



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 7, 2009

Ms. Katherine R. Fite  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2009-06107

Dear Ms. Fite:

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# 341797.

The Office of the Governor (the "governor") received a request for Countrywide Home Loan's ("Countrywide") annual job creation compliance report for 2008. You claim that the submitted information is excepted from disclosure under section 552.110 of the Government Code.<sup>1</sup> You also indicate that the release of the submitted information may implicate the proprietary interests of Countrywide. Accordingly, you state you have notified Countrywide of the governor's receipt of the request for information and its right to submit arguments to this office as to why the information should not be released to the requestor. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances).* We have received

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<sup>1</sup>Although you also specifically raise sections 552.101, 552.104 and 552.131 of the Government Code as exceptions to disclosure of the requested information and generally raise the remaining exceptions under the Act, you have provided no arguments regarding the applicability of these sections. Since you have not submitted arguments concerning these exceptions, we assume that you no longer urge them. *See Gov't Code §§ 552.301(b), (e), .302.*

arguments from a representative of Countrywide.<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that by letter dated March 4, 2009, Countrywide has informed this office that it does not object to the release of the submitted Annual Certification Letter dated February 13, 2009. As the governor's arguments for this information under section 552.110 of the Government Code pertain to the proprietary interests of Countrywide and Countrywide does not object to its release, this information, which we have marked, must be released to the requestor.<sup>3</sup> We will, however, consider the arguments against the disclosure of the remaining information.

Next, the governor asserts that the remaining information is confidential because it is marked confidential and it was obtained from Countrywide with the assurance that it would remain confidential. Countrywide also states that it requested that the remaining information "be held in confidence." However, information is not made confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977); *see also* Open Records Decision Nos. 479 (1987) (information is not confidential under the Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Consequently, the remaining information may not be withheld unless it falls within an exception to disclosure.

Countrywide raises section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). In this instance, Countrywide has not directed our attention to any law under which any of the submitted

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<sup>2</sup>Although Countrywide claims that the state granted an "exemption for this same confidential information in connection with a previous public information request on February 15, 2007," we note that the request in this instance is limited to the annual job creation compliance report for 2008. Thus, any ruling by this office in 2007 is not a previous determination with respect to the submitted 2008 report. *See* Open Records Decision No. 673 (2001) (for first type of previous determination to exist, the requested information must be precisely the same information as was addressed in prior attorney general ruling). Thus, we will consider the governor's and Countrywide's arguments against disclosure of the submitted information.

<sup>3</sup>We note that the EIR referenced by Countrywide in its March 4, 2009 correspondence to this office, was not submitted to this office and would not be responsive to the instant request because it was not in the possession of the governor on the date the governor received the request for information.

information is considered to be confidential for the purposes of section 552.101. We therefore conclude that the governor may not withhold any of the submitted information under section 552.101 of the Government Code.

Countrywide also raises section 552.102 of the Government Code for the remaining information, which it states is "extracted from Countrywide's [h]uman [r]esources database, an electronic personnel file." Section 552.102 of the Government Code excepts from 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 office has found that section 552.102 only applies to information in a personnel file of an employee of a governmental body. The information Countrywide seeks to withhold is not contained in the personnel file of a governmental body employee. Therefore, we determine that section 552.102 does not apply to any of the remaining information.

Countrywide also raises section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. We note, however, that section 552.104 only protects the interests of a governmental body and is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). In this instance, the governor has not argued that the release of any portion of the remaining information would harm its interests in a particular competitive situation under section 552.104. Because the governor has not submitted any arguments under section 552.104, we conclude that the governor may not withhold any portion of the remaining information under section 552.104 of the Government Code.

Although the governor argues that the remaining information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we will only address Countrywide's arguments under section 552.110. Section 552.110 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 trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage

over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>4</sup> RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude 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

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<sup>4</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

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

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 (1999) at 5-6.

Countrywide contends that the remaining information is a trade secret excepted under section 552.110(a). Having considered Countrywide's claim, we conclude that Countrywide has failed to demonstrate that any portion of the remaining information fits within the definition of a trade secret. Countrywide has also not sufficiently established any of the trade secret factors with respect to any of the remaining information. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Countrywide also contends that the remaining information is excepted under section 552.110(b). Upon review of Countrywide's claim and the remaining information, we find that Countrywide has made only conclusory allegations that the release of the remaining information would result in substantial damage to Countrywide's competitive position. Thus, Countrywide has not demonstrated that substantial competitive injury would result from the release of the remaining information. *See id.* Accordingly, none of the remaining information may be withheld under section 552.110(b). As no further exceptions against disclosure are raised, the submitted information must be released to the requestor in its entirety.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Laura E. Ream  
Assistant Attorney General  
Open Records Division

LER/dls

Ref: ID# 341797

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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