



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2007

Mr. Scott Kelly
Deputy General Counsel
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845-3424

OR2007-09012A

Dear Mr. Kelly:

This office issued Open Records Letter No. 2007-09012 (2007) on July 17, 2007. We have examined this ruling and determined that an error was made in its issuance. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on July 17, 2007. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). Your request was assigned ID# 284523.

The Texas A&M University (the "university") received a request for all materials regarding "the university's selection of preferred lenders serving student borrowers, beginning in the 2001 academic year." You claim that the submitted information is excepted from disclosure under sections 552.117 and 552.136 of the Government Code.¹ You also state that the submitted information may contain proprietary information, and thus, pursuant to section 552.305 of the Government Code, you have notified Citibank, N.A., The Student

¹We note that the university failed to raise section 552.117 within the ten business day deadline mandated in section 552.301(b). *See* Gov't Code § 552.301(b). However, because section 552.117 is a mandatory exception that can provide a compelling reason to withhold information, we will consider your arguments under this exception. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302).

Loan Corporation (“Citibank”), Woodforest National Bank, Nelnet, CollegeBoard Educational Loan Program, SallieMae Education Trust, Education Finance Partners, Compass Bank, First National Bank of Bryan, College Loan Corporation, AggieLand Credit Union, Comerica Bank Student Lending, StudentLoanXpress, SunTrust, EFSI, COSTEP, Hibernia Bank and Banking Segment of Capital One, Wachovia, Student Capital Corporation, FinanSure Student Loans, Bank of America Student Lending, Chase, Wells Fargo, and First National Bank of the request and of each company’s right to submit arguments to this office as to why the information should not be released. *See id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received correspondence from counsel for Citibank. We have considered all of the submitted arguments and reviewed the submitted information.²

Section 552.117(a)(1) of the Government Code exempts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is received. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received. In this case you inform us that the employee whose records are at issue in Exhibit C timely elected confidentiality under section 552.024. Therefore, the university must withhold the information you have marked in Exhibit C under section 552.117(a)(1) of the Government Code.

You claim that the bank account and routing numbers in Exhibit C are excepted from public disclosure under section 552.136, which provides:

(a) In this section, “access device” means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Upon review, we agree that the bank account and routing numbers you have marked in Exhibit C must be withheld under section 552.136 of the Government Code.

Next, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). With the exception of Citibank, this office has not received comments from any of the remaining third parties explaining how the release of the submitted information will affect their proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of these remaining companies. *See, e.g.,* Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, none of the submitted information may be withheld based on the proprietary interests of the remaining companies at issue.

We now turn to Citibank's arguments for its submitted information. Citibank raises section 552.102 of the Government Code for portions of its information in Exhibit B. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). This exception is applicable only to information that relates to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to section 552.102). Because the information at issue relates to employees of Citibank, a private entity, the university may not withhold any of the information at issue under section 552.102(a) of the Government Code.

Citibank claims that portions of its information in Exhibit B are excepted from public disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.*

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the

information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the arguments and submitted information, we conclude that Citibank has not established by specific factual evidence that any of the submitted information is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). *See* Open Records Decision Nos. 661 at 5-6 (section 552.110(b) requires specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of information), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, none of the information at issue may be withheld under section 552.110 of the Government Code.

Finally, we note that some of the materials at issue are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the university must withhold the information it has marked in Exhibit C under section 552.117(a)(1) and section 552.136 of the Government Code. The university must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Holly R. Davis
Assistant Attorney General
Open Records Division

HRD/eeg

Ref: ID# 284523

Enc. Submitted documents

c: Mr. Robert Tomsho
The Wall Street Journal
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Hibernia Bank
Banking Segment of Capital One
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Woodforest National Bank
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Nelnet
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Sallie Mae Education Trust
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Education Finance Partners
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Compass Bank
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

First National Bank of Bryan
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

College Loan Corporation
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Aggie Land Credit Union
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Comerica Bank Student Lending
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

SunTrust
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

COSTEP
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Student Capital Corporation
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Bank of America Student Lending
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Wells Fargo
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Student Loan Xpress
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

EFSI
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Wachovia
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

FinanSure Student Loans
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Chase
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

College Board Educational Loan Program
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

First National Bank
c/o Mr. Scott Kelly
Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845
(w/o enclosures)

Mr. Carl Schertz
Locke, Liddell, & Sapp LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(w/o enclosures)