of access to judicial records to situations involving pre-indictment warrant materials. See 868 F.3d at 396. However, upon review, we find this case does not establish a right of access to any information for purposes of the Act. Therefore, the requestor does not have a right of access to any portion of the information at issue pursuant to *United States v. Sealed Search Warrants*, and the board need not release any information to the requestor on that basis.

adjust "remaining" if necessary after addressing 107127

In summary, the board must withhold Exhibits C1 through C7 under section 552.101 of the Government Code in conjunction with article 581-28(A) of the TSA. The board must withhold the remaining information under section 552.101 of the Government Code in conjunction with federal law.

Finally, you request that this office issue a "previous determination" that would permit the board in the future to withhold from disclosure communications made by the board in connection with an investigation to prevent or detect a violation of the TSA, board rule, or order without the need of requesting a ruling from us about whether such information can be withheld from disclosure. We decline to issue such a previous determination at this time. Accordingly, 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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/

Ref: ID# 798456

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 2 Third Parties
(w/o enclosures)

DRAFT

REF: ID # 798456

AARON P BORDEN
MEADOWS & COLLIER, LLP
901 MAIN ST, STE 3700
DALLAS, TX 75202

UNITED STATES DEPARTMENT OF JUSTICE
ATTN: ALAN BUIE
903 SAN JACINTO BLVD, STE 334
AUSTIN, TX 78701

JASON R CAMMACK
ASSOCIATE DIVISION COUNSEL
FEDERAL BUREAU OF INVESTIGATION
5740 UNIVERSITY HEIGHTS
SAN ANTONIO, TX 78249-1835

DRAFT

Brennan, Blake

From: Brennan, Blake
Sent: Tuesday, November 12, 2019 9:36 AM
To: Open Records Division
Subject: .304 Brief Check; ID# 798456

ID# 798456

GB: Texas State Securities Board

Requestor: Aaron Borden (counsel for Natin Paul and World Class Capital Group)

Request: all info pertaining to Natin Paul or World Class Capital Group prepared by or in possession of a named board investigator, and all agreements between the named board investigator and the federal government, including any NDAs

I'm looking for **.304 briefing** from: the **US Department of Justice**, or the **FBI**.

Thanks for checking.

Brennan, Blake

Sent: Tuesday, November 12, 2019 9:00 AM
Subject: ID# 798456

DRAFT APPROVAL E-MAIL

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

The following file is ready for issuance. The draft ruling is attached.

ID# 798456: The Texas State Securities Board (the "board") received two requests from the same requestor for: (1) all info pertaining to Natin Paul (the requestor's client) or World Class Capital Group prepared by or in possession of board investigator [REDACTED]; and (2) all agreements between [REDACTED] and the federal government, including any NDAs. The board states it is withholding certain info pursuant to ORL 2004-0239. Fn: ORL 2004-0239. The board states it has released some info to the requestor. The board raises .101/581-28(A), .101/FRCP rule 6(e), .101/NDA b/t [REDACTED] and the FBI, .101/FRE 501, .107(2), and .108 for Exhibits C1-C7. The board also states release of some of the submitted info may implicate the interests of the DOJ and the FBI, both of which were notified. We received comments from the FBI. Fn: have not received comments from the DOJ (all internal mail checks complete). We have also received comments from the requestor. Fn: representative sample.

Info: pertains to an investigation by a joint taskforce (comprised of the FBI and the board) into the misappropriation and commingling of investors' funds by the requestor's client's real estate investment firm (i.e. World Class Capital Group/World Class Holdings)

- Info for which board raises .101/581-28(A): C1— e-mail from [REDACTED] to DOJ attorneys and FBI agents re: investigation; C2— opening data sheet for investigation; C3— e-mail from board's director of enforcement to employees with attached opening data sheet; C4— investigative worksheet; C5— screenshot of database inquiry, re: investigation; C6— enforcement action report; C7— preservation letter prepared by [REDACTED] and sent to Apple
- Info for which board does not raise any arguments: submitted NDA b/t [REDACTED] and FBI

Note: The board states exhibits C1-C7 cannot be released because [REDACTED] and the FBI have NDAs stating the info to which [REDACTED] has access is the property of the US government and may not be released to any unauthorized party. Because the info at issue is confidential under 581.28(A), we are not addressing this argument.

FBI arguments: The FBI asserts the NDAs at issue are not subject to the Act because they are the property of the FBI. The FBI also raises .101 and .111. We are understanding the FBI to assert .101/FOIA (552(b)(5)) for the info at issue.

.304 requestor comments:

- The requestor asserts 581-28 is not applicable because: the board is not investigating TSA violations, [REDACTED] is working as part of the task force and thus it is not a board investigation, and the board is broadly interpreting 581-28; the board rebuts all of these arguments.
- The requestor asserts .107(2) is not applicable because the court has since granted a leave to disclose the sealed search warrant; the board, in a supplemental brief, states it was unaware of the order, but concedes the order sealing the records at issue has since been rescinded.
- The requestor asserts a common-law right of access to the requested info pursuant to *US v. Sealed Search Warrants*, 868 F.3d 385 (5th Cir. 2017). This case dealt with an individual moving to unseal PC affidavits that supported pre-indictment search warrants. The court considered the scope of the qualified common law right of access to judicial records, and considered other circuits' application of the right to pre-indictment warrant materials. The Fifth Circuit extended its case-by-case approach to determining whether an individual has a right of access to include situations involving pre-indictment warrant materials.

.002: The FBI asserts the info at issue is “not subject to [the Act] as it is not the property of the State of Texas.” However, we find the info is maintained in connection with the transaction of the board’s official business, and the board has submitted this info to our office as being subject to the Act. Thus, the info is subject to the Act.

.101/581-28(A): The board states the info submitted as Exhibits C1 through C7 was made by the board in connection with an investigation to prevent or detect a violation of the TSA or board rule or order. We agree the info at issue consists of internal notes, memoranda, reports, or communications made in connection with an investigation. Thus, the board must withhold Exhibit C1 through C7 under .101/581-28(A). Fn: dispositive.

.101/FOIA (552(b)(5)): We understand the FBI to raise .101/FOIA (552(b)(5) deliberative process privilege). The FBI indicates the remaining info, which consists of NDAs, is the property of the FBI and was provided to the board in the course of a joint investigation conducted by the board and the FBI. The FBI informs this office it considers the info at issue to be confidential under the DPP found in 5 USC 552(b)(5). Thus, the board must withhold the remaining information under .101/FOIA.

ROA arg: The requestor asserts an ROA pursuant to *US v. Sealed Search Warrants*. In this case, the Fifth Circuit extended the case-by-case approach it employs to assess the common-law qualified ROA to judicial records to situations involving pre-indictment warrant materials. However, upon review, we find this case does not establish an ROA to any info for purposes of the Act, and the board need not release any info to the requestor on that basis.

PD Denial: The board requests a PD permitting it to withhold from disclosure communications made by the board in connection with an investigation to prevent or detect a violation of the TSA, board rule, or order w/o the need of requesting a ruling from our office. We decline to issue such a PD at this time.

All content

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TX, All Fed.

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United States v. Sealed Search Warrants

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United States Court of Appeals, Fifth Circuit. • August 21, 2017 • 868 F.3d 385 (Approx. 15 pages)

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Original

868 F.3d 385

United States Court of Appeals, Fifth Circuit.

**UNITED STATES of America,
Plaintiff-Appellee
v.
SEALED SEARCH WARRANTS,
Defendants,
Justin Smith, Appellant**

No. 16-20562
August 21, 2017

Synopsis

Background: Taxpayer moved to unseal three probable cause affidavits supporting pre-indictment search warrants executed at his home, place of business, and storage unit. The United States District Court for the Southern District of Texas, Dena Hanovice Palermo, United States Magistrate Judge, 2016 WL 3002358, granted taxpayer's motion in part, requiring the Government to submit proposed redacted versions of the affidavits. After the Government

ROSTR. AGs - common law ROA
↳ "in the Fifth Cir., the subject of an investigation has a common law ROA to pre-indictment search warrant materials." (cite to sealed search warrants)
↳ "ROA is invoked when the records are requested by the owner of seized property." (cite to the sealed search warrants issued, 353 F. Supp. 2d 584 (D. Mo. 2004))

submitted affidavits with substantial redactions, the District Court, 195 F.Supp.3d 908, submitted its own redacted versions and ordered that they be unsealed after fourteen days if the Government did not object. The Government raised objections, and the United States District Court, Gray H. Miller, J., 2016 WL 9526496, reversed. Taxpayer appealed.

Holdings: The Court of Appeals, Xavier Rodriguez, J., sitting by designation, held that: 1 Court of Appeals had jurisdiction over taxpayer's appeal; 2 as a matter of first impression, a district court has discretion in determining whether the common law qualified right of access to judicial records extends to pre-indictment search warrant materials, on a case by case basis; and 3 remand for district court to conduct case-specific balancing of public's right of access against interests favoring nondisclosure was warranted.

Vacated and remanded.

Procedural Posture(s): On Appeal.


West Headnotes (11)

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1 Criminal Law Preliminary or interlocutory orders in general

Court of Appeals had jurisdiction over taxpayer's appeal from district court's order denying his motion to unseal three probable cause affidavits supporting pre-indictment search warrants executed at his home, place of business, and storage unit; no criminal charges were pending against taxpayer when he filed his motions and thus the motion was not tied to any criminal


prosecution. U.S. Const. Amend. 4; Fed. R. Crim. P. 41.

2 **Criminal Law**  Preliminary or interlocutory orders in general

General rule that orders granting or denying pre-indictment motions to suppress are not a part of independent, immediately appealable proceedings is not absolute; only if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant can the proceedings be regarded as independent. U.S. Const. Amend. 4.

3 **Constitutional Law**  Access to Proceedings; Closure

In determining whether a First Amendment right of access to criminal proceedings exists, courts must determine: (1) whether the proceeding has historically been open to the public and press, and (2) whether public access plays a significant positive role in the functioning of the particular process in question. U.S. Const. Amend. 1.

4 **Constitutional Law**  Access to Proceedings; Closure

Under First Amendment right of access, the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one, and where the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. U.S. Const. Amend. 1.

5 **Records**  Court records




Although the common law right of access to judicial records is not absolute, the district court's discretion to seal the record of judicial proceedings is to be exercised charily.

5 Cases that cite this headnote

6 **Records**  Court records

Defining the precise scope of the common law right to access judicial records is a question of law, which is reviewed de novo.

2 Cases that cite this headnote

7 **Records**  Making and use of copies
Records  Access to records or files in general
Records  Court records

General, common law right to inspect and copy public records and documents, including judicial records and documents, is not absolute.

3 Cases that cite this headnote

8 **Records**  Court records

If the unsealing of pre-indictment warrant materials would threaten an ongoing investigation, a district court has discretion to make redactions prior to unsealing or, where necessary, to leave the materials under seal; the same is true where unsealing such materials might endanger or discourage witnesses from providing evidence or testimony, or where the publication of a warrant could damage an unindicted target's reputation while leaving no judicial forum to rehabilitate that reputation.

9 **Records**  Court records

A district court has discretion in determining whether the common law qualified right of access to judicial records and documents extends to pre-indictment search warrant materials, on a case by case basis, and in making that determination, a district court should balance the public's right to access judicial documents against interests favoring nondisclosure. U.S. Const. Amend. 4.

3 Cases that cite this headnote

10 Records  Court records

The Court of Appeals reviews a district court's decision to keep pre-indictment search warrant materials under seal for abuse of discretion. U.S. Const. Amend. 4.

11 Records  Court records

Lack of factual findings precluded Court of Appeals from discerning whether district court abused its discretion in determining that taxpayer was not entitled to unseal probable cause affidavits for pre-indictment search warrants of taxpayer's home, business, and storage unit, under common law right of access to judicial records, and thus remand for district court to make explicit findings as to the necessity of keeping the documents sealed was warranted; district court did not conduct case-specific balancing of the public's qualified right of access against the interests favoring nondisclosure. U.S. Const. Amend. 4; Fed. R. Crim. P. 41.

***386** Appeal from the United States District Court for the Southern District of Texas

Attorneys and Law Firms

***387** Carmen Castillo Mitchell, Assistant U.S. Attorney, U.S. Attorney's Office, Houston, TX, for Plaintiff-Appellee.

Michael Louis Minns, Ashley Blair Arnett, Houston, TX, for Appellant.

Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, * District Judge.

Opinion

XAVIER RODRIGUEZ, District Judge:

On the basis of sealed probable cause affidavits, the Government obtained and executed three pre-indictment search warrants of Appellant Justin Smith's home, business, and storage unit in March and April of 2016. Smith filed motions in the district court seeking to unseal the affidavits supporting these warrants. The Magistrate Judge initially granted the motion in part, requiring the Government to submit proposed redacted versions of the affidavits to be unsealed. The Government objected but complied. The Magistrate Judge found that the Government redacted too much from the affidavits and submitted its own redacted versions that would be unsealed after fourteen days if the Government did not object. The Government brought its objections to the district court, which reversed the Magistrate Judge because unsealing the affidavits would compromise the Government's ongoing investigation. Smith appealed. He still has not been indicted.

Because the district court failed to specify its factual findings with requisite detail in the context of the required balancing test, the judgment of the district court is VACATED and REMANDED for further findings on the decision to leave the affidavits under seal.

BACKGROUND

The background of this appeal is almost entirely procedural. By his appeal, Appellant Justin Smith challenges the district court's denial of his motions to unseal the probable cause affidavits supporting three pre-indictment search warrants.

Over several weeks in March and April 2016, as part of a criminal tax investigation, IRS agents obtained and executed three search warrants at

properties related to Smith—the first at the commercial airplane hangar of his business, the second at his home, and the third at his storage unit. Relying on Federal Rule of Criminal Procedure 41, Smith filed three separate motions shortly after each warrant was executed, primarily seeking to unseal the probable cause affidavits supporting the warrants. On April 20, 2016, the motions were consolidated before the Magistrate Judge who issued the first of the three warrants.

On May 20, 2016, the Magistrate Judge issued a Memorandum, Recommendation and Order, granting Smith's motions in part and partially unsealing the affidavits while allowing the Government to redact certain information that would readily identify witnesses and other confidential sources. The Government, indicating that it planned to object to the Magistrate Judge's order, sought to stay the order and later asked for reconsideration. The Magistrate Judge denied both requests and ordered the Government to file proposed redacted versions of the affidavits under seal, along with supplemental briefing, by June 10. The Government complied.

On July 18, the Magistrate Judge issued a Memorandum and Order in which she found the Government's redactions too extensive. The Magistrate Judge issued her ³⁸⁸ own redacted versions of the affidavits, to remain under seal for fourteen days to allow the Government to object. On July 29, the Government objected to the Magistrate Judge's May 20 and July 18 decisions.

On August 17, the district court sustained the Government's objections and reversed the Magistrate Judge, ordering that the affidavits

remain fully sealed during the pendency of the Government's investigation. The district court focused on the existence of a common law right of access to documents. Amidst a circuit split on the precise scope of that right, the district court was "reticent to create such a right, absent Fifth Circuit guidance." The district court, condoning the views of the Ninth Circuit, expressed hesitation over creating such a right where it could impede pre-indictment investigations and require a wasteful line-by-line review of affidavits by a magistrate judge.

Smith filed a timely notice of appeal of the district court's order.

DISCUSSION

This Court first assesses the Government's argument that there is no jurisdiction to hear this appeal. After concluding it has jurisdiction, the Court turns to the merits of Smith's appeal by first determining the legal standard that applies to an individual's request for pre-indictment search warrant materials under the common law right of access, and then assessing whether the district court properly applied this test. The Court concludes that such requests for access must be assessed on a case-by-case basis by balancing the public's right of access with interests favoring nondisclosure and that the judgment of the district court must be vacated and remanded for further factual findings in the context of this balancing test.

I. This Court has jurisdiction.

¹ The Government argues that there is no jurisdiction under 28 U.S.C. § 1291, which gives circuit courts jurisdiction over "appeals from all final decisions of the district courts of the United States." The Government asserts that the district court's rulings on Smith's motions were interlocutory and not final because orders

“granting or denying a pre-indictment motion to suppress do[] not fall within any class of independent proceedings otherwise recognized by [the Supreme Court].” *Di Bella v. United States*, 369 U.S. 121, 129, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962). Under *Di Bella*, the Government argues that Smith's motions are functionally pre-indictment motions to suppress, and the suppression issue is interlocutory because it is subsumed by the overarching possibility of a forthcoming criminal trial.

² Notably, however, the general rule of *Di Bella*—that orders granting or denying pre-indictment motions to suppress are not a part of independent, immediately appealable proceedings—is not absolute: “Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.” *Id.* at 131–32, 82 S.Ct. 654.

As Smith correctly points out, numerous cases have found that similar motions to unseal documents (contrasted with suppression motions) are final and appealable. In *In re Search Warrant for Secretarial Area Outside Office of Gunn*, the Government executed numerous search warrants, and a newspaper publisher filed Rule 41 motions with the district court to unseal affidavits in support of these warrants. 855 F.2d 569, 571 (8th Cir. 1988). The district court denied the motions and allowed the affidavits to remain sealed for up to thirty additional days. *Id.* On appeal, the Eighth Circuit squarely addressed the immediate appealability of orders such as the district ³⁸⁹ court's, concluding that they were final orders:

The district court order denied appellants' motion to unseal and thus conclusively rejected appellants' asserted right to immediate access to these documents. Deferral of appellate review pending district court reconsideration after 30 days, or until after additional extensions of time have expired, would effectively deny appellants much of the relief they seek, that is, immediate access.

Id. After concluding that the orders were final and appealable, the court noted that the collateral order exception did not apply to make the orders immediately appealable on this basis because "there is no 'underlying' proceeding in this case. The district court order is not a component of another proceeding." *Id.* at 572.

More squarely to the Government's position that Smith's motions are de facto motions to suppress and unappealable under *Di Bella*, Smith cites *United States v. Pantelidis*, 335 F.3d 226 (3d Cir. 2003). There, the Third Circuit held that it had jurisdiction to hear an appeal of a district court's denial of a Rule 41 motion to return property based on the exception set forth in *Di Bella*. *Id.* at 233–34. The court recognized that the movant sought strictly the return of the property rather than the suppression of its evidentiary value. *Id.* Smith cites several other cases similar to *Pantelidis* and *Office of Gunn* on the jurisdictional question. See, e.g., *Times Mirror Co. v. United States*, 873 F.2d 1210, 1212 (9th Cir. 1989) ("This court's jurisdiction to review the district courts' orders denying access rests on 28 U.S.C. § 1291 ... Each of the orders

denying access 'finally adjudicated the matter presented to the district court and was not a mere component of a different proceeding.' ”).

Finally, the cases cited by the Government in support of its application of *Di Bella* are distinct. In *United States v. Furina*, 707 F.2d 82, 84 (3d Cir. 1983), the court dismissed an appeal of an order denying a Rule 41 motion for lack of jurisdiction where “[a]ppellants ... made it very clear that they seek more than return of property. Suppression of evidence is the primary aim of their motions, and that is enough under *Di Bella* to require that on this record the appeal be dismissed.” Other Third Circuit cases relied upon by the Government reached similar conclusions about an appellant's Rule 41 motion for the return of property based in large part on the implicit, if not express, intention of suppressing evidence. In *Meister v. United States*, 397 F.2d 268, 269 (3d Cir. 1968), the court found that where an appellant sought the return of documents and an injunction preventing their future use against him, “the whole tenor of the amended complaint ma[de] it abundantly clear that the prime, if not sole, purpose of the amended complaint was to prevent the use of such records in potential criminal or civil proceedings against plaintiff.” See also *In re Grand Jury*, 635 F.3d 101, 105 (3d Cir. 2011) (“Although the appellant's motion could have sought solely the return of property, in fact it did not: it sought both the return of property and the suppression of evidence. Accordingly, the order denying the motion is not final and appealable under *Di Bella*.”).

Under the exception of *Di Bella*, this Court has jurisdiction. 369 U.S. at 131–32, 82 S.Ct. 654 (“Only if the motion is solely for return of

property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent.”). A warrant issued pre-indictment is, by definition, issued before criminal charges are filed—there were no criminal charges pending against Smith when he filed his initial motions, when the district court denied his motions, when he appealed these motions, and at present. Furthermore, Smith expressly *does not* seek the suppression of [390] evidence. Nor could he—as stated, no prosecution presently exists in which he could seek suppression (even a year after the initial execution of the warrants). For these reasons, the exception of *Di Bella* applies and jurisdiction exists.

II. The judgment of the district court is vacated and remanded for further factual findings.

[3] [4] [5] Turning to the merits of his appeal, Smith argues that he has a common law right to access the affidavits supporting the pre-indictment warrants. Blue Br. at 9–23. Notably, he does *not* argue that the First Amendment grants him a right of access to the documents, which is an issue frequently litigated in similar cases.¹ See, e.g., *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64–66 (4th Cir. 1989) (finding that a newspaper publisher seeking to unseal pre-indictment search warrant affidavits could not invoke the qualified First Amendment right of access but recognizing the publisher’s common law right of access).

We hold that the qualified common law right of access can extend to an individual seeking to access pre-indictment search warrant materials, and the decision of whether access should be granted must be left to the discretion of the district court, upon the court’s consideration of “the relevant facts and circumstances of the

particular case.” *Nixon*, 435 U.S. at 599, 98 S.Ct. 1306. Though the district court purported to conduct this case-specific analysis, its findings evade meaningful appellate review because they are too conclusory and lack detail, as this circuit and other circuits have required in similar situations. For these reasons, the judgment of the district court is vacated and remanded for further factual clarification.

a. The qualified common law right of access must be assessed on a case-by-case basis.

i. Standard of Review

6 Defining the precise scope of the common law right to access judicial records ³⁹¹ is a question of law, which is reviewed *de novo*. *Times Mirror Co.*, 873 at 1212 (“[T]he question[] whether the common law provides the public with a qualified right of access to warrant materials ... [is] ... [a] question[] of law, requiring *de novo* review.”).

ii. Case Law

7 There is a general, common law right to inspect and copy public records and documents, including judicial records and documents, but this right is not absolute. *Nixon*, 435 U.S. at 597–99, 98 S.Ct. 1306. The scope of this qualified right of access is the primary issue in this appeal, as the parties dispute whether it encompasses access to warrant materials during a pre-indictment investigation.

We have not squarely addressed the precise scope of the qualified common law right of access to judicial records as it applies to pre-indictment warrant materials. Other circuits that have addressed the question have reached conflicting conclusions. Despite not speaking to this precise issue, the Fifth Circuit has decided several cases on the qualified right of access in more general terms, and these decisions are

instructive for analyzing the application of that right in this case.

1. *Times Mirror Co. v. United States*

The Ninth Circuit takes a bright line position on the public's common law qualified right of access to judicial records: the right simply does not extend to pre-indictment warrant materials. In *Times Mirror*, district courts in California issued five warrants related to a national fraud and bribery investigation based on sealed probable cause affidavits. 873 F.2d at 1211. Several media organizations filed separate civil actions in the respective district courts seeking to unseal the warrant materials. *Id.* at 1211-12. The district courts ultimately denied the requests and the media organizations appealed, arguing that the warrant materials should be unsealed under either Rule 41(g), a First Amendment qualified right of access, and most relevant for present purposes, the common law qualified right of access. *Id.* at 1212.

The Ninth Circuit affirmed the district courts. *Id.* at 1221. The Ninth Circuit noted that, based on its precedent, the right does not extend to *all* judicial and quasi-judicial documents. *Id.* at 1219. The court added that none of its previous cases "recognized a common law right of access to judicial records when there is neither a history of access nor an important public need justifying access." *Id.* After announcing this standard, the court concluded that it could never be satisfied in the pre-indictment context: "Under this important public need or 'ends of justice' standard, appellants' claim must be rejected. We believe this threshold requirement cannot be satisfied while a pre-indictment investigation is ongoing." *Id.*

To justify its *per se* ban on using the common law right of access to unseal pre-indictment warrant materials, the Ninth Circuit incorporated its reasoning regarding the First Amendment qualified right of access. *Id.* That discussion focused on the potential for public access to hinder rather than facilitate the warrant process and any accompanying criminal investigations. *Id.* at 1215. Analogizing to grand jury proceedings, which were held in secret, the court identified three main risks of allowing warrant proceedings and pre-indictment warrant materials to be made public. *Id.* at 1215–16. First, those under investigation could “destroy evidence, coordinate their stories before testifying, or even flee the jurisdiction.” *Id.* at 1215. Second, those who provided testimony in support of a warrant's issuance might be placed in danger or chilled from providing this testimony ³⁹² in the first place. *Id.* Finally, those named in a warrant may never be charged with a crime, but publicizing warrant materials could tarnish their reputations in the public's view and leave them without a forum in which to exonerate themselves. *Id.* at 1215–16. In sum, the Ninth Circuit stated “the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials in the midst of a pre-indictment investigation into suspected criminal activity.” *Id.* at 1219.

2. *Baltimore Sun Co. v. Goetz*

The Fourth Circuit requires a case-by-case determination of how the common law qualified right of access applies to pre-indictment warrant materials. The facts of *Baltimore Sun* are similar to those of *Times Mirror*—a newspaper publisher filed a motion with the district court to unseal a search warrant affidavit. 886 F.2d at 62. While the appeal was pending, a grand jury returned

indictments based on the warrant and a magistrate judge unsealed the affidavit at the Government's request. *Id.* at 63.

After first concluding that the appeal was not moot in light of the unsealing of the affidavit, the Fourth Circuit then made the threshold finding that the warrant affidavit was a judicial record because a judicial officer must review the affidavit, the judicial officer's review is then subject to challenge through a motion to suppress, and the Rules of Criminal Procedure require the resulting warrant and all related papers to be filed with the clerk of the district court. *Id.* at 63–64. From there, the court agreed with the Ninth Circuit in *Times Mirror* and determined that the press did not have a First Amendment right of access to the warrant affidavit, even though a warrant affidavit was a judicial record. *Id.* at 64–65.

As in *Times Mirror*, the Fourth Circuit in *Baltimore Sun* then conducted a separate analysis as to whether the affidavit should be unsealed based on the common law qualified right of access. *Id.* at 65–66. Here, the Fourth Circuit departed from the Ninth Circuit by vacating the district court's decision not to unseal the affidavit.² *Id.* The Fourth Circuit distinguished grand jury proceedings from the disclosure of warrant materials, pointing out that the Rules of Criminal Procedure expressly govern the secrecy of grand jury proceedings but the same is not true of warrant proceedings. *Id.* at 65. Relying on the Supreme Court's decision in *Nixon*, the court adopted a case-by-case approach to the unsealing of pre-indictment warrant materials:

[T]he common law qualified right of access to the warrant papers is committed to the sound discretion of the judicial officer who issued the warrant. Taking into consideration, as *Nixon* requires, all of the relevant facts and circumstances, the officer may file all or some of the papers under seal for a stated time or until further order. Or, as frequently is done, he may conclude that the circumstances do not justify secrecy. The judicial officer's decision to seal, or to grant access, is subject to review under an abuse of discretion standard.

Id.

The court then explained the standard that the district court should apply in any given case for determining whether to unseal a warrant affidavit. *Id.* The court stated that the Government may properly ask to seal warrant materials, and the district court may properly grant that request by adopting the Government's facts where appropriate. ^[*393] *Id.* And on a subsequent request to unseal, “[t]he judicial officer may deny access when sealing is ‘essential to preserve higher values and is narrowly tailored to serve that interest.’” *Id.* at 65–66 (quoting *Press-Enterprise Co.*, 464 U.S. at 510, 104 S.Ct. 819). In appropriate circumstances, narrow tailoring may require providing access to some documents or redacted documents. *Id.* at 66.

The Fourth Circuit noted that the district court erred by refusing to grant access to the

Government's proposed redacted version of the affidavit. *Id.* The court criticized the district court for not citing the affidavit with specificity and instead making only conclusory assertions that the public interest of the investigation outweighed the newspaper publisher's right of access. *Id.*³

3. Fifth Circuit Guidance

As noted, the Fifth Circuit has not spoken to the precise question addressed in *Times Mirror* and *Baltimore Sun*—whether the common law right of access to judicial documents extends to pre-indictment warrant materials. This Court has, however, spoken to different questions implicating that qualified right in other situations, and substantial guidance can be gleaned from these decisions.

S.E.C. v. Van Waeyenberghe involved the SEC's civil injunctive action against a defendant for violations of federal securities laws. 990 F.2d at 847. During a settlement hearing, the parties successfully settled but disagreed as to whether the resulting settlement agreement should be sealed. *Id.* After the parties unsuccessfully tried to resolve this dispute, the district court *sua sponte* sealed the entire case and the parties finalized their settlement with the SEC objecting to the sealing. *Id.* The district court signed a final order of permanent injunction and attached the consent decree to it before indicating that it would entertain the SEC's motion to unseal all of the case except for the final order. *Id.* The SEC filed such a motion, which the district court granted. *Id.* Later, the district court sealed the transcript of the settlement hearing. *Id.* The SEC appealed the district court's sealing of the final order and transcript. *Id.*

This Court recognized that “[a]lthough the common law right of access to judicial records is not absolute, ‘the district court’s discretion to seal the record of judicial proceedings is to be exercised charily.’ ” *Id.* at 848. In addition, the Court acknowledged that “access has been denied where court files might have become a vehicle for improper purposes.” *Id.* In exercising discretion to seal judicial records, this Court advised that district courts “must balance the public’s common law right of access against the interests favoring nondisclosure.” *Id.* In conducting this balance, the Court said, a district court should take stock of “[t]he presumption in favor of the public’s common law right of access to court records,” which applies so long as a document is a judicial record. *See id.* at 849 (finding that the settlement agreement filed with the court was a judicial document and therefore was entitled to this presumption of public access). For clarity, though, the Court pointed out that the Fifth Circuit has not assigned a particular weight to the presumption in favor of access, unlike some other circuits which have characterized it as “strong” or others ³⁹⁴ which reduce it to “one of the interests to be weighed.” *Id.* at 848 n.4.

Applying these principles, the Fifth Circuit found that the district court abused its discretion, reversing and remanding for further proceedings. *Id.* at 850. Initially, this Court briefly pointed out that the district court did not apply the presumption in favor of public access to judicial records. *Id.* at 849. In addition, the Court criticized the district court’s failure to “articulate any reasons that would support sealing the final order.” *Id.* The district court acknowledged that the public had a right to know that the defendant had been enjoined from certain

conduct as a result of the SEC's action, but the defendant argued that this right would be protected by regulations requiring the defendant himself to disclose the injunction. *Id.* The Fifth Circuit found this reliance on regulatory disclosures misplaced because the right of access applies to the records which contain information, not simply the information itself: "The public's right to information does not protect the same interests that the right of access is designed to protect. 'Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.'" *Id.* (quoting *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3d Cir. 1988) (alterations in original)).

Later, in *United States v. Chavis*, this Court found that the district court did not abuse its discretion in balancing the public's common law right of access against the interests favoring nondisclosure by redacting portions of a sentencing memorandum, pointing to the "very specific" nature of the district court's order. 111 F.3d 892 (5th Cir. 1997) (unpublished) (citing *Van Waeyenberghe*, 990 F.2d at 848).

Even more recently, this Court applied *Van Waeyenberghe* to a third-party movant's appeal from a district court's order, in which the movant argued that because the order was issued under seal, it did not afford the movant a sufficient remedy for the violation of its rights. In *United States v. Holy Land Foundation for Relief and Development*, 624 F.3d 685, 688 (5th Cir. 2010), a grand jury issued an indictment charging the defendants with engaging in a criminal

conspiracy to provide support to Hamas. Attached to its pre-trial brief, the Government provided a list of “Unindicted Co-conspirators and/or Joint Venturers,” which included the North American Islamic Trust (the “Trust”), the aforementioned third-party movant. Unlike the order, the list of unindicted co-conspirators was not filed under seal. *Id.* The Trust, which was not indicted and took issue with being named a coconspirator, filed a motion with the district court, arguing that its Fifth Amendment rights were violated by the unsealed list of co-conspirators; the Trust's motion further sought relief, including “a public declaration that its rights had been violated [and] the expungement of its name from any public document filed or issued by the Government identifying [the Trust] as an unindicted coconspirator...” *Id.* The district court granted the Trust's motion in part in an opinion filed under seal. The court found that the Trust's Fifth Amendment rights had been violated and ordered the sealing of the list of unindicted co-conspirators, but it declined to expunge the Trust's name from the list of co-conspirators. The Trust appealed, contending that the district court abused its discretion by sealing this opinion. *Id.* at 689.

Emphasizing that the common law right of access promotes the trustworthiness of the judicial system, this Court reversed the district court's order which sealed its opinion. *Id.* at 690–91. Though both parties ³⁹⁵ speculated as to the district court's motivations for sealing the opinion, the effect of the court's order “was to leave [the Trust] hamstrung in its ability to mitigate the damage done by its public identification as a possible coconspirator in the activities of the [indicted defendants].” *Id.* at 690. And because there were no countervailing

government interests favoring the opinion being sealed, the Court reversed. *Id.* at 691.

iii. Discussion

In the Fifth Circuit, the common law right of access to judicial records has consistently been addressed on a case-by-case basis, indicating that this Court should adopt such an approach in the context of pre-indictment warrant materials. In all of the major cases discussed above, the Fifth Circuit has left the decision to seal judicial records to the discretion of the district court. And in so doing, the Fifth Circuit has consistently required the district court to explain its decisions to seal or unseal. *Van Waeyenberghe*, 990 F.2d at 849 (“We find no evidence in the record that the district court balanced the competing interests prior to sealing the final order. First, the district court made no mention of the presumption in favor of the public's access to judicial records. Second, the district court did not articulate any reasons that would support sealing the final order.”); *Holy Land Foundation*, 624 F.3d at 690 (“Here, the district court did not explain why it chose to seal its opinion and order holding that [the Trust's] rights were violated.”).

⁸ Underscoring this conclusion, the policy justifications that concerned the Ninth Circuit in *Times Mirror* are not at all diluted by a case-specific approach. In any given case, the discretion of the district court protects these interests, as this Court has repeatedly emphasized; in other words, this Court has consistently trusted district courts to exercise their discretion to determine when court files “might ... become a vehicle for improper purposes.” *Van Waeyenberghe*, 990 F.2d at 848. If the unsealing of pre-indictment warrant materials would threaten an ongoing

investigation, the district court has discretion to make redactions prior to unsealing or, where necessary, to leave the materials under seal. The same is true where unsealing such materials might endanger or discourage witnesses from providing evidence or testimony, or where the publication of a warrant could damage an unindicted target's reputation while leaving no judicial forum to rehabilitate that reputation.

The final reasons for extending the Fifth Circuit's general approach and adopting the Fourth Circuit's reasoning from *Baltimore Sun* are the affirmative policy justifications behind the common law right of access to judicial documents. This Court in *Van Waeyenberghe* acknowledged that the right of access promotes the trustworthiness of the judicial process, curbs judicial abuses, and provides the public with a better understanding of the judicial process, including its fairness. *Id.* at 849. The right serves as a “check[] on the integrity of the system.” *Id.* at 849–50 (quoting *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (alterations original)); see also *Holy Land Foundation*, 624 F.3d at 690 (“ ‘Public confidence [in our judicial system] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view.’ ” (quoting *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir. 2008)) (alterations in original)). A case-by-case approach to pre-indictment warrant materials gives the district court discretion in balancing the legitimate interests ^{*396} against public access against the public's interests supporting access.

⁹ In sum, we extend the case-by-case approach previously used by this Court for assessing the common law qualified right of access to judicial records to situations involving an individual's request to access pre-indictment warrant materials such as the affidavits in this case. In cases involving a request to unseal affidavits in support of pre-indictment search warrants, district courts should exercise their discretion by balancing the public's right to access judicial documents against interests favoring nondisclosure. *Van Waeyenberghe*, 990 F.2d at 848.

b. The district court abused its discretion by finding that the pre-indictment warrant materials here should remain sealed without making sufficient factual findings.

Having extended a qualified right of access to pre-indictment warrant materials, the Court now turns to whether the district court properly found that the pre-indictment warrant affidavits in this case should remain sealed.⁴

i. Standard of Review

¹⁰ Because the decision as to access is one left to the sound discretion of the trial court, the Fifth Circuit reviews the district court's decision to keep the search warrant affidavits under seal for abuse of discretion. *Id.* at 848 (citing and quoting *Nixon*, 435 U.S. at 598–600, 98 S.Ct. 1306).

ii. The District Court's Opinion

The district court's opinion discussed many of the cases cited above. Without making clear which of these standards it purported to apply, the district court stated:

[T]he court has reviewed the unsealed affidavit in Cause Number 16-mj-409 and the corresponding affidavits that were redacted by

either the Government or, line by line, by the Magistrate Judge, and the court finds that there is a substantial probability that the investigation will be compromised if the affidavit is unsealed.

Going further, the district court noted the unsettled nature of the law in the Fifth Circuit on the common law right of access to pre-indictment warrant materials, along with the circuit split between the Ninth and Fourth Circuits. The district court “like the Ninth Circuit, ha[d] concerns that ‘the ends of justice would be frustrated, not served, if the public were allowed access to warrant materials in the midst of a pre-indictment investigation into suspected criminal activity.’” Additionally, the district court believed that a magistrate judge's line-by-line review to determine which information in a warrant affidavit should be unsealed was a waste of judicial resources, “particularly since the government officials conducting the investigation are better equipped to determine what disclosures could be detrimental to the investigation.”

iii. Discussion

As an initial matter, it is unclear whether the district court applied the proper case-by-case standard. The court briefly noted that “there is a substantial probability that the investigation will be compromised if the affidavit is unsealed” based on ³⁹⁷ a review of the affidavits and redacted versions before a longer discussion of why a case-by-case assessment of the materials seemed inappropriate. Notwithstanding its brief reference to the specific investigation from which this case stems, the district court did not apply the *Van Waeyenberghe* factors by conducting a case-specific balancing of the

public's qualified right of access against the interests favoring nondisclosure.

11 Assuming that the district court assessed the affidavits in this case under *Van Waeyenberghe*, its opinion does not contain the requisite specificity. The Fourth Circuit's opinion in *Baltimore Sun* advised that a district court must review the individual affidavits in order to “make findings and conclusions specific enough for appellate review.” 886 F.2d at 66. This requirement of specificity from district courts is consistent with the value that the Fifth Circuit has placed on detailed, clear, and specific findings made by a district court in sealing or unsealing an order. See, e.g., *Chavis*, 111 F.3d at 892 (finding that a district court did not abuse its discretion because, in large part, “[t]he district court's order [was] not general in nature, but [was] very specific to particular information, in one particular document, in this defendant's sentencing proceeding”).

This is not to say that a district court must go to painstaking lengths to review pre-indictment warrant materials, detailing factual findings on each line of every affidavit. This Court is sensitive to the district court's concern over the judicial resources that would have to be expended if that much detail were unilaterally required. As a result, the requisite degree of specificity will vary from case to case, but in most cases, a district court should at least “articulate any reasons that would support sealing [a judicial document],” *Van Waeyenberghe*, 990 F.2d at 849, or “explain why it chose to seal [a judicial document],” *Holy Land Foundation*, 624 F.3d at 690.

The findings made by the district court in this case are bare—the entire case specific balance of

the right of access against interests favoring nondisclosure is the statement that “there is a substantial probability that the investigation will be compromised if the affidavit is unsealed.” While the district court need not conduct an exhaustive assessment, it must generally articulate its reasons to support sealing the affidavits with a level of detail that will allow for this Court’s review.⁵

Where a district court’s lack of factual findings has left this Court “unable to discern ... whether it was an abuse of discretion” to leave a judicial document under seal, this Court has previously remanded so that the district court could “make explicit findings as to the necessity of keeping” that document sealed. *Test Masters*, slip op. at 3-4. Given the district court’s failure to conduct the balancing required by *Van Waeyenberghe*, a remand for similar purposes is appropriate here. Accordingly, the judgment of the district court is vacated and this case is remanded 398 for further factual findings under the *Van Waeyenberghe* balancing test.

Vacating and remanding the district court’s judgment is Smith’s second choice, as he would rather have the district court’s order reversed and the affidavits unsealed outright. In this regard, he relies on ④ *Breidenbach v. Bolish*, 126 F.3d 1288 (10th Cir. 1997), *overruled on other grounds as stated in* *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001). The plaintiffs, whose homes were the targets of search warrants, sued an FBI agent, alleging that he recklessly or knowingly made false statements in affidavits supporting the warrants. ④ *Id.* at 1290–91. The Tenth Circuit affirmed the district court’s qualified immunity-based dismissal of the *Bivens* claim against the agent, reasoning that the plaintiffs

did not allege sufficient facts (many of which were unavailable because they appeared in the sealed affidavits) regarding the objective reasonableness of the agent's actions. ⁴ *Id.* at 1292–93. The court also recognized the “Catch–22” caused by this result: without access to the sealed warrant materials, the plaintiffs could not be expected to make more detailed allegations relating to those affidavits (and may even subject counsel to sanctions for presenting pleadings without evidentiary support). ⁴ *Id.* at 1293–94. According to the court, the plaintiffs did not, however, “pursue every possible avenue to obtain the necessary facts to support their legal claims prior to filing a complaint in federal court.” ⁴ *Id.* at 1294. For this reason, the court suggested an alternative procedural path: seek “an order from the judge who sealed the affidavit to allow an unsealing or limited unsealing of the affidavit for use in preparing their civil complaint,” and appeal any denial of that request. ⁴ *Id.* at 1294.

⁴ *Bolish* does not warrant outright unsealing in this case. The procedural route Smith chose here is precisely what the ⁴ *Bolish* court recommended—ask the district court to unseal the affidavit and appeal a denial of that decision if necessary. As discussed above, without more detailed findings from the district court regarding the reasons for keeping the warrant materials sealed, this Court cannot properly assess those materials and the impact of unsealing them; the district court is in the best position to conduct the required balancing test. As a result, Smith's procedural path to obtaining the affidavits may be slowed by a remand of this action, but the ultimate relief he seeks is still entirely available.

CONCLUSION

For the foregoing reasons, the judgment of the district court is VACATED and this case is REMANDED for a case-by-case analysis and a sufficiently detailed factual assessment.

All Citations

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Footnotes

- * District Judge of the Western District of Texas, sitting by designation.
- 1 The First Amendment right of access and the common law qualified right of access differ in significant ways. The First Amendment right of access stems from the historical practice of opening criminal trials to the public. “[T]he circumstances under which the press and public can be barred from a criminal trial are limited; the State’s justification in denying access must be a weighty one. Where ... the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 509–10, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–07, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982)). To guide the determination of whether a First Amendment right of access exists, the Supreme Court has established a two-part inquiry: “(1) whether the proceeding has historically been open to the public and press; and (2) ‘whether public access plays a significant positive role in the functioning of the particular process in question.’” *In re Hearst Newspapers, LLC*, 641 F.3d 168, 175 (5th Cir. 2011) (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)).

Even absent a finding of a First Amendment right of access, the Supreme Court has articulated a qualified right of access to judicial documents that is born from the common law. In *Nixon v.*

Warner Communications, Inc., 435 U.S. 589, 597–99, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), the Court recognized that the public has a right “to inspect and copy public records and documents; including judicial records and documents” which “is not absolute.” Further, “[a]lthough the common law right of access to judicial records is not absolute, ‘the district court’s discretion to seal the record of judicial proceedings is to be exercised charily.’” *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845 (5th Cir. 1993) (quoting *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987)).

- 2 Because the affidavit had already been unsealed, however, the court found that further proceedings in the district court were unnecessary. *Baltimore Sun*, 886 F.2d at 66.
- 3 In *Office of Gunn*, the Eighth Circuit also took a case-specific approach to a request to unseal pre-indictment search warrant affidavits, though its analysis applied only the standard for the First Amendment right of access without differentiating the standard for the common law right of access. 855 F.2d at 574–75.
- 4 A gateway question—whether the warrant materials are judicial records—is not an issue on this appeal. See *Baltimore Sun*, 886 F.2d at 63–64 (concluding that pre-indictment search warrant materials are judicial records); *Van Waeyenberghe*, 990 F.2d at 849 (concluding that the settlement documents, final order, and transcript were judicial records).
- 5 To the extent that the district court would have difficulty explaining its reasoning without disclosing sensitive information from the affidavits, it may file its reasoning under seal. See *Baltimore Sun*, 886 F.2d at 65 (“The judicial officer may explicitly adopt the facts that the government presents to justify sealing when the evidence appears creditable. But the decision to seal the papers must be made by the judicial officer; he cannot abdicate this function. If appropriate, the government’s submission and the officer’s reason for sealing the documents can be filed under seal.” (internal citations omitted)). Alternatively, the district court may find it appropriate to unseal some of the warrant materials or unseal redacted versions. *Id.* at 66; *Test Masters Educ. Servs., Inc. v. Robin Singh Educ.*

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Gordon, Justin

From: Gordon, Justin
Sent: Tuesday, January 14, 2020 5:29 PM
To: Bangert, Ryan
Subject: Draft: OR2019-33291 Reconsideration - Follow Up

Ryan, pasted below is a draft of the breakdown you requested on the OR2019-33291 reconsideration request involving the Texas State Securities Board.

- Justin

1) Timeline:

- 9/9/19: Request received by Texas State Securities Board (the "Board").
- 9/20/19: Board released some information to requestor, requested an OAG ruling on some information, and notified the requestor that other information was withheld pursuant to a previous determination.*
- 9/20/19: Board's initial decision request and briefing received by ORD.
- 9/27/19: Board follow up brief received by ORD.
- 10/4/19: Requestor's first brief received by ORD.
- 10/4/19: Requestor's second request, which specifically sought FBI NDA, received by Board.
- 10/16/19: Board's third brief received by ORD.
- 10/16/19: Board's brief regarding second request received by ORD and added to pending file.
- 10/30/19: Requestor's second brief received.
- 10/30/19: FBI brief regarding requested NDA received.
- 11/25/19: ORD issues ruling concluding information must be withheld.
 - Link to ruling: <https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2019/pdf/or201933291.pdf>
 - We concluded that the information identified by the Board was confidential under its broad confidentiality provision in Article 581-28(A) of the Texas Securities Act. We also concluded that the FBI NDA must be withheld under 552.101 in conjunction with federal law (552.(b)(5) of FOIA).
- 12/17/19: Request for reconsideration from requestor received by ORD.

*Note: In 2004 the Board was granted a previous determination that permits it to withhold information "obtained" by the board in connection with an investigation to prevent or detect a violation of the Texas Securities Act or a board rule or order. That previous determination is linked below:

i. [or200400239.pdf](#)

- 2) Search warrant background: Our office generally treats executed search warrants as public court records that are "super-public" information under Government Code section 552.022(a)(17). However, based on a determination made in 2007, we distinguish between the search warrants and the related search warrant affidavits. Beginning in 2007, our office stopped identifying search warrant affidavits as public court records subject to section 552.022(a)(17). This distinction is important because a document subject to section 552.022(a)(17) cannot be withheld under the 552.108 law enforcement exception (552.108 is a discretionary exception as opposed to a mandatory exception). Of note in this instance, we will not call out a search warrant or search warrant affidavit under section 552.022(a)(17) if it is sealed. Additionally, because information subject to section 552.022 can still be withheld under confidentiality exceptions, even if 552.022(a)(17) information cannot be withheld under 552.108, we will address the applicability of confidentiality provisions to

552.022(a)(17) information. The search warrants and affidavits we typically see are from state courts. However, I do not believe the above analyses would differ in the context of federal warrants.

- a. Example of files where 552.022(a)(17) is raised for a search warrant and thus information cannot be withheld under section 552.108:

<https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2019/pdf/or201934113.pdf>

<https://www2.texasattorneygeneral.gov/opinions/openrecords/51paxton/orl/2019/pdf/or201931522.pdf>

- 3) Approach for release of search warrant affidavit: As noted above, the Board submitted representative samples of information in its decision request. The submitted representative sample did not include a search warrant or search warrant affidavit. So, our office has not reviewed these records and we have no indication of what they contain. It also appears many of the records filed in this case are under seal. However, the federal court required release of the search warrant to the requestor, and it appears the requestor has access to the warrant itself. The unsealing order does not reference the affidavit. The Board's arguments apply generally to almost all of the submitted information. Only the Board's NDA with the FBI was excluded from its arguments. Thus, we can assume that the Board asserts all of the above listed arguments for the search warrant affidavit. Release of the affidavit would then require a pour out for each raised exception. Because the Board made broadly applicable arguments for the raised exceptions and submitted representative sample, but did not specifically apply them to the affidavit, the best approach would be to generally conclude that the broad arguments fail to establish the raised exceptions are applicable to the specific affidavit. This is the approach our office typically takes when an entity asserts a broadly applicable provision, but does not specifically apply the provision to the documents at issue. This conclusion would put the burden back onto the Board, which would then be required to file suit challenging this determination. Note that this approach does not take into account the possibility that the affidavit contains information that is confidential, and that our office is not aware of because we have not reviewed the document. This approach would also be complicated if the Board withheld the affidavit information under its 2004 previous determination.
- 4) Based on the procedural posture of this case there are numerous potential paths that it could take. Three potential paths are summarized below:
 1. Deny reconsideration. Requestor files mandamus against Board.
 - a. The requestor's reconsideration is currently pending and denial of the reconsideration would confirm that that the Board can continue to rely on our determination in OR19-33291.
 - b. The requestor does not have a deadline to file suit, and can assert his interest at any time. The requestor could assert any arguments against the Board.
 - c. Subject to section 552.326(b), the Board could only assert the exceptions it raised in its briefing to our office.
 - d. The OAG would not be a party to this lawsuit, but would likely represent the Board.
 - e. If the requestor substantially prevails, he would be entitled to attorney's fees.
 2. Requestor submits new request for search warrant affidavit (or other specific records that were not part of representative sample).
 - a. Assuming the Board believes its representative sample in OR2019-33291 was accurate, the Board may decide to deny any subsequent request for information covered by the representative sample by relying on OR19-33291 as a previous determination pursuant to 552.301(a). It is also possible that the Board withheld the warrant materials based on the previous determination in OR2004-0239

- i. In this instance, the requestor could file a mandamus action against the board under section 552.321, file a formal complaint with the Travis County District Attorney under section 552.3215, or file an informal complaint with our office.
 - b. If the Board does submit a new ruling, then our office would have the opportunity to review the document and determine whether the raised exceptions apply to the specific record.
 - c. If we order release, then the Board, or any other interested third party (ie: the FBI), could sue our office under sections 552.324 and 552.325.
 - d. If we order the information withheld, then the requestor could sue the Board as described in Path 1.
3. Grant reconsideration request and order Board to release specific records.
 - a. If we decide to reverse our earlier determination, we would need to amend OR2019-33291 by issuing an "A" ruling. This ruling could follow the approach listed above and would be issued to the Board and requestor.
 - b. Before issuing an amended ruling that orders the release of information, our office would likely have to review the information to ensure the released records do not contain confidential information. This would require our office to ask the Board to submit the information at issue to our office.
 - c. If the Board does not agree with the amended ruling, the Board would have 30 calendar days to file suit against our office. Any other interested third party could also file suit against our office. Administrative Law would defend our ruling and Financial Litigation would likely represent the Board.

THAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



RECEIVED

SEP 20 2019

OPEN RECORDS DIVISION

E. WALLY KINNEY
CHAIR

MIGUEL ROMANO, JR.
MEMBER

KENNY KONCABA
MEMBER

ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

OR. 798456.19
798456

September 20, 2019

ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Public Information Request Regarding Paul and World Class Capital
Group, LLC

Dear General Paxton:

On Friday, September 6, 2019, at 5:44 PM,¹ the Texas State Securities Board ("TSSB" or "Agency") received an open records request via email from Mr. Aaron Borden. A copy of the request showing the date and time it was received is enclosed and tabbed as **Item A**. Mr. Borden stated he was requesting a complete copy of all files, records, documents, correspondence, letters, communications, reports, or other information related to Mr. Paul and/or World Class Capital Group, LLC (sometimes also referred to as World Class Holdings) prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED] (the "named employee"). [REDACTED] is an investigator for the TSSB and in that capacity also serves as a Task Force Officer in the White Collar Crimes Squad with the Federal Bureau of Investigation (the "FBI") in Austin, Texas.

The Agency responded to the requestor to inform him of the costs to provide the public information in paper copies responsive to his request on September 17, 2019. The public information responsive to the request was provided to requestor electronically at no charge on September 20, 2019. The cover letter is enclosed and tabbed as **Item B**.

Other records responsive to the request are held by the Agency, but they were obtained in connection with an investigation. This Agency has received a prior determination ruling from your Office that covers these responsive records (ORD 2004-0239). These records were obtained by the TSSB pursuant to the Securities Commissioner's duty to conduct investigations to prevent or detect a violation of The Securities Act, Tex. Rev. Civ. Stat. Ann., Arts. 581-1 to 581-45 (West, Westlaw through 2019 R. Sess.) ("TSA"), or a Board

¹ The request was received on September 6, 2019, after close of business hours, which is 5:00 PM. Therefore, for purposes of counting days to request an open records decision from your Office, the receipt date was the next business day, which was September 9, 2019.

19-09202019-OAG Request_Borden PIA

rule or order and the Commissioner's authority to receive evidence under Section 28 of the TSA. All information received by the TSSB in connection with an investigation is confidential by law pursuant to Section 28 of the TSA. The Agency informed the requestor that responsive records covered by ORD 2004-0239 were withheld by the Agency pursuant to that prior determination.

Other records responsive to the request are held by the Agency, but they were made in connection with an investigation and are, therefore, considered to be within exceptions from public disclosure. These records were made by the TSSB pursuant to the Securities Commissioner's duty to conduct investigations to prevent or detect a violation of the TSA, or a Board rule or order. All information made by the TSSB in connection with an investigation is confidential by law pursuant to Section 28 of the TSA.

These Agency records are also excepted from public disclosure under Section 552.108 of the Texas Public Information Act, Tex. Gov't Code Ann., Arts. 552.001 to 552.353 (West, Westlaw through 2019 R. Sess.) ("PIA") because they deal with the "detection, investigation, or prosecution" of activity that may constitute a crime. Other records responsive to the request are excepted from disclosure under Section 552.101 of the PIA as they are confidential pursuant to the Federal Rules of Civil Procedure ("FRCP") or are confidential attorney-client communications.

In addition, certain of the records are excepted from public disclosure under Section 552.107(2) of the PIA because a court by order has prohibited disclosure of the information.

Pursuant to Section 552.301 of the PIA, we request a public information opinion regarding these records. Enclosed is a representative sample.

§552.101 - CONFIDENTIAL BY STATUTE - Section 28

Section 28 of the TSA provides:

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of this Act or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by this Act to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided however, that all information of every kind and nature received in connection with an investigation and ***all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential*** by the Commissioner and shall not be disclosed to the public except under the order of court for good cause shown....

Section 28 of the TSA protects investigative information maintained by this Agency from public disclosure for strong public policy reasons. For example, disclosure of this information may discourage persons from providing information relating to violations of the law, result in the depletion of funds obtained from the victims of securities fraud and additional violations of the TSA, prompt escape from the jurisdiction of the State by persons under investigation, and create potential harm or threat of harm to witnesses and complainants of fraudulent activities and other violations of the TSA, among other grave concerns. Disclosure of the internal notes, memoranda, reports, or communications that are part of an investigation would compromise the ability of the Agency to do its work and is not what the legislature intended when it passed Section 28 of the TSA.

Records Made in Connection with an Investigation

As has been previously mentioned, some of the records responsive to this request were *made* in connection with an investigation rather than *received* in connection with an investigation. In OR2010-15409, issued October 8, 2010, the OAG noted in footnote 4 that letters sent by the TSSB were outside the scope of the previous determination granted in OR2004-0239 regarding "information obtained" by the TSSB in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order, and could not be withheld on that basis. However, the OAG further concluded that the letters sent by the TSSB were "made" by the TSSB in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order and were therefore confidential under Section 28 of the TSA and must be withheld pursuant to Section 552.101 of the Government Code.

Some of the records responsive to this request were made by the named employee, who is an employee of the TSSB Enforcement staff, in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order. Other records responsive to this request were made by other Agency employees in connection with an investigation. The TSSB contends that these records are also information made confidential by statute pursuant to Section 28 of the TSA and must be withheld pursuant to Section 552.101 of the PIA. A representative sample of these records is enclosed and tabbed as **Items C1 through C7.**²

² Item C1 is an email from named employee to United States Department of Justice attorneys, with cc's to FBI agents. The Agency has provided third party notices to the United States Attorneys Office/ Department of Justice, Austin, TX office and to the FBI, Austin Texas Office pursuant to Section 552.305 of the PIA, whose proprietary interests may be affected by release of the information. Copies of the third parties notices are attached to this request for ruling as Items E1 and E2. Item C2 is an opening data sheet (ODS) for investigations prepared by the named employee and reported to the Agency's Enforcement Division for record keeping purposes. Item C3 is an email from the Agency's Director of Enforcement to Agency employees forwarding the ODS to them. Item C4 is an investigative work sheet filled out by an Agency employee to check names in an investigation. Item C5 is a screenshot of an inquiry made by an Agency employee to search the TX Secretary of State Business Entity Database for a particular entity name and the

As recently as August 18, 2017, in OR2017-18823, the OAG concluded that records made by this Agency in connection with investigations to prevent or detect a violation of the TSA or a Board order or rule are confidential under Section 28 of the TSA and are required to be withheld pursuant to Section 552.101 of the PIA.³ The TSSB contends that records represented by the enclosed samples are also information made confidential by statute pursuant to Section 28 of the TSA and must be withheld pursuant to Section 552.101 of the PIA.

Since the October 8, 2010 opinion noted the distinction between information "obtained" and information "made" in connection with an investigation, the TSSB has made more than a dozen⁴ requests for opinions relating to records prepared by the TSSB in connection with an investigation. In the interest of conserving limited state resources and improving efficiency of processing requests for public information, the TSSB respectfully requests that your office issue a predetermination letter finding that communications made in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order are confidential under Section 552.101 in conjunction with Section 28 of the TSA without the necessity of requesting a decision from the OAG.

In addition to **Items C1 through C7**, there are items responsive to the request that consist of search warrants, and related search warrant applications and affidavits that were submitted to and issued by the United States District Court. These items are discussed below under **EXCEPTION: CERTAIN LEGAL MATTERS- PIA SECTION 552.107**.

related search results generated by the database. Although the database is public, the search was made as part of an investigation and reveals possible targets of an investigation. Item C6 is an Enforcement Action Report prepared by the named employee. Item C7 is a preservation letter prepared by the named employee which was sent directing the recipient to preserve records in its possession in connection with an investigation.

³ Previous OAG opinions reaching the same conclusion regarding records made in connection with an investigation are: OR2014-21408 (November 23, 2014); OR2014-16067 (September 11, 2014); OR2014-18159 (October 9, 2014); OR2014-21408 (November 23, 2014); OR2014-00231 (January 3, 2014); OR2013-19039 (October 31, 2013); OR2013-19015 (October 31, 2013); OR2013-18306 (October 22, 2013); OR2013-13205 (July 31, 2013); OR2011-13511 (September 9, 2011); OR2011-13228 (September 14, 2011); OR2011-12619 (August 31, 2011); OR2011-11846 (August 16, 2011); OR2011-09402 (July 5, 2011); and OR2011-08429 (June 14, 2011); OR2011-05011 (April 11, 2011); OR2011-02964 (March 1, 2011); and OR2011-01807 (February 7, 2011).

⁴ The OAG declined to issue a prior determination for records "made in connection with" a Section 28 investigation although requested to by the TSSB in: OR2014-21408; OR2014-16067; OR2014-18159; OR2014-21408; OR2014-00231; OR2013-19039; OR2013-19015; OR2013-18306; OR2013-13205; OR2011-13511; OR2011-13228; OR2011-12619; OR2011-11846; OR2011-09402; OR2011-08429; OR2011-01807; and OR2011-05011.

§552.101 - CONFIDENTIAL BY LAW - Federal Rules of Civil Procedure

In addition to **Items C1 through C7**, the responsive records include federal grand jury subpoenas. The Agency does not have possession or custody of these records, and therefore has not attached a representative sample. The named employee as FBI Task Force Officer assisted with the drafting of these documents that were executed by FBI agents. These records are held under seal by a Federal Grand Jury considering alleged criminal violations of federal law. The TSSB contends that these records are not only information made confidential by statute pursuant to Section 28 of the TSA as records made in an investigation, and must be withheld pursuant to Section 552.101 of the PIA, but are also information made confidential by statute pursuant to Rule 6(e) of the Federal Rules of Civil Procedure (the "FRCP") and must be withheld pursuant to Section 552.101 of the PIA. Rule 6(e) of the FRCP provides:

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule (6)(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(I) a grand juror;

(ii) an interpreter;

(III) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (III).

(3) Exceptions.

(A) Disclosure of a grand-jury matter--other than the grand jury's deliberations or any grand jury's vote-- made be made to:

...

(ii) any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom disclosure has been made, and must certify that the attorney had advised those persons of their obligation of secrecy under this rule.

The subpoenas were prepared by the named employee as a government personnel to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law, and as such, the named employee may only use or disclose that information for such purpose. Therefore we contend that these records held under seal consist of information made confidential by statute pursuant to FRCP Rule 6(e) and must be withheld pursuant to Section 552.101 of the PIA.

§552.108 - LAW ENFORCEMENT EXCEPTION

Section 552.108 of the PIA excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the "detection, investigation, or prosecution of crime." The records covered as Section 28 investigatory material are also covered by the law enforcement exception in PIA, Section 552.108.

The TSSB is a law enforcement agency in which the Securities Commissioner is charged with the duty to investigate violations of state securities law which may be punished or addressed by administrative, civil, or criminal actions. See *Texas Attorney General's Office v. Adams*, 793 S.W. 2d 771 (Tex.App.-Fort Worth 1990, no writ) at 773 and the TSA Sections 3, 14, 29, and 32. Criminal referrals are made to district attorneys and United States attorneys throughout the state, and the TSSB routinely assists state and federal prosecutors in drafting indictments, presenting cases to grand juries, and the trial of criminal cases. The representative samples discussed above deal with the detection and investigation of activity that may constitute a crime. Disclosure of these or other confidential records in TSSB investigative files would interfere with this Agency's ability to detect, investigate, and prosecute violations of the TSA because it would affect the integrity of the investigatory process, would allow witnesses to corroborate their testimonies, and would create a chilling effect on how information is gathered and used by this Agency during its ongoing investigations. Therefore, we assert that the records represented by **Items C1 through C7** are excepted from public disclosure under Section 552.108 of the PIA and must be withheld.

§552.101, ATTORNEY-CLIENT PRIVILEGE

Section 552.101 excepts information from disclosure if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

The common law privilege for attorney client communications, which has been codified in Rule 501 of the Federal Rules of Evidence ("FRE") protects confidential disclosures between a client to his attorney made in order to obtain legal assistance. This privilege includes clients that are government agencies and their government attorneys. The attorney client privilege assures the client that confidential communications to his attorney will not be disclosed without his consent.

Communications between the TSSB (the client) and the client's lawyers, in this case US Attorneys, are privileged. The protection extends to factual information or requests for legal advice communicated by the client to the attorney, as well as legal advice or opinions given by the attorney in furtherance of the rendition of legal services.

A communication between a TSSB employee and US attorneys is reflected in sample **Item C1**. The existence and content of these communications are confidential legal matters pursuant to the PIA and attorney client privilege, as codified in FRE Rule 501. The TSSB, as the client when the communications were made, asserts its privilege to refuse to disclose confidential attorney-client communications made for the purpose of facilitating the rendition of professional legal services to the TSSB. Therefore, such information must be withheld as covered attorney-client communication.

INFORMATION SHARING - TSA Section 28, Board Rule 131.1

There are some unique information sharing authorizations applicable to the TSSB that may be relevant in your analysis, especially as it relates to information shared with other governmental authorities.

Section 28 of the TSA provides in pertinent part:

A. Investigations by the Commissioner **The Commissioner may, at the Commissioner's discretion, disclose any confidential information in the Commissioner's possession to any governmental or regulatory authority or association of governmental or regulatory authorities approved by Board rule or to any receiver appointed under Section 25-1 of this Act.** The disclosure does not violate any other provision of this Act or Chapter 552, Government Code.

Board Rule 131.1 provides:

(a) The Board recognizes the need for cooperative law enforcement among agencies responsible for the prevention, detection, and prosecution of white collar crime, for the regulation and policing of persons who offer and sell securities, and for the regulation of offerings of securities. Pursuant to the authority given the Board under the Texas Securities Act, §28, **the Board authorizes the Securities Commissioner in his or her discretion to supply any confidential information in the Commissioner's possession to:**

- (1) **any governmental or regulatory authority**, including any bankruptcy trustee, receiver, or other official appointed by a state or federal court in a proceeding involving a governmental or regulatory authority; or
- (2) any association of governmental or regulatory authorities.

(b) Disclosure for limited purposes. **Disclosure of the confidential information referred to in subsection (a) of this section will be made only for the purpose(s) of assisting in the detection or prevention of violations of law or to further administrative, civil, or criminal action.**

The above provisions permit the TSSB to share confidential information with other governmental authorities without the information losing its confidential status.

To the extent that any responsive records, represented by representative samples **Items C1 or C7**, or the federal grand jury subpoenas or search warrant materials were disclosed to either the United States Department of Justice or the FBI, both of which are governmental authorities, the sharing of that information does not cause the information to lose its confidential status. This would include any records that the named employee prepared or created and then shared with the United States Department of Justice or the FBI as an investigator with the TSSB, while serving in that capacity and while serving as an FBI Task Force Officer.

EXCEPTION: CERTAIN LEGAL MATTERS- PIA SECTION 552.107

The records that are responsive to the request that the Agency has withheld include drafts of search warrant affidavits and copies of search warrant applications, affidavits and related search warrants. The final affidavits and related search applications and warrants have been sealed by multiple orders of the United States District Court, Western District of Texas Austin Division (the "Federal Orders"). Attached as **Item D** as a representative sample is a copy of one of these orders, which is submitted for your review. These responsive records continue to be sealed from disclosure by the United States District Court. Section 552.107(2) of the Government Code allows a governmental body to withhold information if "a court by order has prohibited disclosure of the information." Government Code Section 552.107(2). Therefore we assert that these records subject to

the Federal Orders are excepted from public disclosure under Section 552.107(2) of the PIA and must be withheld.

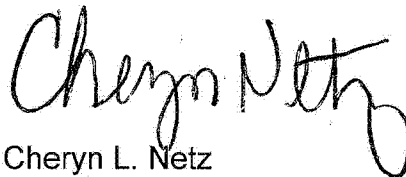
CONCLUSION

For the reasons stated herein, we respectfully request that upon review, your office issue a decision finding that the requested records are not subject to disclosure under the PIA pursuant to Government Code Section 552.101 and Section 28 of the TSA; Government Code Section 552.108; Government Code Section 552.107 and Government Code Section 552.101 and common law attorney client privilege, codified in the Federal Rules of Evidence Rule 501.

We further request that, upon your review, your office issue a predetermination letter finding that records made in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order are confidential under Section 552.101 in conjunction with Section 28 of the TSA without the necessity of requesting a decision from the OAG.

I trust this letter and the enclosed materials will be of assistance to you in issuing your public information opinion. Please feel free to call me at 512-305-8303 if you need further information.

Sincerely,



Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (redacted w/o enclosures)
Via Regular U.S. Mail and Electronic Mail

From: [Borden, Aaron P.](#)
To: [gg](#)
Subject: Open Records Request
Date: Friday, September 6, 2019 5:44:09 PM
Attachments: [image002.png](#)

On behalf of my client, Natin Paul, I request a complete copy of all files, records, documents, correspondence, letters, communications, reports, or other information related to Mr. Paul and/or World Class Capital Group, LLC (sometimes also referred to as World Class Holdings) prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED]

Sincerely,

Aaron Borden

Associate



901 Main Street, Suite 3700
Dallas, Texas 75202

Phone: 214.749.2402 [E-MAIL](#)
Toll Free: 800.451.0093 [WEBSITE](#)
Fax: 214.747.3732 [BIO](#)

The message and information contained in or attached to this communication is privileged, confidential and intended only for the person or persons named above. If you are not the intended recipient of this transmission, you are hereby notified that any dissemination, distribution or copying of this communication to anyone other than the intended recipient or recipients is strictly prohibited. If you receive this communication in error, do not read it. Please immediately reply to the sender that you have received this communication in error and then please delete this communication from your computer. Thank you.

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

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CHAIR

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MEMBER

MELISSA TYROCH
MEMBER

September 20, 2019

Mr. Aaron P. Borden, Esq.
Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P.
901 Main Street, Suite 3700
Dallas, Texas 75202

Via Email

Re: Public Information Request

Dear Mr. Borden:

I have enclosed the electronic copies you requested in your email dated September 17, 2019 related to the Open Records Request dated September 6, 2019.

There is no charge for these copies.

If you have any questions, please contact me at 512-304-8303.

Sincerely

A handwritten signature in cursive script that reads "Cheryn L. Netz".

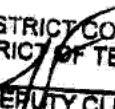
Cheryn L. Netz
Assistant General Counsel

Enclosures

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

AUG 12 2019

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY CLERK

SEALED

In the Matter of the Search of
World Class Holdings Offices, 303 and
307/305 West Ninth Street and 814 Lavaca
Street, Austin, TX 78701

§
§
§
§
§
§

Number: 1:19-MJ-431(1)-ML

ORDER

Before the Court is the Government's Motion to Seal the Search Warrant Application and Search Warrant in the above-referenced case, and after considering the same, the Court is of the opinion that it should be granted in the interest of law enforcement. Accordingly,

IT IS ORDERED that the Clerk of the Court file the Search Warrant Application and Affidavit and the Search Warrant UNDER SEAL for a period of 30 days. Should the government wish the warrant documents to remain sealed thereafter, it must file a motion seeking that relief in a manner consistent with the Standing Order of this Division on the sealing of warrants. Failure to seek the continuation of sealing will result in the warrant documents being unsealed.

IT IS FURTHER ORDERED that the Government's Motion to Seal, as well as this order shall remain sealed until such time as the remaining warrant documents are unsealed.

SIGNED this 12th day of August, 2019.


UNITED STATES MAGISTRATE JUDGE

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

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MEMBER

ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

September 20, 2019

United States Department of Justice
Attn: Mr. Alan Buie
903 San Jacinto Blvd, Suite 334
Austin, Texas 78701

Re: Texas Public Information Act

Dear Mr. Buie:

We have received a formal request to inspect or copy some of our files. A copy of the request for information is enclosed. The requested files include records we received from you or from your agency. The Office of the Attorney General is reviewing this matter, and they will issue a decision on whether Texas law requires us to release your records. Generally, the Texas Public Information Act (the "Act") requires the release of requested information, but there are exceptions. As described below, you have the right to object to the release of your records by submitting written arguments to the attorney general that one or more exceptions apply to your records. You are not required to submit arguments to the attorney general, but if you decide not to submit arguments, the Office of the Attorney General will presume that you have no interest in withholding your records from disclosure. In other words, if you fail to take timely action, the attorney general will more than likely rule that your records must be released to the public. If you decide to submit arguments, **you must do so not later than the tenth business day after the date you receive this notice.**

If you submit arguments to the attorney general, you must:

- a) identify the legal exceptions that apply,
- b) identify the specific parts of each document that are covered by each exception, and
- c) explain why each exception applies.

Gov't Code § 552.305(d). A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436 (1974). You may contact this office to review the information at issue in order to make your arguments. We will provide the attorney general with a copy of the request for information and a copy of the requested information, along with other material required by the Act. The attorney general is generally required to issue a decision within 45 business days.

Mr. Alan Buie
September 20, 2019
Page 2 of 3

Please send your written comments to the Office of the Attorney General at the following address:

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

If you wish to submit your written comments electronically, you may only do so via the Office of the Attorney General's eFiling System. An administrative convenience charge will be assessed for use of the eFiling System. No other method of electronic submission is available. Please visit the attorney general's website at <http://www.texasattorneygeneral.gov> for more information.

In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General. Gov't Code § 552.305(e). You may redact the requestor's copy of your communication to the extent it contains the substance of the requested information. Gov't Code § 552.305(e).

Commonly Raised Exceptions

In order for a governmental body to withhold requested information, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. We have listed the most commonly claimed exceptions in the Government Code concerning proprietary information and the leading cases or decisions discussing them. This listing is not intended to limit any exceptions or statutes you may raise.

Section 552.101: Information Made Confidential by Law

Open Records Decision No. 652 (1997).

Section 552.104: Confidentiality of Information Relating to Competition

Boeing Co. v. Paxton, 466 S.W. 3d 831 (Tex. 2015).

Section 552.110: Confidentiality of Trade Secrets and Commercial or Financial Information

Trade Secrets:

In re Bass, 113 S.W.3d 735 (Tex. 2003).

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

Open Records Decision No. 552 (1990).

Mr. Alan Buie
September 20, 2019
Page 3 of 3

Commercial or Financial Information:

Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. filed) (construing previous version of section 552.110), *abrogated by In re Bass*, 113 S.W.3d 735 (Tex. 2003).

Open Records Decision No. 639 (1996).

Open Records Decision No. 661 (1999).

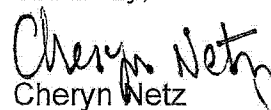
Section 552.113: Confidentiality of Geological or Geophysical Information

Open Records Decision No. 627 (1994).

Section 552.131: Confidentiality of Certain Economic Development Negotiation Information

If you have questions about this notice or release of information under the Act, please refer to the *Public Information Handbook* published by the Office of the Attorney General, or contact the attorney general's Open Government Hotline at (512) 478-OPEN (6736) or toll-free at (877) 673-6839 (877-OPEN TEX). To access the *Public Information Handbook* or Attorney General Opinions, including those listed above, please visit the attorney general's website at <http://www.texasattorneygeneral.gov>.

Sincerely,



Cheryn Netz
Assistant General Counsel
Texas State Securities Board

Enclosure: Copy of request for information
cc:

Aaron P. Borden
901 Main Street, Suite 3700
Dallas, Texas 75202
(w/o enclosures)

Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

E. WALLY KINNEY
CHAIR

MIGUEL ROMANO, JR.
MEMBER

KENNY KONCABA
MEMBER

ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

September 20, 2019

Federal Bureau of Investigation
Attn: Ms. Holly Kelley
12515 Research, Building 7, Suite 400
Austin, Texas 78759

Re: Texas Public Information Act

Dear Ms. Kelley:

We have received a formal request to inspect or copy some of our files. A copy of the request for information is enclosed. The requested files include records we received from you or from your agency. The Office of the Attorney General is reviewing this matter, and they will issue a decision on whether Texas law requires us to release your records. Generally, the Texas Public Information Act (the "Act") requires the release of requested information, but there are exceptions. As described below, you have the right to object to the release of your records by submitting written arguments to the attorney general that one or more exceptions apply to your records. You are not required to submit arguments to the attorney general, but if you decide not to submit arguments, the Office of the Attorney General will presume that you have no interest in withholding your records from disclosure. In other words, if you fail to take timely action, the attorney general will more than likely rule that your records must be released to the public. If you decide to submit arguments, **you must do so not later than the tenth business day after the date you receive this notice.**

If you submit arguments to the attorney general, you must:

- a) identify the legal exceptions that apply,
- b) identify the specific parts of each document that are covered by each exception, and
- c) explain why each exception applies.

Gov't Code § 552.305(d). A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436 (1974). You may contact this office to review the information at issue in order to make your arguments. We will provide the attorney general with a copy of the request for information and a copy of the requested information, along with other material required by the Act. The attorney general is generally required to issue a decision within 45 business days.

Holly Kelley
September 20, 2019
Page 2 of 3

Please send your written comments to the Office of the Attorney General at the following address:

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

If you wish to submit your written comments electronically, you may only do so via the Office of the Attorney General's eFiling System. An administrative convenience charge will be assessed for use of the eFiling System. No other method of electronic submission is available. Please visit the attorney general's website at <http://www.texasattorneygeneral.gov> for more information.

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Holly Kelley
September 20, 2019
Page 3 of 3

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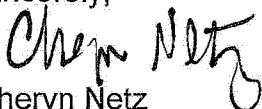
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Sincerely,


Cheryn Netz
Assistant General Counsel
Texas State Securities Board

Enclosure: Copy of request for information

cc:

Aaron P. Borden
901 Main Street, Suite 3700
Dallas, Texas 75202
(w/o enclosures)

Open Records Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)

FRANIS J. ILES
SECURITIES COMMISSIONER



E. WALLY KINNEY
CHAIR

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

MIGUEL ROMANO, JR.
MEMBER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Texas State Securities Board

KENNY KONCABA
MEMBER

ROBERT BELT
MEMBER

Phone: (512) 305-8300
Facsimile: (512) 305-8310

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

MELISSA TYROCH
MEMBER

798456
799492

RECEIVED

SEP 27 2019

September 27, 2019

OPEN RECORDS DIVISION

ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Supplemental Letter to Request for Opinion Concerning Public
Information Request Regarding [Redacted] World Class Capital Group, LLC

Dear General Paxton:

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On September 20, 2019, the Texas State Securities Board ("TSSB" or "Agency") filed a request for open records opinion ("B Request"). The purpose of this letter is to supplement that request. As stated in the TSSB Request, the requestor requested certain files, records prepared by, or in the possession or control of, Texas State Securities Board employee [Redacted] (the "named employee"). [Redacted] is an investigator for the TSSB and in that capacity also serves as a Task Force Officer in the White Collar Crimes Squad with the Federal Bureau of Investigation (the "FBI") ("FBI Task Force Officer") in Austin, Texas.

The TSSB Request stated that certain records there are responsive to the PIA request that were prepared by the named employee as part of his position as an FBI Task Force Officer. In addition to records he prepared, the named employee has access to other FBI records as an FBI Task Force Officer. The named employee entered into multiple nondisclosure agreements with the FBI in 2013 (the "NDAs") that cover all FBI records of which he has access. A copy of these agreements is attached as **ITEM F**. These agreements specifically provide that the information to which he has access or may obtain access is now and will remain the property of, or under the control of the United States Government. These agreements prohibit him from disclosing FBI information to any unauthorized parties. Items **C7**, the federal grand jury subpoenas, and all search warrant materials (all referenced in the TSSB Request), as well as any records obtained by the FBI in response to these items are subject to the NDAs, as provided in the NDAs, are the property of and under the control of the United States Government.

19-09202019-OAG Request_Borden PIA

FRANIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

September 27, 2019

E. WALLY KINNEY
CHAIR

MIGUEL ROMANO, JR.
MEMBER

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MEMBER

ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

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SEP 27 2019

OPEN RECORDS DIVISION

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ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Supplemental Letter to Request for Opinion Concerning Public
Information Request Regarding Paul and World Class Capital Group, LLC

Dear General Paxton:

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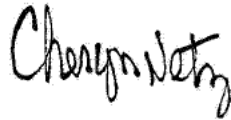
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19-09202019-OAG Request_Borden PIA

The Honorable Ken Paxton
September 27, 2019
Page 2

I trust this supplemental letter and the enclosed materials will be of assistance to you in issuing your public information opinion. Please feel free to call me at 512-305-8303 if you need further information.

Sincerely,



Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (redacted w/o enclosures)
Via Regular U.S. Mail and Electronic Mail

19-09202019-OAG Request_Borden PIA

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

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Texas State Securities Board

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OCT 16 2019

OPEN RECORDS DIVISION

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E. WALLY KINNEY
CHAIR
MIGUEL ROMANO, JR.
MEMBER
KENNY KONCABA
MEMBER
ROBERT BELT
MEMBER
MELISSA TYROCH
MEMBER

October 16, 2019

ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

BBX
11/25

VIA HAND-DELIVERY

RE: Supplemental Letter Number 2 to Request for Opinion Concerning Public Information Request Regarding Paul and World Class Capital Group, LLC

Dear General Paxton:

The Texas State Securities Board ("TSSB" or "Agency") filed a request for open records opinion with your office on September 20, 2019, and supplemented that request with a letter filed with your office on September 27, 2019 (collectively, the "TSSB Request"). On October 4, 2019, Mr. Aaron Borden (the "Requestor") sent your office a letter by certified mail in regards to the TSSB Request (the "Requestor Letter"). **See Exhibit A.** The purpose of this letter is to further supplement the TSSB Request and to respond to certain statements made in the Requestor Letter.

Response to Statements that TSSB failed to demonstrate that the information withheld is confidential under Article 581-28 of the Texas Securities Act.

The Agency disagrees with the Requestor's statements that the Agency has failed to demonstrate that the information withheld is confidential under Article 581-28 of the Texas Securities Act. Section 28.A of the TSA provides:

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of this Act or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by this Act to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided however, that **all information of every kind and nature received in connection with an investigation and all internal notes,**

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

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OCT 16 2019

OPEN RECORDS DIVISION

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E. WALLY KINNEY
CHAIR

MIGUEL ROMANO, JR.
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MEMBER

MELISSA TYROCH
MEMBER

October 16, 2019

ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Supplemental Letter Number 2 to Request for Opinion Concerning Public Information Request Regarding Paul and World Class Capital Group, LLC

Dear General Paxton:

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memoranda, reports, or communications made in connection with an investigation shall be treated as confidential by the Commissioner and shall not be disclosed to the public except under the order of court for good cause shown....

Section 28.A concerns all investigations by the TSSB that are conducted to prevent a violation of the Texas Securities Act or a Board rule or order or to *determine if there is a violation of the Texas Securities Act or a Board rule or order* (collectively, the "TSA"). This section does not state, and it is not intended to mean, that only investigations in which an actual violation of the TSA is investigated or found are confidential. Sometimes conduct is investigated, and the Agency determines that the conduct was not a violation of the TSA or that there is insufficient evidence to determine if the conduct was a TSA violation. The absence of a finding of a violation doesn't make the investigatory files become public—they are still confidential. Sometimes conduct is investigated and the Agency determines that there is no jurisdiction because the conduct is not a violation of the TSA, but could be a violation of other state or federal laws or a violation of securities laws in another state. In these cases the Agency may refer the case to another state or federal regulatory or law enforcement authority. Again, that referral doesn't make the investigatory files become public—they are still confidential.

Section 3-1 of the TSA (Nonexclusivity of Means of Enforcement) states that the Commissioner "may utilize any or all penalties, sanctions, remedies, or relief as the Commissioner deems necessary." The effect of Section 3-1 is that the Commissioner is NOT limited to pursuing state actions (criminal or otherwise) under the TSA. Not only is the Commissioner not limited in its means of enforcement, Section 31 (Construction) of the TSA,¹ makes it clear that persons violating the TSA can be prosecuted for violations of other statutes.

These provisions are relevant to the requested records. In addition to investigations of conduct that may not be TSA violations, sometimes conduct is investigated and the Agency determines that there are violations of the TSA, but the conduct is *also* in violation of the federal securities laws, which means the state and federal governments would have joint jurisdiction over the matter. This can happen because the TSA criminal securities fraud provision² is almost identical to the federal securities laws fraud provisions.³

¹ Sec. 31. Construction. Nothing herein contained shall limit or diminish the liability of any person or company, or of its officers or agents, now imposed by law to prevent the prosecution of any person or company, or of its officers or agents, for the violation of the provisions of any other statute.

² Sec. 29. Penal Provisions.

Any person who shall:

This joint jurisdiction doesn't make the files become public, they are still confidential. As authorized by Section 3-1, the TSSB Enforcement Division, as part of its enforcement activities, routinely refers cases to Federal prosecutors and also works with Federal prosecutors to prosecute securities fraud cases under the federal securities laws in Federal Court rather than pursue state action. These activities are in addition to, and complementary to, working with state prosecutors to prosecute state securities fraud cases under the TSA. In these federal cases, the conduct that was investigated by TSSB employees could consist of both violations of the TSA and the federal securities laws, but for various reasons, including the availability of TSSB resources, the TSSB and the Federal prosecutors opted to bring the case in federal court versus state court. This doesn't mean that violations of the TSA or potential violations of the TSA did not exist or were not investigated. Further, this doesn't mean that records generated in an investigation by a TSSB employee in connection with conduct that could be potential violations of state or

C. In connection with the sale, offering for sale or delivery of, the purchase, offer to purchase, invitation of offers to purchase, invitations of offers to sell, or dealing in any other manner in any security or securities, whether or not the transaction or security is exempt under Section 5 or 6 of this Act, or in connection with the rendering of services as an investment adviser or an investment adviser representative, directly or indirectly:

- (1) engage in any fraud or fraudulent practice;*
- (2) employ any device, scheme, or artifice to defraud;*
- (3) knowingly make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or*
- (4) engage in any act, practice or course of business which operates or will operate as a fraud or deceit upon any person, is:*
 - (a) guilty of a felony ***.*

³17 CFR § 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

- (a) To employ any device, scheme, or artifice to defraud,*
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or*
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,*
in connection with the purchase or sale of any security.

federal securities laws (or both) that ultimately result in federal criminal charges (rather than state criminal charges) are not also protected by the confidentiality provisions of Section 28.A of the TSA.

Because of the joint jurisdiction of securities fraud crimes, it is an efficient use of resources and commonplace for federal and state regulatory authorities, including the TSSB, to work together in not just referring cases to federal prosecutors and in working together to prosecute securities fraud and other related financial crimes, but by also conducting joint investigations of possible securities fraud. One of the ways the Agency works with federal authorities to conduct joint investigations is by having its employees serve as task force officers with the Federal Bureau of Investigation ("FBI"). This working arrangement exists in the instant case. As the Agency stated in the TSSB Request, the named employee is a FBI Task Force Officer as *part of his duties and responsibilities as an employee of the TSSB and an investigator with the TSSB Enforcement staff*. In this role, he works with the FBI to investigate conduct that could be violations of Texas securities laws that may also constitute violations of federal securities law or other state or federal laws.

The Requestor contends to your office in the Requestor Letter that the named employee was on a task force assignment working "outside his normal role" and that on August 14, 2019, he represented to the Requestor (who is Mr. Paul's legal counsel) that his investigation does not involve a violation of the Texas Securities Act. This statement is not accurate. At no time did the named employee discuss any investigation of violations of the Texas Securities Act with the Requestor or state that there were no violations of the Texas Securities Act in connection with the investigation. Attached is a copy of an affidavit from [REDACTED] concerning the contents of the August 14, 2019 conversation as **Item B.**⁴ Furthermore, note that TSSB Board Rule 101.2(e) provides that "statements made and opinions expressed orally or in writing by personnel of the Securities Board in response to inquiries or otherwise, and not specifically identified and promulgated as rules shall not be considered regulatory standards of the board and shall not be considered binding on the Commissioner in connection with specific adjudications undertaken by the Commissioner thereafter."

For the reasons stated above, the Agency disagrees that the Agency has failed to demonstrate that the information withheld is confidential under Article 581-28.A of the TSA and must be withheld pursuant to Section 552.101 of the Government Code. The investigative records responsive to this request were made by the named employee and by other Agency employees, in connection with an investigation to prevent or detect a violation of the TSA. The facts that the investigated conduct may be also in violation of federal securities law or that the Agency may or may not pursue any state actions in connection with the investigative records at issue does not affect their status as confidential records.

⁴ Original affidavit available on request.

The Honorable Ken Paxton
October 16, 2019
Page 5

In conclusion, the Agency contends that these records are information made confidential by statute pursuant to Section 28.A of the TSA.

Response to Statements that the TSSB failed to inform the Attorney General of the United States District Court order granting the government leave to disclose sealed records to Mr. Paul.

The Requestor refers to a September 5, 2019, Court Order, which he attached to the Requestor Letter (but did not provide a copy of to this Agency). This court order is sealed, and because it is sealed, the Agency was not aware of its existence and is not privy to its contents. The Agency is not a party to the order, does not have a copy of this order in its possession, and no other third parties had informed the Agency of its existence at the time the Agency sent the TSSB Request Letter. The Agency was not aware of the court order until it received a copy of the Requestor Letter from the Requestor by email on October 7, 2019.

In regards to the numerous other arguments the Requestor made in the Requestor Letter in favor of disclosure, if your office determines that more information is necessary to render a decision, the Agency is available and willing to provide you with any additional information you request for your office to issue your public information opinion. Please feel free to call me at 512-305-8303 if you need further information.

Sincerely,


Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (w/o enclosures)
Via Regular U.S. Mail and Electronic Mail



MEADOWS COLLIER

ATTORNEYS AT LAW

MEADOWS, COLLIER, REED, COUSINS, CROUCH & UNGERMAN, L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

901 MAIN STREET, SUITE 3700
DALLAS, TEXAS 75202
(214) 744-3700
www.meadowscollier.com

AARON P. BORDEN
Associate
aborden@meadowscollier.com



October 4, 2019

Via Certified Mail 7016 2140 0000 7772 4787

The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701
ATTN: Open Records Division

Re: Public Information Request Regarding Natin "Nate" Paul and World Class Capital Group, LLC

Dear General Paxton:

On September 6, 2019, the undersigned counsel, on behalf of Mr. Paul, made a request under the Texas Public Information Act ("PIA") for "a complete copy of all files, records, documents, correspondence, letters, communications, reports, or other information related to Mr. Paul and/or World Class Capital Group, LLC (sometimes also referred to a World Class Holdings) prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED] See Exhibit A.

On September 17, 2019, the TSSB notified Mr. Paul that it would provide 33 pages of records in response to the request. The 33 pages of records released are various organizational filings and public information reports that are generally available to the public through the state's websites. The TSSB acknowledged that it had other information that was public information that was being withheld under exceptions to the disclosure required by the PIA. See Exhibit B.

On September 20, 2019, the TSSB requested a public information opinion from the Attorney General regarding the information withheld. See Exhibit C. On September 27, 2019, the TSSB supplemented its request with additional factual information. See Exhibit D.

Direct (214) 749-2402 / (800) 451-0093 / Fax (214) 747-3732

The Honorable Ken Paxton
October 4, 2019

Pursuant to Tex. Gov't Code § 552.304(a), the following information is provided on behalf of Mr. Paul in response to the September 20, 2019 request from Texas State Security Board ("TSSB") for a public information opinion and the September 27, 2019 supplement.

The PIA is to be liberally construed in favor of granting requests for information. Tex. Gov't Code § 522.001(b). Exceptions to the PIA are to be narrowly construed. *Thomas v. Cornyn*, 71 S.W.3d 473, 481 (Tex. App.—Austin 2002, no pet.). When a government body seeks to withhold information, it bears the burden of establishing to the Attorney General that the requested information falls within an exception. *Id.* at 480-81. As detailed below, the TSSB fails to establish that the requested information falls within an exception to the PIA.

The TSSB fails to demonstrate that the information withheld is confidential under article 581-28 of the TSA.

In its request for a public information opinion, the TSSB argues that the requested information is confidential under article 581-28 of the Texas Securities Act ("TSA"); and therefore, the TSSB can withhold the information under Tex. Gov't Code § 552.101. In support of its argument, the TSSB relies on OR2004-0239 (Jan. 12, 2004), OR2010-15409 (Oct. 8, 2010), and OR2017-18823 (Aug. 18, 2019); however, these decisions dealt with investigations by the TSSB of violations of the TSA or a Board order or rule.

In the instant case, the TSSB is not investigating violations of the TSA or a Board order or rule. The TSSB admits that the named employee was on a task force assignment working outside his normal role, and named employee represented to Mr. Paul's legal counsel on August 14, 2019 that his investigation does not involve a violation of the TSA.

In its request to the Attorney General, the TSSB attempts turn article 581-28's narrow confidentiality provision covering TSSB investigations of violations of the TSA or Board order or rule into a broad provision encompassing any investigation. The Texas Department of State Health Services ("TDSHS") tried and failed a similar approach in a *Paxton v. Texas Dep't of State Health Services*, 500 S.W.3d 702 (Tex. App.—Austin 2016, no pet.). In *Texas Dep't of State Health Services*, the request at issue sought information collected by the OIG during an investigation of employee misconduct at the TDSHS. *Id.* at 703. In its request for an opinion from the Attorney General, the TDSHS argued that the information was confidential because Tex. Gov't Code § 531.1021(g) makes information compiled by the OIG in an audit or investigation confidential. *Id.* at 704. The Attorney General rejected the TDSHS's argument and held that the information was not within the confidentiality exception because the OIG investigation at issue was not an investigation of Medicaid or other health and human services fraud, abuse, or overcharges. *Id.* The Attorney General found that the confidentiality provision was limited to these types of audits and investigations based on § 531.1021(g)'s statutory context and the OIG's enabling provisions. *Id.* The district court held for the TDSHS, but the Austin Court of Appeals reversed the district court's decision and rendered judgment in favor of the Attorney General. *Id.* The appeals court noted that the statute in isolation could support the TDSHS's position, but held that the context of the statute showed that the Legislature intended for confidentiality to extend only to those OIG

The Honorable Ken Paxton
October 4, 2019

audits and investigations that concerned fraud waste and abuse in the provision and delivery of health and human services in the state. *Id.* at 706.

Since the decision in *Texas Dep't of State Health Services*, the Attorney General has held that *Texas Dep't of State Health Services* requires DART to release personal identifying numbers. OR2018-30942 (Dec. 11, 2018). DART argued that the identifying numbers are confidential under § 452.061(e) of the Transportation Code. The Attorney General concluded that the statutory context of the § 452.061(e) evidenced that it made personal identifying numbers confidential only when collected by DART for purposes related to the collection of fares and other charges. Thus, personal identifying numbers collected in other contexts are not confidential and cannot not be withheld.

Similarly, in OR2019-03815 (Feb. 8, 2019), the Attorney General considered a request to the Texas Board of Veterinary Medical Examiners for documentation of inspections of clinics and individuals. The Board argued that the documents were confidential under § 801.207(b) of the Occupations Code. The Attorney General noted that the context of § 801.207(b) limited its application to stated categories of investigations, which did not include the inspections at issue. Thus, under *Texas Dep't of State Health Services*, the Veterinary Board was required to release the requested information.¹

The express language of Article 581-28 shows that it does make all investigations confidential. Article 581-28 authorizes only investigations “to prevent or detect violation of [the TSA] or Board rule or order.”

In addition, the context of the confidentiality provision shows that the Legislature did not intend for it to be a broad exception for any investigation. The confidentiality provision the TSSB relied on in article 581-28 immediately follows the language authorizing the TSSB to investigate violations of the TSA or Board rule or order. Furthermore, the TSA’s enabling provision in article 581-3 empowers the TSSB to enforce the TSA, and the Board to provide assistance in prosecution involving alleged violations of the TSA. This statutory context shows that article 581-28’s confidentiality provision, like the OIG’s confidentiality provision in *Texas Dep't of State Health Services*, is limited. In this case, the statutory context limits the confidentiality to TSSB investigations of a violation of the TSA or Board rule or order.

Here, the TSSB’s statements in its letters to the Attorney General, the documents withheld and the named employee’s representations to Mr. Paul’s counsel evidence that the investigation at

¹ Even before *Texas Dep't of State Health Services*, the Attorney General found that there were limits to the confidentiality provision in article 581-28. In OR2011-02964 (Mar. 1, 2011), the TSSB argued that a court document obtained in connection with the TSSB examination of the requestor’s client was confidential under article 581-28. The Attorney General held that the court document was beyond the scope of article 581-28; and the TSSB was required to release the document to the requestor. Similarly, in OR2014-18159 (Oct. 9, 2014), the TSSB received a request for information pertaining to its investigation of two individuals and a specified entity. The TSSB argued that a requested document was confidential under article 581-28 of the TSA. After reviewing the document, the Attorney General held that the document that was not made in connection with an investigation of a violation of the TSA or Board rule or order. Thus, the document was not confidential under article 581-28 and could not be withheld under § 552.101. See also OR2007-11566 (Sep. 5, 2007) (holding that the TSSB failed to demonstrate that the requested documents were confidential under article 581-28).

The Honorable Ken Paxton
October 4, 2019

issue is not a TSSB investigation of the TSA or a Board rule or order. Accordingly, the holding in *Texas Dep't of State Health Services* mandates release of the requested information.

The TSSB Rule 6(e) argument fails under the Attorney General's prior precedent.

The TSSB also argues that requested information prepared by the named employee must be withheld because it was provided to the grand jury; and the information is therefore made confidential by § 552.101 in conjunction with Rule 6(e) of the Federal Rules of Criminal Procedure.

Section 552.101 excepts from disclosure information that is "confidential by law, either constitutional, statutory or by judicial decision." In Open Records Decision No. 676 (2002), the Attorney General considered whether § 552.101 in conjunction with rules of procedure or in conjunction with rules of evidence make records confidential. The Attorney General held that § 552.101 in conjunction with these rules does not make records confidential because procedural rules and rules of evidence are not constitutional laws, statutory laws, or judicial decisions required by the statutory language of § 552.101. Accordingly, the TSSB's argument that the requested information is confidential under § 552.101 in conjunction with Rule 6(e) fails under the Attorney General's prior precedent.

The TSSB fails to demonstrate that the information withheld is confidential under Rule 6(e) of the Federal Rules of Criminal Procedure.

Even if § 552.101 in conjunction with Rule 6(e) could make records confidential, the TSSB's argument fails. In situations where Rule 6(e) may be applicable, the government body must satisfy a two-prong test. First, the government body must establish that the matter is still before the grand jury. OR2013-2147 (Feb. 6, 2013); OR2008-5601 (Apr. 25, 2008). Second, the government body must establish that the named employee is among the persons subject to the secrecy rule in Rule 6(e)(2). *Id.*

The Attorney General has previously noted that the federal case law is ambiguous on the confidentiality provided by Rule 6(e), and records may not be withheld simply because they were considered by the grand jury. OR2009-5816 (May 1, 2009) (citing Open Records Decision No. 518 at 5 (1988)). Moreover, the Attorney General has previously considered the impact of providing information to the grand jury and held that Rule 6(e) is not violated by disclosure of the information the government body provided to the grand jury. OR2009-5816 (May 1, 2009) (citing *In re Grand Jury Matter*, 682 F.2d 61, 64 (3rd Cir. 1982)).

Here, the TSSB makes no effort to establish that the requested information is still before the grand jury. With regard to the second prong, the TSSB does not argue that the names person is within the persons subject to the secrecy rule. Instead, the TSSB argues that the information is made confidential by Rule 6(e) because the named employee prepared the information which was provided to the grand jury. However, as stated in OR2009-5816, providing information to the

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October 4, 2019

grand jury does not render that information confidential under Rule 6(e). Thus, the information withheld is not confidential under Rule 6(e), and the requested information must be released.²

The TSSB fails to demonstrate that the information withheld is excepted from disclosure under the law enforcement exception.

The TSSB argues that the requested information must be withheld under the law enforcement exception in Tex. Gov't Code § 552.108 because disclosure would "interfere with [the TSSB's] ability to detect, investigate, and prosecute violations of the TSA because it would affect the integrity of the investigatory process, would allow witnesses to corroborate their testimonies, and would create a chilling effect." The Attorney General previously considered and rejected the same conclusory argument from the TSSB. *See* OR 2014-18159 (Oct. 9, 2014).

To prevail on a claim that § 552.108 excepts information from disclosure, a government body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. OR2004-10590 (Dec. 14, 2004). Instead, the government body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). Mere allegations that the release of the records will interfere with the government body's investigative ability and that release will have a chilling effect without explaining how are insufficient. OR2000-4443 (Nov. 17, 2000).

Here, the TSSB relies on mere conclusory assertions in its claim that the requested information must be withheld under § 552.108. The TSSB does not offer any specific factual allegations on how or why the release would interfere with its investigative efforts, allow witnesses to corroborate their testimonies, or have a chilling effect. Accordingly, the TSSB did not meet its burden, and the requested information must be released.

The TSSB's attorney-client privilege argument fails under the Attorney General's prior precedent.

The TSSB alleges that exhibit C1 is a representative sample of communications between the named employee and an unidentified US attorney and argues that the communications must be withheld under § 552.101 in conjunction with Rule 501 of the Federal Rules of Evidence.

As discussed above, Open Records Decision No. 676 considered whether rules of procedure and rules of evidence are constitutional laws, statutory laws, or judicial decisions that fall within the purview of § 552.101. The Attorney General held that procedural and evidentiary rules are not and further held that information subject to the attorney-client privilege was not made confidential under § 552.101 in conjunction with evidentiary rules. In OR2006-14451 (Dec. 8,

² The TSSB also alleges that it does not possess the records its employee drafted. In response, Mr. Paul notes that he requested "all files, records, documents, correspondence, letters, communications, reports or other information," and requests the Attorney General to order the TSSB to release all copies, drafts, or correspondence related to these records that may be in physical files, stored electronically, in the cloud, or otherwise recoverable.

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October 4, 2019

2006), the Attorney General applied ORD 676 to attorney-client communications withheld under §552.101 in conjunction with Rule 501 and held that the attorney-client communications could not be withheld on that basis. Accordingly, the TSSB's argument that the requested information is made confidential by §552.101 in conjunction with Rule 501 fails under the Attorney General's prior precedent.

The TSSB fails to demonstrate that the information withheld is within the attorney-client privilege.

Even if the TSSB had a valid basis for claiming that the attorney-client privilege might apply, it would be required to show that (1) the document was a communication transmitted between privileged parties or reveals a confidential communication; (2) the communication was made for the purpose of facilitating the rendition of professional legal service to the client government body (the mere fact that a communication involves an attorney does not demonstrate this element); (3) each communication was between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest; and (4) the communication was confidential. Open Records Decision No. 676 at 6-7 (2002); *see also* OR2009-0917 (Jan. 23, 2009) (rejecting the government body's attorney-client privilege argument where the government body failed to establish the attorney-client relationship between it and the attorney).³

Here, the TSSB has not established that (1) an attorney-client relationship existed between the unidentified US attorney and the TSSB, (2) the communications were confidential, or (3) that the communications were made for the purpose of facilitating the rendition of legal services to the TSSB. Thus, the TSSB fails to establish that the requested information falls within the attorney-client privilege, and the requested information must be released.

The TSSB fails to inform the Attorney General of the United State's District Court's order granting the government leave to disclose sealed records to Mr. Paul.

The TSSB argues that certain requested records have been withheld because the United States District Court for the Western District sealed the records; thus, the records are excepted from disclosure under § 552.107(2). However, the TSSB fails to address (or even disclose) the District Court's order granting the government leave to disclose sealed records to the requestor. *See Exhibit E*, Sep. 5, 2019 Court Order. Accordingly, the TSSB fails to establish that the requested information is excepted from disclosure under § 552.107(2), and the requested information must be released.

The requested information cannot be withheld because it is the subject of nondisclosure agreements referenced in the TSSB's September 27, 2019 supplement.

In its September 27, 2019 supplement, the TSSB alleges that some of the information forwarded to the Attorney General for review is subject to nondisclosure agreements between the

³ The TSSB's argument also references the sharing provision under Board Rule 13.1. However, this Rule only applies to information that is confidential. Because the TSSB fails to demonstrate that any of the requested information is confidential, Rule 13.1 is inapplicable.

The Honorable Ken Paxton
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named employee and the federal government; however, the TSSB does not argue that this prevents the TSSB from releasing the information withheld. By failing to make an argument, the TSSB waived its claim that the information may be withheld. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (government body waived its claim); Open Records Decision No. 663 at 5 (1999) (government body waived exception); Open Records Decision No. 177 (1977) (finding that the statutory predecessor to § 552.108 was subject to waiver).

Even if the TSSB had not waived its arguments related to the nondisclosure agreements, the nondisclosure agreements do not provide a basis for withholding the requested information. Parties to an agreement with a government body are presumed to know the legal requirements imposed upon the government body, and the requirement to disclose public information cannot be overcome by agreement between the parties. Open Records Decision 541 at 4 (1990); *see also* Attorney General Opinion JM-672 (1987). The Attorney General has repeatedly held that the PIA requires release of information that is subject to a nondisclosure disclosure. *See* OR2004-4209 (May 24, 2004); OR2004-8344 (Oct. 1, 2004).

Because the TSSB waived its claim that the nondisclosure agreements provide an exception to disclosure, and because nondisclosure agreements do not except information from disclosure, the requested information must be released.

Mr. Paul has a common law right of access to the requested information.

In the Fifth Circuit, the subject of an investigation has a common law right of access to pre-indictment search warrant materials. *U.S. v. Sealed Search Warrants*, 868 F.3d 385, 390 (5th Cir. 2017). Early access serves to enhance the transparency and trustworthiness of the process, to curb abuses, and to allow the public to understand the system better. *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993). The right of access is elevated when the records are requested by the owner of seized property. *In re Search Warrants Issued on Apr. 26, 2004*, 353 F. Supp. 2d 584, 587 (D. Md. 2004).

In the instant case, the named employee seized Mr. Paul's property from his home and other locations. The seized records included nearly every business and personal record from Mr. Paul's adult life. Because of seizure of his property, Mr. Paul has an elevated right of access to the requested information, and Mr. Paul's common law right of access trumps the TSSB's arguments for withholding the information. Accordingly, the requested information must be released.

The Honorable Ken Paxton
October 4, 2019

Conclusion.

For the foregoing reasons, the TSSB fails to establish any basis for withholding the requested information, particularly when the TSSB's arguments are considered in light of the requirement to construe exceptions narrowly and to liberally construe the PIA in favor of granting requests. Therefore, Mr. Paul requests the Attorney General to enter an opinion instructing the TSSB to release all responsive information.

Sincerely,



Aaron P. Borden

Enclosures

cc: Cheryn L. Netz (w/o enclosures)

STATE OF TEXAS
COUNTY OF TRAVIS

§
§
§

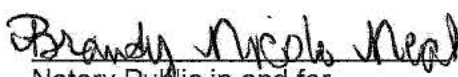
AFFIDAVIT OF [REDACTED]

1. BEFORE ME, the undersigned authority, personally appeared [REDACTED] who after being duly sworn stated as follows:
2. I am an investigator in the Austin office of the Enforcement Division of the Texas State Securities Board ("TSSB"). I have been continuously employed in this capacity since June 11, 2007. My job duties include conducting investigations that will prevent or detect violations of the Texas Securities Act, Tex. Rev. Civ. Stat. Ann. arts. 581-1 to 581-45 (West, Westlaw through 2019 R. Sess.) (the "Texas Securities Act" or the "Securities Act"). In my capacity as an employee of the TSSB, I am also a Task Force Officer in the White-Collar Crimes Squad with the Federal Bureau of Investigation (the "Federal Bureau of Investigation") in Austin, Texas. In these capacities I have investigated a number of white-collar crimes, including securities fraud, wire fraud, mail fraud, bank fraud, and other financial crimes. I have participated in the drafting and execution of warrants to search for evidence of financial crimes. I have also participated in debriefing defendants, witnesses, informants, and other persons who have knowledge of felony offenses under both state and federal law. During my employment with TSSB, I have received training and gained experience in analyzing personal financial records and business records, and in analyzing both legal and illegal businesses and activities. I am a Certified Fraud Examiner. I attended and graduated from the University of Houston Clear Lake, where I earned a bachelor's degree in Finance.
3. On August 14, 2019, as part of my job duties, I participated in the execution of a search warrant at [REDACTED]. After the execution of the search warrant I spoke with Aaron P. Borden ("Borden") with an FBI Agent present (the "August 14 Conversation"). During the August 14 Conversation Borden asked me if his client could expect a state action that would be separate from the federal investigation. I stated that typically the TSSB would not take a separate state action when assisting the United States Attorney's Office in a federal investigation.
4. At no point during the August 14 Conversation did I represent to Mr. Borden that the investigation "does not involve a violation of" the Texas Securities Act or that his client's conduct did not involve a violation of the Texas Securities Act.

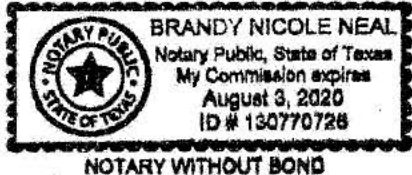
FURTHER AFFIANT SAYETH NOT.


AFFIANT

Sworn to and subscribed before me on the 16 day of October, 2019, by [REDACTED].


Notary Public in and for
The State of Texas

My commission expires on August 3, 2020



TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



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OCT 16 2019

OPEN RECORDS DIVISION

Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

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CHAIR

MIGUEL ROMANO, JR.
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MELISSA TYROCH
MEMBER

October 16, 2019

ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Public Information R

11/25
-disclosure agreements

Dear General Paxton:

On Friday, October 4, 2019, the Texas State Securities Board ("TSSB" or "Agency") received an open records request via email from Mr. Aaron Borden (the "Requestor"). A copy of the request ("Borden Request 2") showing the date and time it was received (with an the attachment to the request) is enclosed and tabbed as **Item A**. The Requestor stated he was requesting a "complete copy of all agreements between Texas State Securities Board employee [REDACTED] and the federal government. Including, but not limited to, the nondisclosure agreements between [REDACTED] and the FBI referenced in Assistant General Counsel Cheryn L. Netz's September 27, 2019 letter to Attorney General Ken Paxton."

The Agency responded to the Requestor on October 15, 2019, to inform him of its intention to decline to release the information, as the information involves third party proprietary interests, and its intention to make a request in accordance with Section 552.305 of the Government Code for a public information opinion to your office for your approval to withhold these records. A copy of this letter is enclosed and tabbed as **Item B**.

By way of background, the Agency previously filed a request for open records opinion with your office on September 20, 2019 in regards to an open records request from the same Requestor, that was received on September 6, 2019 ("Borden Request 1") and supplemented that request with a letter filed with your office on September 27, 2019 (the "Supplemental Letter") (collectively, the "TSSB Request," copies of which are enclosed and tabbed as **Items C1** (without enclosures) and **C2** (without enclosures)). The TSSB Request is currently pending with your Office. The Borden Request 2 is referring to the Supplemental Letter (**Item C2**) in the Request.

The records responsive to Borden Request 2 request consist of the agreements between Agency employee [REDACTED] and the Federal Bureau of Investigation (the "FBI") that were

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



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CHAIR

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MELISSA TYRÖCH
MEMBER

October 16, 2019

ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Public Information Request Regarding FBI non-disclosure agreements

Dear General Paxton:

On Friday, October 4, 2019, the Texas State Securities Board ("TSSB" or "Agency") received an open records request via email from Mr. Aaron Borden (the "Requestor"). A copy of the request ("Borden Request 2") showing the date and time it was received (with an the attachment to the request) is enclosed and tabbed as **Item A**. The Requestor stated he was requesting a "complete copy of all agreements between Texas State Securities Board employee [REDACTED] and the federal government. Including, but not limited to, the nondisclosure agreements between [REDACTED] and the FBI referenced in Assistant General Counsel Cheryn L. Netz's September 27, 2019 letter to Attorney General Ken Paxton."

The Agency responded to the Requestor on October 15, 2019, to inform him of its intention to decline to release the information, as the information involves third party proprietary interests, and its intention to make a request in accordance with Section 552.305 of the Government Code for a public information opinion to your office for your approval to withhold these records. A copy of this letter is enclosed and tabbed as **Item B**.

By way of background, the Agency previously filed a request for open records opinion with your office on September 20, 2019 in regards to an open records request from the same Requestor, that was received on September 6, 2019 ("Borden Request 1") and supplemented that request with a letter filed with your office on September 27, 2019 (the "Supplemental Letter") (collectively, the "TSSB Request," copies of which are enclosed and tabbed as **Items C1** (without enclosures) and **C2** (without enclosures)). The TSSB Request is currently pending with your Office. The Borden Request 2 is referring to the Supplemental Letter (**Item C2**) in the Request.

The records responsive to Borden Request 2 request consist of the agreements between Agency employee [REDACTED] and the Federal Bureau of Investigation (the "FBI") that were

The Honorable Ken Paxton
October 16, 2019
Page 2

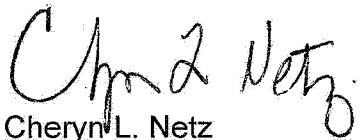
provided to your office as attachments to the Supplemental Letter (the "subject agreements"). The Requestor was copied on the Supplemental Letter, but was not provided copies of the enclosed subject agreements. The records are enclosed herein and tabbed as **Item D**. There are no other records responsive to Borden Request 2.

The employee provided copies of the subject agreements to the Agency in connection with legal research conducted by the Agency in order to respond to the Borden Request 1 and to request the TSSB Request letter.

The Agency has declined to release the agreements to the Requestor for the purpose of requesting an attorney general decision, pursuant to Section 552.305 of the Government Code, as the proprietary interests of a third party (the FBI) may be involved. The Agency has also provided a third party notice to the FBI, Austin, Texas Office pursuant to Section 552.305 of the Government Code, whose proprietary interests may be affected by the release of the information. A copy of the notice (with enclosures) is attached as **Item E**.

Pursuant to Section 552.301 of the Government Code, we request a public information opinion regarding these records.

Sincerely,



Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (w/o enclosures)
Via Regular U.S. Mail and Electronic Mail

From: [Borden, Aaron P.](#)
To: [gc](#)
Subject: Open Records Request
Date: Friday, October 4, 2019 4:03:12 PM
Attachments: [image002.png](#)
[2019-09-27 TSSB supp. request to OAG.pdf](#)

Please send me a complete copy of all agreements between Texas State Securities Board employee [REDACTED] and the federal government. Including, but not limited to, the nondisclosure agreements between [REDACTED] and the FBI referenced in Assistant General Counsel Cheryn L. Netz's September 27, 2019 letter to Attorney General Ken Paxton (copy attached for your reference).

Sincerely,

Aaron Borden

Associate



901 Main Street, Suite 3700
Dallas, Texas 75202

Phone: 214.749.2402 [E-MAIL](#)
Toll Free: 800.451.0093 [WEBSITE](#)
Fax: 214.747.3732 [BIO](#)

The message and information contained in or attached to this communication is privileged, confidential and intended only for the person or persons named above. If you are not the intended recipient of this transmission, you are hereby notified that any dissemination, distribution or copying of this communication to anyone other than the intended recipient or recipients is strictly prohibited. If you receive this communication in error, do not read it. Please immediately reply to the sender that you have received this communication in error and then please delete this communication from your computer. Thank you.

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

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ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

October 16, 2019

Mr. Aaron P. Borden, Esq.
Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P.
901 Main Street, Suite 3700
Dallas, Texas 75202

Via Email and U.S. Mail

Re: Public Information Request

Dear Mr. Borden:

The Agency is in receipt of your request for information dated October 4, 2019. Because the information involves third party proprietary interests, the Agency is declining to release the information. The Agency will make a request to the Office of the Attorney General in accordance with Section 552.305 of the Government Code for an Attorney General decision on whether Texas law requires us to release the records. You will be copied on this request when it is made and provided with a copy by email and by mail to your mailing address.

If you have any questions, please contact me at 512-304-8303.

Sincerely,

A handwritten signature in cursive script that reads "Cheryn Netz".

Cheryn L. Netz
Assistant General Counsel

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
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ROBERT BELT
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MELISSA TYROCH
MEMBER

September 20, 2019

ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Public Information Request Regarding Paul and World Class Capital
Group, LLC

Dear General Paxton:

On Friday, September 6, 2019, at 5:44 PM,¹ the Texas State Securities Board ("TSSB" or "Agency") received an open records request via email from Mr. Aaron Borden. A copy of the request showing the date and time it was received is enclosed and tabbed as **Item A**. Mr. Borden stated he was requesting a complete copy of all files, records, documents, correspondence, letters, communications, reports, or other information related to Mr. Paul and/or World Class Capital Group, LLC (sometimes also referred to as World Class Holdings) prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED] (the "named employee"). [REDACTED] is an investigator for the TSSB and in that capacity also serves as a Task Force Officer in the White Collar Crimes Squad with the Federal Bureau of Investigation (the "FBI") in Austin, Texas.

The Agency responded to the requestor to inform him of the costs to provide the public information in paper copies responsive to his request on September 17, 2019. The public information responsive to the request was provided to requestor electronically at no charge on September 20, 2019. The cover letter is enclosed and tabbed as **Item B**.

Other records responsive to the request are held by the Agency, but they were obtained in connection with an investigation. This Agency has received a prior determination ruling from your Office that covers these responsive records (ORD 2004-0239). These records were obtained by the TSSB pursuant to the Securities Commissioner's duty to conduct investigations to prevent or detect a violation of The Securities Act, Tex. Rev. Civ. Stat. Ann., Arts. 581-1 to 581-45 (West, Westlaw through 2019 R. Sess.) ("TSA"), or a Board

¹ The request was received on September 6, 2019, after close of business hours, which is 5:00 PM. Therefore, for purposes of counting days to request an open records decision from your Office, the receipt date was the next business day, which was September 9, 2019.

19-09202019-OAG Request_Borden PIA

rule or order and the Commissioner's authority to receive evidence under Section 28 of the TSA. All information received by the TSSB in connection with an investigation is confidential by law pursuant to Section 28 of the TSA. The Agency informed the requestor that responsive records covered by ORD 2004-0239 were withheld by the Agency pursuant to that prior determination.

Other records responsive to the request are held by the Agency, but they were made in connection with an investigation and are, therefore, considered to be within exceptions from public disclosure. These records were made by the TSSB pursuant to the Securities Commissioner's duty to conduct investigations to prevent or detect a violation of the TSA, or a Board rule or order. All information made by the TSSB in connection with an investigation is confidential by law pursuant to Section 28 of the TSA.

These Agency records are also excepted from public disclosure under Section 552.108 of the Texas Public Information Act, Tex. Gov't Code Ann., Arts. 552.001 to 552.353 (West, Westlaw through 2019 R. Sess.) ("PIA") because they deal with the "detection, investigation, or prosecution" of activity that may constitute a crime. Other records responsive to the request are excepted from disclosure under Section 552.101 of the PIA as they are confidential pursuant to the Federal Rules of Civil Procedure ("FRCP") or are confidential attorney-client communications.

In addition, certain of the records are excepted from public disclosure under Section 552.107(2) of the PIA because a court by order has prohibited disclosure of the information.

Pursuant to Section 552.301 of the PIA, we request a public information opinion regarding these records. Enclosed is a representative sample.

§552.101 - CONFIDENTIAL BY STATUTE - Section 28

Section 28 of the TSA provides:

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of this Act or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by this Act to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided however, that all information of every kind and nature received in connection with an investigation and ***all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential*** by the Commissioner and shall not be disclosed to the public except under the order of court for good cause shown....

Section 28 of the TSA protects investigative information maintained by this Agency from public disclosure for strong public policy reasons. For example, disclosure of this information may discourage persons from providing information relating to violations of the law, result in the depletion of funds obtained from the victims of securities fraud and additional violations of the TSA, prompt escape from the jurisdiction of the State by persons under investigation, and create potential harm or threat of harm to witnesses and complainants of fraudulent activities and other violations of the TSA, among other grave concerns. Disclosure of the internal notes, memoranda, reports, or communications that are part of an investigation would compromise the ability of the Agency to do its work and is not what the legislature intended when it passed Section 28 of the TSA.

Records Made in Connection with an Investigation

As has been previously mentioned, some of the records responsive to this request were *made* in connection with an investigation rather than *received* in connection with an investigation. In OR2010-15409, issued October 8, 2010, the OAG noted in footnote 4 that letters sent by the TSSB were outside the scope of the previous determination granted in OR2004-0239 regarding "information obtained" by the TSSB in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order, and could not be withheld on that basis. However, the OAG further concluded that the letters sent by the TSSB were "made" by the TSSB in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order and were therefore confidential under Section 28 of the TSA and must be withheld pursuant to Section 552.101 of the Government Code.

Some of the records responsive to this request were made by the named employee, who is an employee of the TSSB Enforcement staff, in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order. Other records responsive to this request were made by other Agency employees in connection with an investigation. The TSSB contends that these records are also information made confidential by statute pursuant to Section 28 of the TSA and must be withheld pursuant to Section 552.101 of the PIA. A representative sample of these records is enclosed and tabbed as **Items C1 through C7**.²

² Item C1 is an email from named employee to United States Department of Justice attorneys, with cc's to FBI agents. The Agency has provided third party notices to the United States Attorneys Office/ Department of Justice, Austin, TX office and to the FBI, Austin Texas Office pursuant to Section 552.305 of the PIA, whose proprietary interests may be affected by release of the information. Copies of the third parties notices are attached to this request for ruling as Items E1 and E2. Item C2 is an opening data sheet (ODS) for investigations prepared by the named employee and reported to the Agency's Enforcement Division for record keeping purposes. Item C3 is an email from the Agency's Director of Enforcement to Agency employees forwarding the ODS to them. Item C4 is an investigative work sheet filled out by an Agency employee to check names in an investigation. Item C5 is a screenshot of an inquiry made by an Agency employee to search the TX Secretary of State Business Entity Database for a particular entity name and the

As recently as August 18, 2017, in OR2017-18823, the OAG concluded that records made by this Agency in connection with investigations to prevent or detect a violation of the TSA or a Board order or rule are confidential under Section 28 of the TSA and are required to be withheld pursuant to Section 552.101 of the PIA.³ The TSSB contends that records represented by the enclosed samples are also information made confidential by statute pursuant to Section 28 of the TSA and must be withheld pursuant to Section 552.101 of the PIA.

Since the October 8, 2010 opinion noted the distinction between information "obtained" and information "made" in connection with an investigation, the TSSB has made more than a dozen⁴ requests for opinions relating to records prepared by the TSSB in connection with an investigation. In the interest of conserving limited state resources and improving efficiency of processing requests for public information, the TSSB respectfully requests that your office issue a predetermination letter finding that communications made in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order are confidential under Section 552.101 in conjunction with Section 28 of the TSA without the necessity of requesting a decision from the OAG.

In addition to **Items C1 through C7**, there are items responsive to the request that consist of search warrants, and related search warrant applications and affidavits that were submitted to and issued by the United States District Court. These items are discussed below under **EXCEPTION: CERTAIN LEGAL MATTERS- PIA SECTION 552.107**.

related search results generated by the database. Although the database is public, the search was made as part of an investigation and reveals possible targets of an investigation. Item C6 is an Enforcement Action Report prepared by the named employee. Item C7 is a preservation letter prepared by the named employee which was sent directing the recipient to preserve records in its possession in connection with an investigation.

³ Previous OAG opinions reaching the same conclusion regarding records made in connection with an investigation are: OR2014-21408 (November 23, 2014); OR2014-16067 (September 11, 2014); OR2014-18159 (October 9, 2014); OR2014-21408 (November 23, 2014); OR2014-00231 (January 3, 2014), OR2013-19039 (October 31, 2013), OR2013-19015 (October 31, 2013), OR2013-18306 (October 22, 2013), OR2013-13205 (July 31, 2013), OR2011-13511 (September 9, 2011), OR2011-13228 (September 14, 2011), OR2011-12619 (August 31, 2011), OR2011-11846 (August 16, 2011), OR2011-09402 (July 5, 2011), and OR2011-08429 (June 14, 2011), OR2011-05011 (April 11, 2011), OR2011-02964 (March 1, 2011), and OR2011-01807 (February 7, 2011).

⁴ The OAG declined to issue a prior determination for records "made in connection with" a Section 28 investigation although requested to by the TSSB in: OR2014-21408; OR2014-16067; OR2014-18159; OR2014-21408; OR2014-00231, OR2013-19039, OR2013-19015, OR2013-18306, OR2013-13205, OR2011-13511, OR2011-13228, OR2011-12619, OR2011-11846, OR2011-09402, OR2011-08429, OR2011-01807, and OR2011-05011.

§552.101 - CONFIDENTIAL BY LAW - Federal Rules of Civil Procedure

In addition to **Items C1 through C7**, the responsive records include federal grand jury subpoenas. The Agency does not have possession or custody of these records, and therefore has not attached a representative sample. The named employee as FBI Task Force Officer assisted with the drafting of these documents that were executed by FBI agents. These records are held under seal by a Federal Grand Jury considering alleged criminal violations of federal law. The TSSB contends that these records are not only information made confidential by statute pursuant to Section 28 of the TSA as records made in an investigation, and must be withheld pursuant to Section 552.101 of the PIA, but are also information made confidential by statute pursuant to Rule 6(e) of the Federal Rules of Civil Procedure (the "FRCP") and must be withheld pursuant to Section 552.101 of the PIA. Rule 6(e) of the FRCP provides:

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule (6)(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter--other than the grand jury's deliberations or any grand jury's vote-- made be made to:

...

(ii) any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom disclosure has been made, and must certify that the attorney had advised those persons of their obligation of secrecy under this rule.

The subpoenas were prepared by the named employee as a government personnel to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law, and as such, the named employee may only use or disclose that information for such purpose. Therefore we contend that these records held under seal consist of information made confidential by statute pursuant to FRCP Rule 6(e) and must be withheld pursuant to Section 552.101 of the PIA.

§552.108 - LAW ENFORCEMENT EXCEPTION

Section 552.108 of the PIA excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the "detection, investigation, or prosecution of crime." The records covered as Section 28 investigatory material are also covered by the law enforcement exception in PIA, Section 552.108.

The TSSB is a law enforcement agency in which the Securities Commissioner is charged with the duty to investigate violations of state securities law which may be punished or addressed by administrative, civil, or criminal actions. See *Texas Attorney General's Office v. Adams*, 793 S.W. 2d 771 (Tex.App.-Fort Worth 1990, no writ) at 773 and the TSA Sections 3, 14, 29, and 32. Criminal referrals are made to district attorneys and United States attorneys throughout the state, and the TSSB routinely assists state and federal prosecutors in drafting indictments, presenting cases to grand juries, and the trial of criminal cases. The representative samples discussed above deal with the detection and investigation of activity that may constitute a crime. Disclosure of these or other confidential records in TSSB investigative files would interfere with this Agency's ability to detect, investigate, and prosecute violations of the TSA because it would affect the integrity of the investigatory process, would allow witnesses to corroborate their testimonies, and would create a chilling effect on how information is gathered and used by this Agency during its ongoing investigations. Therefore, we assert that the records represented by **Items C1 through C7** are excepted from public disclosure under Section 552.108 of the PIA and must be withheld.

§552.101, ATTORNEY-CLIENT PRIVILEGE

Section 552.101 excepts information from disclosure if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

The common law privilege for attorney client communications; which has been codified in Rule 501 of the Federal Rules of Evidence ("FRE") protects confidential disclosures between a client to his attorney made in order to obtain legal assistance. This privilege includes clients that are government agencies and their government attorneys. The attorney client privilege assures the client that confidential communications to his attorney will not be disclosed without his consent.

Communications between the TSSB (the client) and the client's lawyers, in this case US Attorneys, are privileged. The protection extends to factual information or requests for legal advice communicated by the client to the attorney, as well as legal advice or opinions given by the attorney in furtherance of the rendition of legal services.

A communication between a TSSB employee and US attorneys is reflected in sample **Item C1**. The existence and content of these communications are confidential legal matters pursuant to the PIA and attorney client privilege, as codified in FRE Rule 501. The TSSB, as the client when the communications were made, asserts its privilege to refuse to disclose confidential attorney-client communications made for the purpose of facilitating the rendition of professional legal services to the TSSB. Therefore, such information must be withheld as covered attorney-client communication.

INFORMATION SHARING - TSA Section 28, Board Rule 131.1

There are some unique information sharing authorizations applicable to the TSSB that may be relevant in your analysis, especially as it relates to information shared with other governmental authorities.

Section 28 of the TSA provides in pertinent part:

A. Investigations by the Commissioner The Commissioner may, at the Commissioner's discretion, disclose any confidential information in the Commissioner's possession to any governmental or regulatory authority or association of governmental or regulatory authorities approved by Board rule or to any receiver appointed under Section 25-1 of this Act. The disclosure does not violate any other provision of this Act or Chapter 552, Government Code.

Board Rule 131.1 provides:

(a) The Board recognizes the need for cooperative law enforcement among agencies responsible for the prevention, detection, and prosecution of white collar crime, for the regulation and policing of persons who offer and sell securities, and for the regulation of offerings of securities. Pursuant to the authority given the Board under the Texas Securities Act, §28, **the Board authorizes the Securities Commissioner in his or her discretion to supply any confidential information in the Commissioner's possession to:**

(1) any governmental or regulatory authority, including any bankruptcy trustee, receiver, or other official appointed by a state or federal court in a proceeding involving a governmental or regulatory authority; or

(2) any association of governmental or regulatory authorities.

(b) Disclosure for limited purposes. **Disclosure of the confidential information referred to in subsection (a) of this section will be made only for the purpose(s) of assisting in the detection or prevention of violations of law or to further administrative, civil, or criminal action.**

The above provisions permit the TSSB to share confidential information with other governmental authorities without the information losing its confidential status.

To the extent that any responsive records, represented by representative samples **Items C1 or C7**, or the federal grand jury subpoenas or search warrant materials were disclosed to either the United States Department of Justice or the FBI, both of which are governmental authorities, the sharing of that information does not cause the information to lose its confidential status. This would include any records that the named employee prepared or created and then shared with the United States Department of Justice or the FBI as an investigator with the TSSB, while serving in that capacity and while serving as an FBI Task Force Officer.

EXCEPTION: CERTAIN LEGAL MATTERS- PIA SECTION 552.107

The records that are responsive to the request that the Agency has withheld include drafts of search warrant affidavits and copies of search warrant applications, affidavits and related search warrants. The final affidavits and related search applications and warrants have been sealed by multiple orders of the United States District Court, Western District of Texas Austin Division (the "Federal Orders"). Attached as **Item D** as a representative sample is a copy of one of these orders, which is submitted for your review. These responsive records continue to be sealed from disclosure by the United States District Court. Section 552.107(2) of the Government Code allows a governmental body to withhold information if "a court by order has prohibited disclosure of the information." Government Code Section 552.107(2). Therefore we assert that these records subject to

19-09202019-OAG Request_Borden PIA

The Honorable Ken Paxton
September 20, 2019
Page 9

the Federal Orders are excepted from public disclosure under Section 552.107(2) of the PIA and must be withheld.

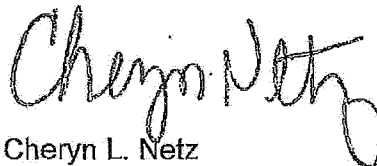
CONCLUSION

For the reasons stated herein, we respectfully request that upon review, your office issue a decision finding that the requested records are not subject to disclosure under the PIA pursuant to Government Code Section 552.101 and Section 28 of the TSA; Government Code Section 552.108; Government Code Section 552.107 and Government Code Section 552.101 and common law attorney client privilege, codified in the Federal Rules of Evidence Rule 501.

We further request that, upon your review, your office issue a predetermination letter finding that records made in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order are confidential under Section 552.101 in conjunction with Section 28 of the TSA without the necessity of requesting a decision from the OAG.

I trust this letter and the enclosed materials will be of assistance to you in issuing your public information opinion. Please feel free to call me at 512-305-8303 if you need further information.

Sincerely,



Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (redacted w/o enclosures)
Via Regular U.S. Mail and Electronic Mail

19-09202019-OAG Request_Borden PIA

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 306-8310



Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

E. WALLY KINNEY
CHAIR

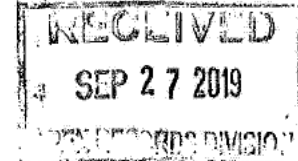
MIGUEL ROMANO, JR.
MEMBER

KENNY KONCABA
MEMBER

ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

September 27, 2019



ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Supplemental Letter to Request for Opinion Concerning Public
Information Request Regarding Paul and World Class Capital Group, LLC

Dear General Paxton:

On September 20, 2019, the Texas State Securities Board ("TSSB" or "Agency") filed a request for open records opinion with your office (the "TSSB Request"). The purpose of this letter is to supplement that request. As the Agency stated in the TSSB Request, the requestor requested certain files and records prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED] (the "named employee"). [REDACTED] is an investigator for the TSSB and in that capacity also serves as a Task Force Officer in the White Collar Crimes Squad with the Federal Bureau of Investigation (the "FBI") ("FBI Task Force Officer") in Austin, Texas.

The TSSB Request stated that certain records there are responsive to the PIA request that were prepared by the named employee as part of his position as an FBI Task Force Officer. In addition to records he prepared, the named employee has access to other FBI records as an FBI Task Force Officer. The named employee entered into multiple nondisclosure agreements with the FBI in 2013 (the "NDAs") that cover all FBI records of which he has access. A copy of these agreements is attached as **ITEM F**. These agreements specifically provide that the information to which he has access or may obtain access is now and will remain the property of, or under the control of the United States Government. These agreements prohibit him from disclosing FBI information to any unauthorized parties. Items **C7**, the federal grand jury subpoenas, and all search warrant materials (all referenced in the TSSB Request), as well as any records obtained by the FBI in response to these items are subject to the NDAs, as provided in the NDAs, are the property of and under the control of the United States Government.

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The Honorable Ken Paxton
September 27, 2019
Page 2

I trust this supplemental letter and the enclosed materials will be of assistance to you in issuing your public information opinion. Please feel free to call me at 512-305-8303 if you need further information.

Sincerely,



Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (redacted w/o enclosures)
Via Regular U.S. Mail and Electronic Mail

19-09202019-OAG Request_Borden PIA

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



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E. WALLY KINNEY
CHAIR

MIGUEL ROMANO, JR.
MEMBER

KENNY KONCABA
MEMBER

ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

October 16, 2019

Federal Bureau of Investigation
Attn: Ms. Holly Kelley
12515 Research, Building 7, Suite 400
Austin, Texas 78759

Re: Public Information Act

Dear Ms. Kelley:

We have received a formal request to inspect or copy some of our files. A copy of the request for information is enclosed. The requested files include records we received from you or from your company. The Office of the Attorney General is reviewing this matter, and they will issue a decision on whether Texas law requires us to release your records. Generally, the Public Information Act (the "Act") requires the release of requested information, but there are exceptions. As described below, you have the right to object to the release of your records by submitting written arguments to the attorney general that one or more exceptions apply to your records. You are not required to submit arguments to the attorney general, but if you decide not to submit arguments, the Office of the Attorney General will presume that you have no interest in withholding your records from disclosure. In other words, if you fail to take timely action, the attorney general will more than likely rule that your records must be released to the public. If you decide to submit arguments, **you must do so not later than the tenth business day after the date you receive this notice.**

If you submit arguments to the attorney general, you must:

- a) identify the legal exceptions that apply,
- b) identify the specific parts of each document that are covered by each exception, and
- c) explain why each exception applies.

Gov't Code § 552.305(d). A claim that an exception applies without further explanation will not suffice. Attorney General Opinion H-436 (1974). You may contact this office to review the information at issue in order to make your arguments. We will provide the attorney general with a copy of the request for information and a copy of the requested information, along with other material required by the Act. The attorney general is generally required to issue a decision within 45 business days.

Ms. Holly Kelley
October 16, 2019
Page 2 of 3

Please send your written comments to the Office of the Attorney General at the following address:

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

If you wish to submit your written comments electronically, you may only do so via the Office of the Attorney General's eFiling System. An administrative convenience charge will be assessed for use of the eFiling System. No other method of electronic submission is available. Please visit the attorney general's website at <http://www.texasattorneygeneral.gov> for more information.

In addition, you are required to provide the requestor with a copy of your communication to the Office of the Attorney General. Gov't Code § 552.305(e). You may redact the requestor's copy of your communication to the extent it contains the substance of the requested information. Gov't Code § 552.305(e).

Commonly Raised Exceptions

In order for a governmental body to withhold requested information, specific tests or factors for the applicability of a claimed exception must be met. Failure to meet these tests may result in the release of requested information. We have listed the most commonly claimed exceptions in the Government Code concerning proprietary information and the leading cases or decisions discussing them. This listing is not intended to limit any exceptions or statutes you may raise.

Section 552.101: Information Made Confidential by Law

Open Records Decision No. 652 (1997).

Section 552.104: Confidentiality of Information Relating to Competition

Boeing Co. v. Paxton, 466 S.W. 3d 831 (Tex. 2015).

Section 552.110: Confidentiality of Trade Secrets and Commercial or Financial Information

Trade Secrets:

In re Bass, 113 S.W.3d 735 (Tex. 2003).

Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

Open Records Decision No. 552 (1990).

Ms. Holly Kelley
October 16, 2019
Page 3 of 3

Commercial or Financial Information:

Birnbaum v. Alliance of Am. Insurers, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. filed) (construing previous version of section 552.110), *abrogated by In re Bass*, 113 S.W.3d 735 (Tex. 2003).

Open Records Decision No. 639 (1996).

Open Records Decision No. 661 (1999).

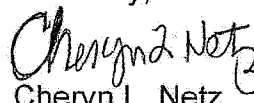
Section 552.113: Confidentiality of Geological or Geophysical Information

Open Records Decision No. 627 (1994).

Section 552.131: Confidentiality of Certain Economic Development Negotiation Information

If you have questions about this notice or release of information under the Act, please refer to the *Public Information Handbook* published by the Office of the Attorney General, or contact the attorney general's Open Government Hotline at (512) 478-OPEN (6736) or toll-free at (877) 673-6839 (877-OPEN TEX). To access the *Public Information Handbook* or Attorney General Opinions, including those listed above, please visit the attorney general's website at <http://www.texasattorneygeneral.gov>.

Sincerely,



Cheryn L. Netz
Assistant General Counsel
Texas State Securities Board

Enclosure: Copy of request for information
cc:

Aaron P. Borden
901 Main Street, Suite 3700
Dallas, Texas 75202
(w/o enclosures)

Open Records Division ✓
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)

From: [Borden, Aaron P.](#)
To: [gc](#)
Subject: Open Records Request
Date: Friday, October 4, 2019 4:03:12 PM
Attachments: [image002.png](#)
[2019-09-27 TSSB supp request to OAG.pdf](#)

Please send me a complete copy of all agreements between Texas State Securities Board employee [REDACTED] and the federal government. Including, but not limited to, the nondisclosure agreements between [REDACTED] and the FBI referenced in Assistant General Counsel Cheryn L. Netz's September 27, 2019 letter to Attorney General Ken Paxton (copy attached for your reference).

Sincerely,

Aaron Borden

Associate



901 Main Street, Suite 3700
Dallas, Texas 75202

Phone: 214.749.2402 [E-MAIL](#)
Toll Free: 800.451.0093 [WEBSITE](#)
Fax: 214.747.3732 [BIO](#)

The message and information contained in or attached to this communication is privileged, confidential and intended only for the person or persons named above. If you are not the intended recipient of this transmission, you are hereby notified that any dissemination, distribution or copying of this communication to anyone other than the intended recipient or recipients is strictly prohibited. If you receive this communication in error, do not read it. Please immediately reply to the sender that you have received this communication in error and then please delete this communication from your computer. Thank you.

TRAVIS J. ILES
SECURITIES COMMISSIONER

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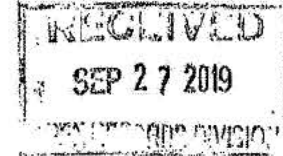
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September 27, 2019



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Information Request Regarding Paul and World Class Capital Group, LLC

Dear General Paxton:

On September 20, 2019, the Texas State Securities Board ("TSSB" or "Agency") filed a request for open records opinion with your office (the "TSSB Request"). The purpose of this letter is to supplement that request. As the Agency stated in the TSSB Request, the requestor requested certain files and records prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED] (the "named employee"). [REDACTED] is an investigator for the TSSB and in that capacity also serves as a Task Force Officer in the White Collar Crimes Squad with the Federal Bureau of Investigation (the "FBI") ("FBI Task Force Officer") in Austin, Texas.

The TSSB Request stated that certain records there are responsive to the PIA request that were prepared by the named employee as part of his position as an FBI Task Force Officer. In addition to records he prepared, the named employee has access to other FBI records as an FBI Task Force Officer. The named employee entered into multiple nondisclosure agreements with the FBI in 2013 (the "NDAs") that cover all FBI records of which he has access. A copy of these agreements is attached as **ITEM F**. These agreements specifically provide that the information to which he has access or may obtain access is now and will remain the property of, or under the control of the United States Government. These agreements prohibit him from disclosing FBI information to any unauthorized parties. Items **C7**,

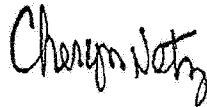
in response to these items are subject to the NDAs, as provided in the NDAs, are the property of and under the control of the United States Government.

19-09202010-OAG Request_Borden PIA

The Honorable Ken Paxton
September 27, 2019
Page 2

I trust this supplemental letter and the enclosed materials will be of assistance to you in issuing your public information opinion. Please feel free to call me at 512-305-8303 if you need further information.

Sincerely,



Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (redacted w/o enclosures)
Via Regular U.S. Mail and Electronic Mail

19-09202019-OAG Request_Borden PIA



MEADOWS COLLIER

ATTORNEYS AT LAW

MEADOWS, COLLIER, REED, COUSINS, CROUCH & UNGERMAN, L.L.P.

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901 MAIN STREET, SUITE 3700
DALLAS, TEXAS 75202
(214) 744-3700
www.meadowscollier.com

AARON P. BORDEN
Associate
aborden@meadowscollier.com

Received by Open Records

NOV 04 2019



BBX

11/25

Via Certified Mail 7019 0140 0000 6267 1006

The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701
ATTN: Open Records Division

798456
806585

Re: Public Information Request Regarding Natin "Nate" Paul and World Class Capital Group, LLC

Dear General Paxton:

In its October 16, 2019 Supplemental Letter Number 2 to Request for Opinion Concerning Public Information Request Regarding Paul and World Class Capital Group, LLC, the Texas State Securities Board ("TSSB") attempts to bolster its request for an opinion with supplemental arguments. For the reasons set forth, the TSSB's supplemental arguments also fail.

The TSSB's attempt to shoehorn the withheld records into the confidentiality provisions of the TSA fails under a cardinal rule of statutory construction.

The TSSB argues that the withheld records are confidential under article 581-28 because section 3-1 of the TSA permits the Commissioner to utilize any penalties, sanctions, remedies, or relief as the Commissioner deems necessary. However, the TSSB does not explain how this enabling provision makes records in a federal taskforce investigation confidential under the TSA.

Moreover, under one of the cardinal rules of statutory construction, the withheld records are not confidential under the TSA because [REDACTED] involvement in the federal taskforce is not authorized by the TSA. An omission of language in one statute, when it is included in another statute, is presumed to be done intentionally.¹ The Texas legislature has repeatedly demonstrated

¹ *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497 (Tex. 2013).

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HBOM00191036

EX. 030.119



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901 MAIN STREET, SUITE 3700
DALLAS, TEXAS 75202
(214) 744-3700
www.meadowscollier.com

AARON P. BORDEN
Associate
aborden@meadowscollier.com

Received by Open Records

NOV 04 2019



October 30, 2019

Via Certified Mail 7019 0140 0000 6267 1006

The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701
ATTN: Open Records Division

798456
806585

Re: Public Information Request Regarding Natin "Nate" Paul and World Class Capital Group, LLC

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Moreover, under one of the cardinal rules of statutory construction, the withheld records are not confidential under the TSA because [REDACTED] involvement in the federal taskforce is not authorized by the TSA. An omission of language in one statute, when it is included in another statute, is presumed to be done intentionally.¹ The Texas legislature has repeatedly demonstrated

¹ *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497 (Tex. 2013).

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EX. 030.120

that it will explicitly reference the federal government when it authorizes a state agency to work with the federal government.²

The two provisions on which the TSSB relies, while enabling the TSSB to work with other state and local authorities, noticeably exclude any authorization to work with federal authorities. Section 3 of the TSA governs “Administration and Enforcement by the Securities Commissioner and the *Attorney General and Local Law Enforcement Officials*.”³ The various provisions of section 3 detail the process for the Commissioner to present cases to the District or County Attorney or the Attorney General and authorize the TSSB to assist County or District Attorney’s in prosecutions. However, the statute does not authorize the TSSB to work with federal law enforcement. Similarly, article 581-28 authorizes the TSSB to assist securities regulators “of another state or foreign jurisdiction,” but the statute does not authorize the TSSB to work with federal securities regulators. Because the Texas legislature has repeatedly referenced federal authorities when it intended to authorize state agencies to work with the federal government, the lack of any authorization in the TSA is presumed to be done intentionally. Thus, the withheld information is not made confidential by the TSA because [REDACTED] work as a member of a federal taskforce was not authorized by the TSA.

Hypothetical arguments regarding what “sometimes” happens in other cases does not establish that the information withheld in this case is confidential under article 581-28.

The TSSB also supplements its original argument regarding article 581-28 by arguing that “[s]ometimes conduct is investigated and the Agency determines...the conduct...could be a violation...of federal laws.... In these cases, the Agency may refer the case to...federal regulatory or law enforcement authority.”⁴ However, the TSSB does not allege that this investigation started out as a TSSB investigation that was subsequently referred to federal authorities. In fact, the TSSB acknowledges that [REDACTED] was a federal taskforce agent, and [REDACTED] affidavit states that he was at Mr. Paul’s home on August 14, 2019 to participate in execution of a search warrant. The search warrant provided in connection with that search does not reference a TSA violation or TSSB involvement, and [REDACTED] signed the related search warrant return in his capacity as a federal taskforce agent. These documents show that the investigation at issue was not a TSSB investigation of a violation of the TSA, and the TSSB cannot overcome the contradictory documentary evidence with hypothetical arguments regarding what sometimes happens in other cases.

² See, e.g., Tex. Parks & Wild. Code Ann. § 13.303 (requiring cooperation with the federal government); Tex. Health & Safety Code Ann. § 481.186 (directing cooperation with a specific federal agency); Tex. Health & Safety Code Ann. § 361.402 (permitting enforcement in conjunction with the federal government); Tex. Hum. Res. Code Ann. § 22.002 (requiring cooperation with federal, state, and local governmental agencies); Tex. Gov’t Code Ann. § 494.008 (allowing departmental employees to assist municipal, county, state, or federal law enforcement officers); Tex. Occ. Code Ann. § 301.161 (allowing the Texas Board of Nursing to cooperate with federal, state, or local law enforcement agencies in the investigation and prosecution of crimes related to the practice of nursing).

³ Emphasis added.

⁴ The TSSB also discusses other things it “sometimes” does, such as referring a case to another state. None of the other possibilities appear to be even remotely relevant to the case at hand.

██████████ August 14, 2019 Comments to Mr. Paul's Counsel

The TSSB also takes issue with the undersigned counsel's representation that ██████████ told him that this investigation did not involve a violation of the TSA. The conversation at issue occurred at Mr. Paul's home on the evening of August 14, 2019 as ██████████ Special Agent ██████████ and other federal agents were concluding a search and seizure at Mr. Paul's home.

Mr. Paul had been aware of the underlying federal investigation for nearly a year. When Mr. Paul learned of the investigation, Mr. Paul, through counsel, reached out to the federal investigators about the possibility of assisting in their investigation and was told that the federal investigators would be in touch if they decided to seek information from Mr. Paul. The federal investigators did not make a single request for records from him in the intervening year. As such, Mr. Paul was surprised when federal investigators engaged in a draconian search of his home on August 14, 2019.

Because of this surprising development, counsel for Mr. Paul engaged in multiple conversations with the federal investigators, including ██████████ over the course of the day. Mr. Paul also voluntarily returned to his home later in the day to open a secure file box for the agents. Throughout all of these dealings, the conversations addressed specific facts and issues regarding this specific investigation.

██████████ in his affidavit acknowledges that the undersigned counsel asked him a specific question about state action separate from the federal investigation. However, ██████████ disputes the undersigned counsel's representation that ██████████ in response, made a specific representation about this investigation. Instead, ██████████ claims that he made a vague and general response "that typically the TSSB would not take a separate state action when assisting...in a federal investigation."

The undersigned counsel's representation was made based on contemporaneous notes from the August 14, 2019 conversation with ██████████ and his recollection of the conversation. Based on these, the undersigned counsel understood ██████████ representation to be a specific representation regarding this case.

Regardless of the different recollections of the conversation, ██████████ affidavit contradicts the TSSB's arguments and supports Mr. Paul's arguments. The TSSB's primarily argues that the information withheld is confidential because it was obtained in a TSSB investigation of a violation of the TSA. However, ██████████ affidavit states that "typically the TSSB would not take a separate state action when assisting...in a federal investigation." Based on this, it would be atypical for the TSSB to be conducting its own "action" while ██████████ was assisting in the federal investigation, and ██████████ affidavit, noticeably, does not state that the TSSB, contrary to the normal course, was engaged in its own investigation.⁵ Thus, ██████████ affidavit supports Mr. Paul's argument that the information at issue was not obtained in a TSSB

⁵ The documents provided thus far to counsel for Mr. Paul (which are few) also indicate ██████████ was not conducting a TSSB investigation of a violation of the TSA.

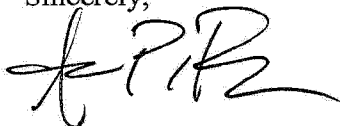
The Honorable Ken Paxton
October 30, 2019

investigation of a violation of the TSA. Thus, the withheld information is not made confidential by the TSA and must be released to Mr. Paul.

Conclusion.

For the reasons set forth above, the TSSB's supplemental arguments fail, and Mr. Paul requests the Attorney General to enter an opinion instructing the TSSB to release all responsive information immediately.

Sincerely,

A handwritten signature in black ink, appearing to read 'APB', with a stylized flourish at the end.

Aaron P. Borden

cc: Cheryn L. Netz



U.S. Department of Justice
Federal Bureau of Investigation

Received by Open Records

NOV 04 2019

In Reply, Please Refer to
File No.

5740 University Heights
San Antonio, Texas 78249
October 30, 2019

798456
807797

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

RE: Public

yes, please attach.
thanks!

-BBX Non-Disclosure Agreement

Dear Open Records Division:

FOIA 65265

The Federal Bureau of Investigation (FBI) has received notice of the above Public Information Request dated, October 16, 2019. The document is a non-disclosure agreement (hereinafter referred to as the "NDA") between the FBI and the Task Force Officer with the FBI. This document is a copy of the NDA. The Task Force Officer records must be maintained in accordance with appropriate applicable laws. This document is not subject to Texas open records laws. The Requestor may make an appropriate claim under federal open records laws for this document.

BBX
does this belong w/
798456?
-SMA7

MLCO
BBX
11/25

The FBI further believes this information is excepted from disclosure specifically, section 552.101 (Confidential Information) and 552.111 (Agency Memoranda) of the Government Code.

Please feel free to contact me if you have any questions at (210) 650-6655.

Sincerely,

Jason R Cammack

Jason R. Cammack
Associate Division Counsel



U.S. Department of Justice
Federal Bureau of Investigation

Received by Open Records

NOV 04 2019

In Reply, Please Refer to
File No.

5740 University Heights
San Antonio, Texas 78249
October 30, 2019

Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

798456

807797

RE: Public Information Request for FBI Non-Disclosure Agreement

Dear Open Records Division:

The Federal Bureau of Investigation (FBI) has received notice of the above Public Information Request dated, October 16, 2019. The document in question is a non-disclosure agreement (hereinafter NDA) between the FBI and [REDACTED] [REDACTED] is a task force officer with the FBI. The FBI requests that this document be returned and all copies destroyed. This document is clearly marked property of the FBI and on loan to your Agency. Furthermore, the Task Force Officer Agreement between [REDACTED] Agency and the FBI states that all FBI records must be returned to the FBI on demand and may not be taken out of FBI space without appropriate approvals. The NDA is property of the FBI and retaining the document after an appropriate request for its return is a violation of the Task Force Officer Agreement. The NDA is not subject to Texas open records laws as it is not the property of the State of Texas. The Requestor may make an appropriate claim under federal open records laws for this document.

The FBI further believes this information is excepted from disclosure specifically, section 552.101 (Confidential Information) and 552.111 (Agency Memoranda) of the Government Code.

Please feel free to contact me if you have any questions at (210) 650-6655.

Sincerely,

Jason R. Cammack
Associate Division Counsel



MEADOWS COLLIER

ATTORNEYS AT LAW

MEADOWS, COLLIER, REED, COUSINS, CROUCH & UNGERMAN, L.L.P.

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901 MAIN STREET, SUITE 3700
DALLAS, TEXAS 75202
(214) 744-3700
www.mcadownscollier.com

AARON P. BORDEN
Associate
aborden@meadowscollier.com



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OCT 07 2019

OPEN RECORDS DIVISION

October 4, 2019

798456
801346

Via Certified Mail 7016 2140 006 7772 4787

The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701
ATTN: Open Records Division

BBX

11/25

**Re: Public Information
Capital Group, LLC**

re: "Nate" Paul and World Class

Dear General Paxton:

On September 6, 2019, the undersigned counsel, on behalf of Mr. Paul, made a request under the Texas Public Information Act ("PIA") for "a complete copy of all files, records, documents, correspondence, letters, communications, reports, or other information related to Mr. Paul and/or World Class Capital Group, LLC (sometimes also referred to as World Class Holdings) prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED] See Exhibit A.

On September 17, 2019, the TSSB notified Mr. Paul that it would provide 33 pages of records in response to the request. The 33 pages of records released are various organizational filings and public information reports that are generally available to the public through the state's websites. The TSSB acknowledged that it had other information that was public information that was being withheld under exceptions to the disclosure required by the PIA. See Exhibit B.

On September 20, 2019, the TSSB requested a public information opinion from the Attorney General regarding the information withheld. See Exhibit C. On September 27, 2019, the TSSB supplemented its request with additional factual information. See Exhibit D.

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EX. 030.126



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901 MAIN STREET, SUITE 3700
DALLAS, TEXAS 75202
(214) 744-3700
www.meadowscollier.com

AARON P. BORDEN
Associate
aborden@meadowscollier.com



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OCT 07 2019

OPEN RECORDS DIVISION

October 4, 2019

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801346

Via Certified Mail 7016 2140 0000 7772 4787

The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701
ATTN: Open Records Division

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OAG_SUB-00001882

HBOM00191044

EX. 030.127

The Honorable Ken Paxton
October 4, 2019

Pursuant to Tex. Gov't Code § 552.304(a), the following information is provided on behalf of Mr. Paul in response to the September 20, 2019 request from Texas State Security Board ("TSSB") for a public information opinion and the September 27, 2019 supplement.

The PIA is to be liberally construed in favor of granting requests for information. Tex. Gov't Code § 522.001(b). Exceptions to the PIA are to be narrowly construed. *Thomas v. Cornyn*, 71 S.W.3d 473, 481 (Tex. App.—Austin 2002, no pet.). When a government body seeks to withhold information, it bears the burden of establishing to the Attorney General that the requested information falls within an exception. *Id.* at 480-81. As detailed below, the TSSB fails to establish that the requested information falls within an exception to the PIA.

The TSSB fails to demonstrate that the information withheld is confidential under article 581-28 of the TSA.

In its request for a public information opinion, the TSSB argues that the requested information is confidential under article 581-28 of the Texas Securities Act ("TSA"); and therefore, the TSSB can withhold the information under Tex. Gov't Code § 552.101. In support of its argument, the TSSB relies on OR2004-0239 (Jan. 12, 2004), OR2010-15409 (Oct. 8, 2010), and OR2017-18823 (Aug. 18, 2019); however, these decisions dealt with investigations by the TSSB of violations of the TSA or a Board order or rule.

In the instant case, the TSSB is not investigating violations of the TSA or a Board order or rule. The TSSB admits that the named employee was on a task force assignment working outside his normal role, and named employee represented to Mr. Paul's legal counsel on August 14, 2019 that his investigation does not involve a violation of the TSA.

In its request to the Attorney General, the TSSB attempts turn article 581-28's narrow confidentiality provision covering TSSB investigations of violations of the TSA or Board order or rule into a broad provision encompassing any investigation. The Texas Department of State Health Services ("TDSHS") tried and failed a similar approach in a *Paxton v. Texas Dep't of State Health Services*, 500 S.W.3d 702 (Tex. App.—Austin 2016, no pet.). In *Texas Dep't of State Health Services*, the request at issue sought information collected by the OIG during an investigation of employee misconduct at the TDSHS. *Id.* at 703. In its request for an opinion from the Attorney General, the TDSHS argued that the information was confidential because Tex. Gov't Code § 531.1021(g) makes information compiled by the OIG in an audit or investigation confidential. *Id.* at 704. The Attorney General rejected the TDSHS's argument and held that the information was not within the confidentiality exception because the OIG investigation at issue was not an investigation of Medicaid or other health and human services fraud, abuse, or overcharges. *Id.* The Attorney General found that the confidentiality provision was limited to these types of audits and investigations based on § 531.1021(g)'s statutory context and the OIG's enabling provisions. *Id.* The district court held for the TDSHS, but the Austin Court of Appeals reversed the district court's decision and rendered judgment in favor of the Attorney General. *Id.* The appeals court noted that the statute in isolation could support the TDSHS's position, but held that the context of the statute showed that the Legislature intended for confidentiality to extend only to those OIG

The Honorable Ken Paxton
October 4, 2019

audits and investigations that concerned fraud waste and abuse in the provision and delivery of health and human services in the state. *Id.* at 706.

Since the decision in *Texas Dep't of State Health Services*, the Attorney General has held that *Texas Dep't of State Health Services* requires DART to release personal identifying numbers. OR2018-30942 (Dec. 11, 2018). DART argued that the identifying numbers are confidential under § 452.061(e) of the Transportation Code. The Attorney General concluded that the statutory context of the § 452.061(e) evidenced that it made personal identifying numbers confidential only when collected by DART for purposes related to the collection of fares and other charges. Thus, personal identifying numbers collected in other contexts are not confidential and cannot not be withheld.

Similarly, in OR2019-03815 (Feb. 8, 2019), the Attorney General considered a request to the Texas Board of Veterinary Medical Examiners for documentation of inspections of clinics and individuals. The Board argued that the documents were confidential under § 801.207(b) of the Occupations Code. The Attorney General noted that the context of § 801.207(b) limited its application to stated categories of investigations, which did not include the inspections at issue. Thus, under *Texas Dep't of State Health Services*, the Veterinary Board was required to release the requested information.¹

The express language of Article 581-28 shows that it does make all investigations confidential. Article 581-28 authorizes only investigations “to prevent or detect violation of [the TSA] or Board rule or order.”

In addition, the context of the confidentiality provision shows that the Legislature did not intend for it to be a broad exception for any investigation. The confidentiality provision the TSSB relied on in article 581-28 immediately follows the language authorizing the TSSB to investigate violations of the TSA or Board rule or order. Furthermore, the TSA’s enabling provision in article 581-3 empowers the TSSB to enforce the TSA, and the Board to provide assistance in prosecution involving alleged violations of the TSA. This statutory context shows that article 581-28’s confidentiality provision, like the OIG’s confidentiality provision in *Texas Dep't of State Health Services*, is limited. In this case, the statutory context limits the confidentiality to TSSB investigations of a violation of the TSA or Board rule or order.

Here, the TSSB’s statements in its letters to the Attorney General, the documents withheld and the named employee’s representations to Mr. Paul’s counsel evidence that the investigation at

¹ Even before *Texas Dep't of State Health Services*, the Attorney General found that there were limits to the confidentiality provision in article 581-28. In OR2011-02964 (Mar. 1, 2011), the TSSB argued that a court document obtained in connection with the TSSB examination of the requestor’s client was confidential under article 581-28. The Attorney General held that the court document was beyond the scope of article 581-28; and the TSSB was required to release the document to the requestor. Similarly, in OR2014-18159 (Oct. 9, 2014), the TSSB received a request for information pertaining to its investigation of two individuals and a specified entity. The TSSB argued that a requested document was confidential under article 581-28 of the TSA. After reviewing the document, the Attorney General held that the document that was not made in connection with an investigation of a violation of the TSA or Board rule or order. Thus, the document was not confidential under article 581-28 and could not be withheld under § 552.101. *See also* OR2007-11566 (Sep. 5, 2007) (holding that the TSSB failed to demonstrate that the requested documents were confidential under article 581-28).

The Honorable Ken Paxton
October 4, 2019

issue is not a TSSB investigation of the TSA or a Board rule or order. Accordingly, the holding in *Texas Dep't of State Health Services* mandates release of the requested information.

The TSSB Rule 6(e) argument fails under the Attorney General's prior precedent.

The TSSB also argues that requested information prepared by the named employee must be withheld because it was provided to the grand jury; and the information is therefore made confidential by § 552.101 in conjunction with Rule 6(e) of the Federal Rules of Criminal Procedure.

Section 552.101 excepts from disclosure information that is “confidential by law, either constitutional, statutory or by judicial decision.” In Open Records Decision No. 676 (2002), the Attorney General considered whether § 552.101 in conjunction with rules of procedure or in conjunction with rules of evidence make records confidential. The Attorney General held that § 552.101 in conjunction with these rules does not make records confidential because procedural rules and rules of evidence are not constitutional laws, statutory laws, or judicial decisions required by the statutory language of § 552.101. Accordingly, the TSSB’s argument that the requested information is confidential under § 552.101 in conjunction with Rule 6(e) fails under the Attorney General’s prior precedent.

The TSSB fails to demonstrate that the information withheld is confidential under Rule 6(e) of the Federal Rules of Criminal Procedure.

Even if § 552.101 in conjunction with Rule 6(e) could make records confidential, the TSSB’s argument fails. In situations where Rule 6(e) may be applicable, the government body must satisfy a two-prong test. First, the government body must establish that the matter is still before the grand jury. OR2013-2147 (Feb. 6, 2013); OR2008-5601 (Apr. 25, 2008). Second, the government body must establish that the named employee is among the persons subject to the secrecy rule in Rule 6(e)(2). *Id.*

The Attorney General has previously noted that the federal case law is ambiguous on the confidentiality provided by Rule 6(e), and records may not be withheld simply because they were considered by the grand jury. OR2009-5816 (May 1, 2009) (citing Open Records Decision No. 518 at 5 (1988)). Moreover, the Attorney General has previously considered the impact of providing information to the grand jury and held that Rule 6(e) is not violated by disclosure of the information the government body provided to the grand jury. OR2009-5816 (May 1, 2009) (citing *In re Grand Jury Matter*, 682 F.2d 61, 64 (3rd Cir. 1982)).

Here, the TSSB makes no effort to establish that the requested information is still before the grand jury. With regard to the second prong, the TSSB does not argue that the names person is within the persons subject to the secrecy rule. Instead, the TSSB argues that the information is made confidential by Rule 6(e) because the named employee prepared the information which was provided to the grand jury. However, as stated in OR2009-5816, providing information to the

grand jury does not render that information confidential under Rule 6(e). Thus, the information withheld is not confidential under Rule 6(e), and the requested information must be released.²

The TSSB fails to demonstrate that the information withheld is excepted from disclosure under the law enforcement exception.

The TSSB argues that the requested information must be withheld under the law enforcement exception in Tex. Gov't Code § 552.108 because disclosure would “interfere with [the TSSB’s] ability to detect, investigate, and prosecute violations of the TSA because it would affect the integrity of the investigatory process, would allow witnesses to corroborate their testimonies, and would create a chilling effect.” The Attorney General previously considered and rejected the same conclusory argument from the TSSB. *See* OR 2014-18159 (Oct. 9, 2014).

To prevail on a claim that § 552.108 excepts information from disclosure, a government body must do more than merely make a conclusory assertion that releasing the information would interfere with law enforcement. OR2004-10590 (Dec. 14, 2004). Instead, the government body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990) (construing statutory predecessor). Mere allegations that the release of the records will interfere with the government body’s investigative ability and that release will have a chilling effect without explaining how are insufficient. OR2000-4443 (Nov. 17, 2000).

Here, the TSSB relies on mere conclusory assertions in its claim that the requested information must be withheld under § 552.108. The TSSB does not offer any specifics factual allegations on how or why the release would interfere with its investigative efforts, allow witnesses to corroborate their testimonies, or have a chilling effect. Accordingly, the TSSB did not meet its burden, and the requested information must be released.

The TSSB’s attorney-client privilege argument fails under the Attorney General’s prior precedent.

The TSSB alleges that exhibit C1 is a representative sample of communications between the named employee and an unidentified US attorney and argues that the communications must be withheld under § 552.101 in conjunction with Rule 501 of the Federal Rules of Evidence.

As discussed above, Open Records Decision No. 676 considered whether rules of procedure and rules of evidence are constitutional laws, statutory laws, or judicial decisions that fall within the purview of § 552.101. The Attorney General held that procedural and evidentiary rules are not and further held that information subject to the attorney-client privilege was not made confidential under § 552.101 in conjunction with evidentiary rules. In OR2006-14451 (Dec. 8,

² The TSSB also alleges that it does not possess the records its employee drafted. In response, Mr. Paul notes that he requested “all files, records, documents, correspondence, letters, communications, reports or other information,” and requests the Attorney General to order the TSSB to release all copies, drafts, or correspondence related to these records that may be in physical files, stored electronically, in the cloud, or otherwise recoverable.

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2006), the Attorney General applied ORD 676 to attorney-client communications withheld under §552.101 in conjunction with Rule 501 and held that the attorney-client communications could not be withheld on that basis. Accordingly, the TSSB's argument that the requested information is made confidential by §552.101 in conjunction with Rule 501 fails under the Attorney General's prior precedent.

The TSSB fails to demonstrate that the information withheld is within the attorney-client privilege.

Even if the TSSB had a valid basis for claiming that the attorney-client privilege might apply, it would be required to show that (1) the document was a communication transmitted between privileged parties or reveals a confidential communication; (2) the communication was made for the purpose of facilitating the rendition of professional legal service to the client government body (the mere fact that a communication involves an attorney does not demonstrate this element); (3) each communication was between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest; and (4) the communication was confidential. Open Records Decision No. 676 at 6-7 (2002); *see also* OR2009-0917 (Jan. 23, 2009) (rejecting the government body's attorney-client privilege argument where the government body failed to establish the attorney-client relationship between it and the attorney).³

Here, the TSSB has not established that (1) an attorney-client relationship existed between the unidentified US attorney and the TSSB, (2) the communications were confidential, or (3) that the communications were made for the purpose of facilitating the rendition of legal services to the TSSB. Thus, the TSSB fails to establish that the requested information falls within the attorney-client privilege, and the requested information must be released.

The TSSB fails to inform the Attorney General of the United State's District Court's order granting the government leave to disclose sealed records to Mr. Paul.

The TSSB argues that certain requested records have been withheld because the United States District Court for the Western District sealed the records; thus, the records are excepted from disclosure under § 552.107(2). However, the TSSB fails to address (or even disclose) the District Court's order granting the government leave to disclose sealed records to the requestor. *See Exhibit E*, Sep. 5, 2019 Court Order. Accordingly, the TSSB fails to establish that the requested information is excepted from disclosure under § 552.107(2), and the requested information must be released.

The requested information cannot be withheld because it is the subject of nondisclosure agreements referenced in the TSSB's September 27, 2019 supplement.

In its September 27, 2019 supplement, the TSSB alleges that some of the information forwarded to the Attorney General for review is subject to nondisclosure agreements between the

³ The TSSB's argument also references the sharing provision under Board Rule 13.1. However, this Rule only applies to information that is confidential. Because the TSSB fails to demonstrate that any of the requested information is confidential, Rule 13.1 is inapplicable.

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named employee and the federal government; however, the TSSB does not argue that this prevents the TSSB from releasing the information withheld. By failing to make an argument, the TSSB waived its claim that the information may be withheld. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (government body waived its claim); Open Records Decision No. 663 at 5 (1999) (government body waived exception); Open Records Decision No. 177 (1977) (finding that the statutory predecessor to § 552.108 was subject to waiver).

Even if the TSSB had not waived its arguments related to the nondisclosure agreements, the nondisclosure agreements do not provide a basis for withholding the requested information. Parties to an agreement with a government body are presumed to know the legal requirements imposed upon the government body, and the requirement to disclose public information cannot be overcome by agreement between the parties. Open Records Decision 541 at 4 (1990); *see also* Attorney General Opinion JM-672 (1987). The Attorney General has repeatedly held that the PIA requires release of information that is subject to a nondisclosure disclosure. *See* OR2004-4209 (May 24, 2004); OR2004-8344 (Oct. 1, 2004).

Because the TSSB waived its claim that the nondisclosure agreements provide an exception to disclosure, and because nondisclosure agreements do not except information from disclosure, the requested information must be released.

Mr. Paul has a common law right of access to the requested information.

In the Fifth Circuit, the subject of an investigation has a common law right of access to pre-indictment search warrant materials. *U.S. v. Sealed Search Warrants*, 868 F.3d 385, 390 (5th Cir. 2017). Early access serves to enhance the transparency and trustworthiness of the process, to curb abuses, and to allow the public to understand the system better. *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993). The right of access is elevated when the records are requested by the owner of seized property. *In re Search Warrants Issued on Apr. 26, 2004*, 353 F. Supp. 2d 584, 587 (D. Md. 2004).

In the instant case, the named employee seized Mr. Paul's property from his home and other locations. The seized records included nearly every business and personal record from Mr. Paul's adult life. Because of seizure of his property, Mr. Paul has an elevated right of access to the requested information, and Mr. Paul's common law right of access trumps the TSSB's arguments for withholding the information. Accordingly, the requested information must be released.

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Conclusion.

For the foregoing reasons, the TSSB fails to establish any basis for withholding the requested information, particularly when the TSSB's arguments are considered in light of the requirement to construe exceptions narrowly and to liberally construe the PIA in favor of granting requests. Therefore, Mr. Paul requests the Attorney General to enter an opinion instructing the TSSB to release all responsive information.

Sincerely,



Aaron P. Borden

Enclosures

cc: Cheryn L. Netz (w/o enclosures)

EXHIBIT A

From: Borden, Aaron P.
Sent: Friday, September 6, 2019 5:44 PM
To: 'gc@ssb.texas.gov'
Subject: Open Records Request

On behalf of my client, Natin Paul, I request a complete copy of all files, records, documents, correspondence, letters, communications, reports, or other information related to Mr. Paul and/or World Class Capital Group, LLC (sometimes also referred to as World Class Holdings) prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED]

Sincerely,

Aaron Borden
Associate



901 Main Street, Suite 3700
Dallas, Texas 75202

Phone: 214.749.2402 [E-MAIL](#)
Toll Free: 800.451.0093 [WEBSITE](#)
Fax: 214.747.3732 [BIO](#)

The message and information contained in or attached to this communication is privileged, confidential and intended only for the person or persons named above. If you are not the intended recipient of this transmission, you are hereby notified that any dissemination, distribution or copying of this communication to anyone other than the intended recipient or recipients is strictly prohibited. If you receive this communication in error, do not read it. Please immediately reply to the sender that you have received this communication in error and then please delete this communication from your computer. Thank you.

EXHIBIT B

From: Cheryn Netz <cnetz@ssb.texas.gov>
Sent: Tuesday, September 17, 2019 2:38 PM
To: Borden, Aaron P.
Subject: RE: Open Records Request
Attachments: OR2004-0239 Sec. 28 Previous Determination.pdf

EXTERNAL E-MAIL

Mr. Borden,

On September 6, 2019 at 5:44 PM, the State Securities Board received your public information request of: a complete copy of all files, records, documents, correspondence, letters, communications, reports, and other information related to Mr. Paul and/or World Class Capital Group, LLC (sometimes also referred to as World Class Holdings) prepared by, or in the possession or control of, Texas State Securities Board Securities Board employee [REDACTED].
On September 9, 2019, the State Securities Board sent you an interim response in which it stated that certain records responsive to your request are confidential pursuant to the Public Information Act (PIA) and the Texas Securities Act, and thus, not subject to disclosure. I also provided a copy of a 2004 letter ruling in which the Attorney General's office found that investigative records are confidential and must be withheld by this agency.

We have identified some records and files (which are in pdf files) that are not confidential which are responsive to your request. These records consist of (about 33 pages), which appear to include duplicates:

1. 5/30/07 Certificate of Formation of LLC World Class capital Group, LLC (3 pages)
2. 8/27/08 Statement of Change of Registered Office/Agent (1 page)
3. 2008 Texas Franchise Tax Public Information Report (10 pages)
4. 10/5/11 Statement of Change of Registered Office/Agent (1 page)
5. 2011 Texas Franchise Tax Public Information Report (7 pages)
6. 2012 Texas Franchise Tax Public Information Report (1page)
7. Statement of Change of Registered Office/Agent (3 pages)
8. 2013 Texas Franchise Tax Public Information Report (3 pages)
9. 1/22/14 Certificate of Amendment – World Class Capital Group, LLC (3)
10. Jan 30, 2013 Office of Secretary of State certified copies of World Class Capital Group, LLC documents on file (9 total files: 1 page certificate, plus 3,1, 1, 2, 7, 7, 2, 1) appears to be duplicates
11. 1/30/2013 Office of Secretary of State certified copies of World Class Capital Income SLP, LLC (1 page certificate and 2 other files, 4 pages and 1 page)

If you would like electronic copies of these records, I can send them to you at no charge via Sharedrive. If you would like printed copies the cost will be \$3.30, which I can bill to you.

A governmental body may withhold confidential information from a public information request without requesting an attorney general decision if there has been a previous determination that the requested materials falls within one of the exceptions to disclosure. Gov't Code §552.301(a). The attorney general has determined that there are two types of pervious determinations. Open Records Decision No. 673 (2001). The second instance of a previous determination requires:

1. that the information at issue fall within a specific, clearly delineated category of information about which the attorney general has previously rendered a decision;
2. the previous decision is applicable to the particular governmental body from which the information is requested;
3. the previous decision concludes the specific, clearly delineated category of information is or is not excepted from disclosure under the Public Information Act;
4. the elements of law, fact, and circumstances are met to support the previous determination's conclusion that the requested records or information at issue is or not excepted from required disclosure; and

5. the previous decision explicitly provides that the governmental body to which the decision applies may withhold the information without the necessity of again seeking a decision from the attorney general.

To the extent there are records that are responsive to your request that were obtained in connection with an investigation, pursuant to Government Code §552.301(a), the Agency has withheld information or records that are responsive to your request, based on a previous determination (ORD 2004-0239)(copy attached) (the "prior determination").

As for the remainder of the responsive records we believe that they are excepted from public disclosure. The Agency will make a request for a public information opinion to the Office of the Attorney General for their approval to withhold these records. You will be copied on this request when it is made and provided with a copy by email and by mail to your mailing address.

Special Right of Access Argument. In response to your argument that your client has a Special Right of Access to the requested records, you are correct that the PIA grants a special right of access to requestors for their own information held by a governmental entity in some cases.

One of those special rights is when the information is being kept confidential to protect the requestor's privacy interests. Section 552.023(a) of the PIA prevents a governmental body from asserting an individual's own privacy as a basis for withholding records from him. It does not however, grant an individual a special right of access to information protected by exceptions in the PIA or confidentiality provisions in other laws that protect some interest other than the person's privacy.

In this case there would be no special right of access because the information you have requested is not being kept confidential to protect your client's privacy interest. Rather, it is being kept confidential pursuant to the 2 laws I sent you previously to protect the interests of law enforcement, to protect investigatory interests of an occupational board and to protect the integrity of the board's regulatory process. An individual's right of access to private information under §552.023(a) of the PIA does NOT override exceptions to disclosure in the PIA protecting some interest other than that of the individual's privacy.

I conducted a brief search of open records decisions and case law and found several that have this same position. At least two of them involve state regulatory agencies:

- Letter Opinion No. 94-024- licensee of Texas Funeral Service Commission who is the subject of an investigation has no special right of access to information comprising part of an investigation by the Commission
- Informal letter ruling No. OR2000-2924 attorney representing veterinarians who were the subject of an investigation had no special right of access to the Veterinary Board's investigative files

Therefore, if you will be using this as an argument in favor of disclosure, I expect the Attorney General will not be making a decision that would contradict these past decisions.

Public Information Act Exception for when disclosure has been prohibited by court order. I would also like to inform you that certain responsive records which are confidential, consisting of search warrant affidavits and search warrants, have been sealed by court order. The PIA specifically provides in §552.107(2) that records that have been made confidential by court order are not subject to disclosure. The Agency intends to include this argument in its request for open records decision.

Case on Release of Search Warrant Materials is not applicable to PIA requests. Furthermore, the case you sent on release of pre indictment search warrant materials held under seal by the Court is not applicable to the Texas Public Information Act or the Texas Securities Act. If you are seeking release of these sealed records, you would need to do that through the judicial process and not as part of an open records request.

Open Records Decision regarding disclosure of Criminal History Record Information. Finally, the 1979 Opinion you cited is related to disclosure of criminal history record information. You have requested records that are in connection with an investigation, not criminal history record information, which are two different types of records. Therefore, the 1979 opinion would not be applicable to your current request.

Please let me know if based on this response you wish to modify your request to narrow the information requested to exclude confidential records, or if you wish to clarify your request to exclude duplicate records responsive to your request. Or let us know if you wish to modify your request to exclude any of the 11 public records that are not confidential.

If you want copies any or all of the 11 public records, let me know if you would like printed copies to be mailed to you or if you prefer for me to send them to you electronically.

Please let me know if you have any questions.

Sincerely,

Cheryn Netz

Cheryn L. Netz

Assistant General Counsel

Texas State Securities Board

208 East 10th Street, 5th Floor (78701)

PO Box 13167

Austin Texas 78711-3167

cnetz@ssb.texas.gov

512-305-8303

EXHIBIT C

TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 306-8300
Facsimile: (512) 306-8310



RECEIVED

SEP 20 2019

OPEN RECORDS DIVISION

Texas State Securities Board

200 E. 10th Street, 6th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

E. WALLY KINNEY
CHAIR

MIGUEL ROMANO, JR.
MEMBER

KENNY KONCABA
MEMBER

ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

September 20, 2019

ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Public Information Request Regarding Paul and World Class Capital
Group, LLC

Dear General Paxton:

On Friday, September 6, 2019, at 5:44 PM,¹ the Texas State Securities Board ("TSSB" or "Agency") received an open records request via email from Mr. Aaron Borden. A copy of the request showing the date and time it was received is enclosed and tabbed as **Item A**. Mr. Borden stated he was requesting a complete copy of all files, records, documents, correspondence, letters, communications, reports, or other information related to Mr. Paul and/or World Class Capital Group, LLC (sometimes also referred to as World Class Holdings) prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED] (the "named employee"). [REDACTED] is an investigator for the TSSB and in that capacity also serves as a Task Force Officer in the White Collar Crimes Squad with the Federal Bureau of Investigation (the "FBI") in Austin, Texas.

The Agency responded to the requestor to inform him of the costs to provide the public information in paper copies responsive to his request on September 17, 2019. The public information responsive to the request was provided to requestor electronically at no charge on September 20, 2019. The cover letter is enclosed and tabbed as **Item B**.

Other records responsive to the request are held by the Agency, but they were obtained in connection with an investigation. This Agency has received a prior determination ruling from your Office that covers these responsive records (ORD 2004-0239). These records were obtained by the TSSB pursuant to the Securities Commissioner's duty to conduct investigations to prevent or detect a violation of The Securities Act, Tex. Rev. Civ. Stat. Ann., Arts. 581-1 to 581-45 (West, Westlaw through 2019 R. Sess.) ("TSA"), or a Board

¹ The request was received on September 6, 2019, after close of business hours, which is 5:00 PM. Therefore, for purposes of counting days to request an open records decision from your Office, the receipt date was the next business day, which was September 9, 2019.

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rule or order and the Commissioner's authority to receive evidence under Section 28 of the TSA. All information received by the TSSB in connection with an investigation is confidential by law pursuant to Section 28 of the TSA. The Agency informed the requestor that responsive records covered by ORD 2004-0239 were withheld by the Agency pursuant to that prior determination.

Other records responsive to the request are held by the Agency, but they were made in connection with an investigation and are, therefore, considered to be within exceptions from public disclosure. These records were made by the TSSB pursuant to the Securities Commissioner's duty to conduct investigations to prevent or detect a violation of the TSA, or a Board rule or order. All information made by the TSSB in connection with an investigation is confidential by law pursuant to Section 28 of the TSA.

These Agency records are also excepted from public disclosure under Section 552.108 of the Texas Public Information Act, Tex. Gov't Code Ann., Arts. 552.001 to 552.353 (West, Westlaw through 2019 R. Sess.) ("PIA") because they deal with the "detection, investigation, or prosecution" of activity that may constitute a crime. Other records responsive to the request are excepted from disclosure under Section 552.101 of the PIA as they are confidential pursuant to the Federal Rules of Civil Procedure ("FRCP") or are confidential attorney-client communications.

In addition, certain of the records are excepted from public disclosure under Section 552.107(2) of the PIA because a court by order has prohibited disclosure of the information.

Pursuant to Section 552.301 of the PIA, we request a public information opinion regarding these records. Enclosed is a representative sample.

§552.101 - CONFIDENTIAL BY STATUTE - Section 28

Section 28 of the TSA provides:

A. Investigations by Commissioner. The Commissioner shall conduct investigations as the Commissioner considers necessary to prevent or detect the violation of this Act or a Board rule or order. For this purpose, the Commissioner may require, by subpoena or summons issued by the Commissioner, the attendance and testimony of witnesses and the production of all records, whether maintained by electronic or other means, relating to any matter which the Commissioner has authority by this Act to consider or investigate, and may sign subpoenas, administer oaths and affirmations, examine witnesses and receive evidence; provided however, that all information of every kind and nature received in connection with an investigation and *all internal notes, memoranda, reports, or communications made in connection with an investigation shall be treated as confidential* by the Commissioner and shall not be disclosed to the public except under the order of court for good cause shown....

Section 28 of the TSA protects investigative information maintained by this Agency from public disclosure for strong public policy reasons. For example, disclosure of this information may discourage persons from providing information relating to violations of the law, result in the depletion of funds obtained from the victims of securities fraud and additional violations of the TSA, prompt escape from the jurisdiction of the State by persons under investigation, and create potential harm or threat of harm to witnesses and complainants of fraudulent activities and other violations of the TSA, among other grave concerns. Disclosure of the internal notes, memoranda, reports, or communications that are part of an investigation would compromise the ability of the Agency to do its work and is not what the legislature intended when it passed Section 28 of the TSA.

Records Made in Connection with an Investigation

As has been previously mentioned, some of the records responsive to this request were made in connection with an investigation rather than received in connection with an investigation. In OR2010-15409, issued October 8, 2010, the OAG noted in footnote 4 that letters sent by the TSSB were outside the scope of the previous determination granted in OR2004-0239 regarding "information obtained" by the TSSB in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order, and could not be withheld on that basis. However, the OAG further concluded that the letters sent by the TSSB were "made" by the TSSB in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order and were therefore confidential under Section 28 of the TSA and must be withheld pursuant to Section 552.101 of the Government Code.

Some of the records responsive to this request were made by the named employee, who is an employee of the TSSB Enforcement staff, in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order. Other records responsive to this request were made by other Agency employees in connection with an investigation. The TSSB contends that these records are also information made confidential by statute pursuant to Section 28 of the TSA and must be withheld pursuant to Section 552.101 of the PIA. A representative sample of these records is enclosed and tabbed as Items C1 through C7.²

§552.101 - CONFIDENTIAL BY LAW - Federal Rules of Civil Procedure

In addition to **Items C1 through C7**, the responsive records include

The Agency does not have possession or custody of these records, and therefore has not attached a representative sample. The named employee as FBI Task Force Officer assisted with the drafting of these documents that were executed by FBI agents. These records are held under seal by a Federal Grand Jury considering alleged criminal violations of federal law. The TSSB contends that these records are not only information made confidential by statute pursuant to Section 28 of the TSA as records made in an investigation, and must be withheld pursuant to Section 552.101 of the PIA, but are also information made confidential by statute pursuant to Rule 6(e) of the Federal Rules of Civil Procedure (the "FRCP") and must be withheld pursuant to Section 552.101 of the PIA. Rule 6(e) of the FRCP provides:

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

(3) Exceptions.

(A) Disclosure of a grand-jury matter--other than the grand jury's deliberations or any grand jury's vote-- made be made to:

...

(i) any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom disclosure has been made, and must certify that the attorney had advised those persons of their obligation of secrecy under this rule.

The [redacted] were prepared by the named employee as a government personnel to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law, and as such, the named employee may only use or disclose that information for such purpose. Therefore we contend that these records held under seal consist of information made confidential by statute pursuant to FRCP Rule 6(e) and must be withheld pursuant to Section 552.101 of the PIA.

§552.108 - LAW ENFORCEMENT EXCEPTION

Section 552.108 of the PIA excepts from disclosure information held by a law enforcement agency or prosecutor that deals with the "detection, investigation, or prosecution of crime." The records covered as Section 28 investigatory material are also covered by the law enforcement exception in PIA, Section 552.108.

The TSSB is a law enforcement agency in which the Securities Commissioner is charged with the duty to investigate violations of state securities law which may be punished or addressed by administrative, civil, or criminal actions. See *Texas Attorney General's Office v. Adams*, 793 S.W. 2d 771 (Tex.App.-Fort Worth 1990, no writ) at 773 and the TSA Sections 3, 14, 29, and 32. Criminal referrals are made to district attorneys and United States attorneys throughout the state, and the TSSB routinely assists state and federal prosecutors in drafting indictments, presenting cases to grand juries, and the trial of criminal cases. The representative samples discussed above deal with the detection and investigation of activity that may constitute a crime. Disclosure of these or other confidential records in TSSB investigative files would interfere with this Agency's ability to detect, investigate, and prosecute violations of the TSA because it would affect the integrity of the investigatory process, would allow witnesses to corroborate their testimonies, and would create a chilling effect on how information is gathered and used by this Agency during its ongoing investigations. Therefore, we assert that the records represented by **Items C1 through C7** are excepted from public disclosure under Section 552.108 of the PIA and must be withheld.

§552.101, ATTORNEY-CLIENT PRIVILEGE

Section 552.101 excepts information from disclosure if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

The common law privilege for attorney client communications; which has been codified in Rule 501 of the Federal Rules of Evidence ("FRE") protects confidential disclosures between a client to his attorney made in order to obtain legal assistance. This privilege includes clients that are government agencies and their government attorneys. The attorney client privilege assures the client that confidential communications to his attorney will not be disclosed without his consent.

Communications between the TSSB (the client) and the client's lawyers, in this case US Attorneys, are privileged. The protection extends to factual information or requests for legal advice communicated by the client to the attorney, as well as legal advice or opinions given by the attorney in furtherance of the rendition of legal services.

A communication between a TSSB employee and US attorneys is reflected in sample **Item C1**. The existence and content of these communications are confidential legal matters pursuant to the PIA and attorney client privilege, as codified in FRE Rule 501. The TSSB, as the client when the communications were made, asserts its privilege to refuse to disclose confidential attorney-client communications made for the purpose of facilitating the rendition of professional legal services to the TSSB. Therefore, such information must be withheld as covered attorney-client communication.

INFORMATION SHARING - TSA Section 28, Board Rule 131.1

There are some unique information sharing authorizations applicable to the TSSB that may be relevant in your analysis, especially as it relates to information shared with other governmental authorities.

Section 28 of the TSA provides in pertinent part:

A. Investigations by the Commissioner The Commissioner may, at the Commissioner's discretion, disclose any confidential information in the Commissioner's possession to any governmental or regulatory authority or association of governmental or regulatory authorities approved by Board rule or to any receiver appointed under Section 25-1 of this Act. The disclosure does not violate any other provision of this Act or Chapter 552, Government Code.

Board Rule 131.1 provides:

(a) The Board recognizes the need for cooperative law enforcement among agencies responsible for the prevention, detection, and prosecution of white collar crime, for the regulation and policing of persons who offer and sell securities, and for the regulation of offerings of securities. Pursuant to the authority given the Board under the Texas Securities Act, §28, **the Board authorizes the Securities Commissioner in his or her discretion to supply any confidential information in the Commissioner's possession to:**

(1) any governmental or regulatory authority, including any bankruptcy trustee, receiver, or other official appointed by a state or federal court in a proceeding involving a governmental or regulatory authority; or

(2) any association of governmental or regulatory authorities.

(b) Disclosure for limited purposes. **Disclosure of the confidential information referred to in subsection (a) of this section will be made only for the purpose(s) of assisting in the detection or prevention of violations of law or to further administrative, civil, or criminal action.**

The above provisions permit the TSSB to share confidential information with other governmental authorities without the information losing its confidential status.

To the extent that any responsive records, represented by representative samples **Items C1 or C7**, or were disclosed to either the United States Department of Justice or the FBI, both of which are governmental authorities, the sharing of that information does not cause the information to lose its confidential status. This would include any records that the named employee prepared or created and then shared with the United States Department of Justice or the FBI as an investigator with the TSSB, while serving in that capacity and while serving as an FBI Task Force Officer.

EXCEPTION: CERTAIN LEGAL MATTERS- PIA SECTION 552.107.

The records that are responsive to the request that the Agency has withheld include

have been sealed by multiple orders of the United States District Court, Western District of Texas Austin Division (the "Federal Orders"). Attached as **Item D** as a representative sample is a copy of one of these orders, which is submitted for your review. These responsive records continue to be sealed from disclosure by the United States District Court. Section 552.107(2) of the Government Code allows a governmental body to withhold information if "a court by order has prohibited disclosure of the information." Government Code Section 552.107(2). Therefore we assert that these records subject to

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The Honorable Ken Paxton
September 20, 2019
Page 9

the Federal Orders are excepted from public disclosure under Section 552.107(2) of the PIA and must be withheld.

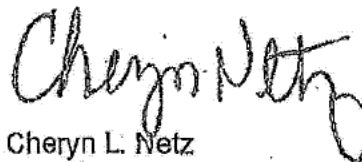
CONCLUSION

For the reasons stated herein, we respectfully request that upon review, your office issue a decision finding that the requested records are not subject to disclosure under the PIA pursuant to Government Code Section 552.101 and Section 28 of the TSA; Government Code Section 552.108; Government Code Section 552.107 and Government Code Section 552.101 and common law attorney client privilege, codified in the Federal Rules of Evidence Rule 501.

We further request that, upon your review, your office issue a predetermination letter finding that records made in connection with an investigation to prevent or detect a violation of the TSA or a Board rule or order are confidential under Section 552.101 in conjunction with Section 28 of the TSA without the necessity of requesting a decision from the OAG.

I trust this letter and the enclosed materials will be of assistance to you in issuing your public information opinion. Please feel free to call me at 512-305-8303 if you need further information.

Sincerely,



Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (redacted w/o enclosures)
Via Regular U.S. Mail and Electronic Mail

19-08202019-OAG Request_Borden PIA

EXHIBIT D

1. TRAVIS J. ILES
SECURITIES COMMISSIONER

CLINTON EDGAR
DEPUTY SECURITIES COMMISSIONER

Mail: P.O. BOX 13167
AUSTIN, TEXAS 78711-3167

Phone: (512) 305-8300
Facsimile: (512) 305-8310



Texas State Securities Board

208 E. 10th Street, 5th Floor
Austin, Texas 78701-2407
www.ssb.texas.gov

E. WALLY KINNEY
CHAIR

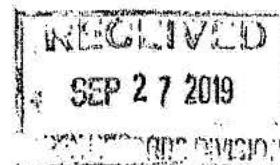
MIGUEL ROMANO, JR.
MEMBER

KENNY KONCABA
MEMBER

ROBERT BELT
MEMBER

MELISSA TYROCH
MEMBER

September 27, 2019



ATTN: Open Records Division
The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701

VIA HAND-DELIVERY

RE: Supplemental Letter to Request for Opinion Concerning Public
Information Request Regarding Paul and World Class Capital Group, LLC

Dear General Paxton:

On September 20, 2019, the Texas State Securities Board ("TSSB" or "Agency") filed a request for open records opinion with your office (the "TSSB Request"). The purpose of this letter is to supplement that request. As the Agency stated in the TSSB Request, the requestor requested certain files and records prepared by, or in the possession or control of, Texas State Securities Board employee [REDACTED] (the "named employee"). [REDACTED] is an investigator for the TSSB and in that capacity also serves as a Task Force Officer in the White Collar Crimes Squad with the Federal Bureau of Investigation (the "FBI") ("FBI Task Force Officer") in Austin, Texas.

The TSSB Request stated that certain records there are responsive to the PIA request that were prepared by the named employee as part of his position as an FBI Task Force Officer. In addition to records he prepared, the named employee has access to other FBI records as an FBI Task Force Officer. The named employee entered into multiple nondisclosure agreements with the FBI in 2013 (the "NDAs") that cover all FBI records of which he has access. A copy of these agreements is attached as **ITEM F**. These agreements specifically provide that the information to which he has access or may obtain access is now and will remain the property of, or under the control of the United States Government. These agreements prohibit him from disclosing FBI information to any unauthorized parties. Items **C7**,

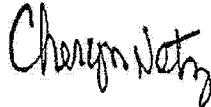
in response to these items are subject to the NDAs, as provided in the NDAs, are the property of and under the control of the United States Government.

19-09202019-OAG Request_Bardon PIA

The Honorable Ken Paxton
September 27, 2019
Page 2

I trust this supplemental letter and the enclosed materials will be of assistance to you in issuing your public information opinion. Please feel free to call me at 512-305-8303 if you need further information.

Sincerely,



Cheryn L. Netz
Assistant General Counsel

Enclosures

cc: Aaron P. Borden (redacted w/o enclosures)
Via Regular U.S. Mail and Electronic Mail

19-09202019-OAG Request_Borden PIA

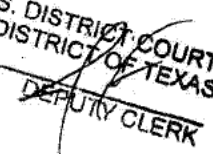
EXHIBIT E

United States District Court
Western District of Texas
Austin Division

In the Matter of the Search of
Contego Information Management
2112 Rutland Drive #141
Austin, Texas 78758

No. A-19-MJ-450-ML

UNDER SEAL

FILED
SEP 05 2019
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY  DEPUTY CLERK

Order

Before the Court is the government's Motion for Leave to Disclose Sealed Search Warrant, and after considering the same, the Court is of the opinion that it is meritorious and should be granted.

ACCORDINGLY, it is hereby ORDERED that the United States Attorney's Office shall disclose the sealed search warrant and inventory in this matter to counsel for World Class Holdings and its affiliated entities, as well as counsel for Natin Paul, to be used and disclosed only as necessary for counsel's representation of their respective clients.

SIGNED this 5th day of September 2019.



MARK LANE
UNITED STATES MAGISTRATE JUDGE

Enforcement Status Sheet

Mail Id: 804729

File Number: OR-798456-19

Date Written: 10/30/2019

Date Received: 10/30/2019

Date File Opened: 09/26/2019

Assigned To: Blake Brennan

Status: ACTIVE

Substatus: DFT

Date Status: 10/11/2019

Entity: SECURITIES BOARD, STATE

Plan Resp: ORL

Mail Type: TORA

Routed To: Blake Brennan

Date Routed: 10/11/2019

Correspondents: Aaron P Borden

Comments:

Description: KG9: WEB RE: ID 798456

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OCT 30 2019

OPEN RECORDS DIVISION

BBX
11/25

Enforcement Status Sheet

Mail Id: 804729
File Number: OR-798456-19
Date Written: 10/30/2019
Date Received: 10/30/2019
Date File Opened: 09/26/2019
Assigned To: Blake Brennan
Status: ACTIVE
Substatus: DFT
Date Status: 10/11/2019
Entity: SECURITIES BOARD, STATE
Plan Resp: ORL
Mail Type: TORA
Routed To: Blake Brennan
Date Routed: 10/11/2019
Correspondents: Aaron P Borden
Comments:
Description: KG9: WEB RE: ID 798456

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OCT 30 2019

OPEN RECORDS DIVISION

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MEADOWS COLLIER

ATTORNEYS AT LAW

MEADOWS, COLLIER, REED, COUSINS, CROUCH & UNGERMAN, L.L.P.

A REGISTERED LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

901 MAIN STREET, SUITE 3700
DALLAS, TEXAS 75202
(214) 744-3700
www.meadowscollier.com

AARON P. BORDEN
Associate
aborden@meadowscollier.com



October 30, 2019

Via Certified Mail 7019 0140 0000 6267 1006

The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701
ATTN: Open Records Division

Re: Public Information Request Regarding Natin "Nate" Paul and World Class Capital Group, LLC

Dear General Paxton:

In its October 16, 2019 Supplemental Letter Number 2 to Request for Opinion Concerning Public Information Request Regarding Paul and World Class Capital Group, LLC, the Texas State Securities Board ("TSSB") attempts to bolster its request for an opinion with supplemental arguments. For the reasons set forth, the TSSB's supplemental arguments also fail.

The TSSB's attempt to shoehorn the withheld records into the confidentiality provisions of the TSA fails under a cardinal rule of statutory construction.

The TSSB argues that the withheld records are confidential under article 581-28 because section 3-1 of the TSA permits the Commissioner to utilize any penalties, sanctions, remedies, or relief as the Commissioner deems necessary. However, the TSSB does not explain how this enabling provision makes records in a federal taskforce investigation confidential under the TSA.

Moreover, under one of the cardinal rules of statutory construction, the withheld records are not confidential under the TSA because [REDACTED] involvement in the federal taskforce is not authorized by the TSA. An omission of language in one statute, when it is included in another statute, is presumed to be done intentionally.¹ The Texas legislature has repeatedly demonstrated

¹ *Liberty Mut. Ins. Co. v. Adcock*, 412 S.W.3d 492, 497 (Tex. 2013).

Direct (214) 749-2402 / (800) 451-0093 / Fax (214) 747-3732

CONFIDENTIAL

OAG_SUB-00001913

HBOM00191075

EX. 030.158

The Honorable Ken Paxton
October 30, 2019

that it will explicitly reference the federal government when it authorizes a state agency to work with the federal government.²

The two provisions on which the TSSB relies, while enabling the TSSB to work with other state and local authorities, noticeably exclude any authorization to work with federal authorities. Section 3 of the TSA governs “Administration and Enforcement by the Securities Commissioner and the *Attorney General and Local Law Enforcement Officials*.”³ The various provisions of section 3 detail the process for the Commissioner to present cases to the District or County Attorney or the Attorney General and authorize the TSSB to assist County or District Attorney’s in prosecutions. However, the statute does not authorize the TSSB to work with federal law enforcement. Similarly, article 581-28 authorizes the TSSB to assist securities regulators “of another state or foreign jurisdiction,” but the statute does not authorize the TSSB to work with federal securities regulators. Because the Texas legislature has repeatedly referenced federal authorities when it intended to authorize state agencies to work with the federal government, the lack of any authorization in the TSA is presumed to be done intentionally. Thus, the withheld information is not made confidential by the TSA because [REDACTED] work as a member of a federal taskforce was not authorized by the TSA.

Hypothetical arguments regarding what “sometimes” happens in other cases does not establish that the information withheld in this case is confidential under article 581-28.

The TSSB also supplements its original argument regarding article 581-28 by arguing that “[s]ometimes conduct is investigated and the Agency determines...the conduct...could be a violation...of federal laws.... In these cases, the Agency may refer the case to...federal regulatory or law enforcement authority.”⁴ However, the TSSB does not allege that this investigation started out as a TSSB investigation that was subsequently referred to federal authorities. In fact, the TSSB acknowledges that [REDACTED] was a federal taskforce agent, and [REDACTED] affidavit states that he was at Mr. Paul’s home on August 14, 2019 to participate in execution of a search warrant. The search warrant provided in connection with that search does not reference a TSA violation or TSSB involvement, and [REDACTED] signed the related search warrant return in his capacity as a federal taskforce agent. These documents show that the investigation at issue was not a TSSB investigation of a violation of the TSA, and the TSSB cannot overcome the contradictory documentary evidence with hypothetical arguments regarding what sometimes happens in other cases.

² See, e.g., Tex. Parks & Wild. Code Ann. § 13.303 (requiring cooperation with the federal government); Tex. Health & Safety Code Ann. § 481.186 (directing cooperation with a specific federal agency); Tex. Health & Safety Code Ann. § 361.402 (permitting enforcement in conjunction with the federal government); Tex. Hum. Res. Code Ann. § 22.002 (requiring cooperation with federal, state, and local governmental agencies); Tex. Gov’t Code Ann. § 494.008 (allowing departmental employees to assist municipal, county, state, or federal law enforcement officers); Tex. Occ. Code Ann. § 301.161 (allowing the Texas Board of Nursing to cooperate with federal, state, or local law enforcement agencies in the investigation and prosecution of crimes related to the practice of nursing).

³ Emphasis added.

⁴ The TSSB also discusses other things it “sometimes” does, such as referring a case to another state. None of the other possibilities appear to be even remotely relevant to the case at hand.

The Honorable Ken Paxton
October 30, 2019

August 14, 2019 Comments to Mr. Paul's Counsel

The TSSB also takes issue with the undersigned counsel's representation that [REDACTED] told him that this investigation did not involve a violation of the TSA. The conversation at issue occurred at Mr. Paul's home on the evening of August 14, 2019 as [REDACTED] Special Agent [REDACTED] and other federal agents were concluding a search and seizure at Mr. Paul's home.

Mr. Paul had been aware of the underlying federal investigation for nearly a year. When Mr. Paul learned of the investigation, Mr. Paul, through counsel, reached out to the federal investigators about the possibility of assisting in their investigation and was told that the federal investigators would be in touch if they decided to seek information from Mr. Paul. The federal investigators did not make a single request for records from him in the intervening year. As such, Mr. Paul was surprised when federal investigators engaged in a draconian search of his home on August 14, 2019.

Because of this surprising development, counsel for Mr. Paul engaged in multiple conversations with the federal investigators, including [REDACTED] over the course of the day. Mr. Paul also voluntarily returned to his home later in the day to open a secure file box for the agents. Throughout all of these dealings, the conversations addressed specific facts and issues regarding this specific investigation.

[REDACTED] in his affidavit acknowledges that the undersigned counsel asked him a specific question about state action separate from the federal investigation. However, [REDACTED] disputes the undersigned counsel's representation that [REDACTED] in response, made a specific representation about this investigation. Instead, [REDACTED] claims that he made a vague and general response "that typically the TSSB would not take a separate state action when assisting... in a federal investigation."

The undersigned counsel's representation was made based on contemporaneous notes from the August 14, 2019 conversation with [REDACTED] and his recollection of the conversation. Based on these, the undersigned counsel understood [REDACTED] representation to be a specific representation regarding this case.

Regardless of the different recollections of the conversation, [REDACTED] affidavit contradicts the TSSB's arguments and supports Mr. Paul's arguments. The TSSB's primarily argues that the information withheld is confidential because it was obtained in a TSSB investigation of a violation of the TSA. However, [REDACTED] affidavit states that "typically the TSSB would not take a separate state action when assisting... in a federal investigation." Based on this, it would be atypical for the TSSB to be conducting its own "action" while [REDACTED] was assisting in the federal investigation, and [REDACTED] affidavit, noticeably, does not state that the TSSB, contrary to the normal course, was engaged in its own investigation.⁵ Thus, [REDACTED] affidavit supports Mr. Paul's argument that the information at issue was not obtained in a TSSB

⁵ The documents provided thus far to counsel for Mr. Paul (which are few) also indicate [REDACTED] was not conducting a TSSB investigation of a violation of the TSA.

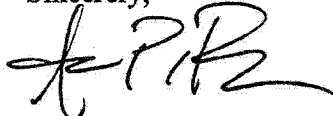
The Honorable Ken Paxton
October 30, 2019

investigation of a violation of the TSA. Thus, the withheld information is not made confidential by the TSA and must be released to Mr. Paul.

Conclusion.

For the reasons set forth above, the TSSB's supplemental arguments fail, and Mr. Paul requests the Attorney General to enter an opinion instructing the TSSB to release all responsive information immediately.

Sincerely,



Aaron P. Borden

cc: Cheryn L. Netz

#507989

Page 4

Enforcement Status Sheet

RECEIVED

DEC 17 2019

OPEN RECORDS DIVISION

Mail Id: 842992
File Number: OR-798456-19
Date Written: 12/17/2019
Date Received: 12/17/2019
Date File Opened: 09/26/2019
Assigned To: Blake Brennan
Status: CLOSED

BBX
OR19-33291

Substatus: ORL
Date Status: 11/25/2019
Entity: SECURITIES BOARD, ST.
Plan Resp: ORL
Mail Type: TORA
Routed To:
Date Routed: 11/25/2019
Correspondents: Aaron P. Borden

REWR
REQUEST

Comments:

Description: JAW9: WEB RE ID# 798456
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Enforcement Status Sheet

RECEIVED

DEC 17 2019

OPEN RECORDS DIVISION

Mail Id: 812992
File Number: OR-798456-19
Date Written: 12/17/2019
Date Received: 12/17/2019
Date File Opened: 09/26/2019
Assigned To: Blake Brennan
Status: CLOSED
Substatus: ORL
Date Status: 11/25/2019
Entity: SECURITIES BOARD, STATE
Plan Resp: ORL
Mail Type: TORA
Routed To:
Date Routed: 11/25/2019
Correspondents: Aaron P. Borden
Comments:
Description: JAW9: WEB RE ID# 798456
G:\COMMON\E-FileSubmissions\2019\OR-800088\OR-800088_Attachments

NOTE: submission also includes copies
of requestor's 304 briefs



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ATTORNEYS AT LAW

MEADOWS, COLLIER, REED, COUSINS, CROUCH & UNGERMAN, L.L.P.

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901 MAIN STREET, SUITE 3700
DALLAS, TEXAS 75202
(214) 744-3700
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December 17, 2019

Via Texas Attorney General Public Information Act Electronic Filing System

The Honorable Ken Paxton
Attorney General of Texas
209 W. 14th Street, 6th Floor
Austin, TX 78701
ATTN: Open Records Division

**Re: *Request for Reconsideration of Information Submitted in Connection With
OR2019-33291***

Dear General Paxton:

Please reconsider the decision reached in open records letter OR2019-33291, which was issued to Ms. Cheryn L. Netz of the Texas State Securities Board on November 25, 2019 by Assistant Attorney General Blake Brennan. The letter appears to be primarily copied from prior open records letters that did not involve the unique circumstances at issue in this matter.

In addition, the letter concludes that the requested records must be withheld under Texas Government Code section 552.101 in conjunction with article 581-28 of the Texas Securities Act and federal law without any discussion or analysis of the counter arguments we made in response to these legal arguments in our October 4, 2019 response to the Texas State Security Board's request and in our October 30, 2019 response to the Texas State Board's supplemental request. For your convenience, a copy of the November 25, 2019 open records letter, our October 4, 2019 response and our October 30, 2019 response to the response to the supplemental request are enclosed.

Sincerely,

/s/ Aaron P. Borden
Aaron P. Borden

The Honorable Ken Paxton
December 17, 2019

cc: Cheryn L. Netz
Enclosures

#510007

Page 2

Enforcement Status Sheet

Mail Id: 800088

File Number: OR-798456-19

Date Written: 10/04/2019

Date Received: 10/04/2019

Date File Opened: 09/26/2019

Assigned To: Blake Brennan

Status: ACTIVE

Substatus: DFT

Date Status: 10/11/2019

Entity: SECURITIES BOARD, STATE

Plan Resp: ORL

Mail Type: TORA

Routed To: Blake Brennan

Date Routed: 10/11/2019

Correspondents: Aaron Borden

Comments:

Description: JAW9: WEB RE ID# 800088
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of regis, 504
11/25 brief, mail
IO# 801346*

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OCT 04 2019
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Enforcement Status Sheet

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File Number: OR-798456-19

Date Written: 10/04/2019

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