



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 21, 2011

Mr. Timothy Wei  
Assistant General Counsel  
Teacher Retirement System of Texas  
1000 Red River Street  
Austin, Texas 78701

OR2011-08839

Dear Mr. Wei:

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# 421384.

The Teacher Retirement System of Texas ("TRS") received a request for five categories of information related to TRS's securities lending program during a specified time period.<sup>1</sup> You state some information has been made available to the requestor. You also state TRS does not maintain information responsive to portions of the request.<sup>2</sup> You claim some of the requested information is excepted from disclosure under sections 552.104 and 552.143 of the Government Code. You also state release of the requested information may implicate the

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<sup>1</sup>You state, and provide documentation demonstrating, TRS sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

<sup>2</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

proprietary interests of ClearLend Securities, a division of Wells Fargo; Credit Suisse, Deutsche Bank AG Agency Securities Lending (“Deutsche”); eSec Lending (“eSec”); State Street Corp.; and State Street Global Services. You notified the third parties of this request for information and of their right to submit arguments to this office as to why the information should not be released. *See* Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov’t Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We received correspondence from Deutsche and eSec. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>3</sup>

Initially, we note, and TRS acknowledges, some of the information in Exhibits 3, 4, and 5 is subject to section 552.0225 of the Government Code. Section 552.0225(b) provides in relevant part as follows:

(b) The following categories of information held by a governmental body relating to its investments are public information and not excepted from disclosure under [the Act]:

(1) the name of any fund or investment entity the governmental body is or has invested in;

(2) the date that a fund or investment entity described by Subdivision (1) was established;

(3) each date the governmental body invested in a fund or investment entity described by Subdivision (1);

(4) the amount of money, expressed in dollars, the governmental body has committed to a fund or investment entity;

(5) the amount of money, expressed in dollars, the governmental body is investing or has invested in any fund or investment entity;

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<sup>3</sup>We assume that the “representative sample” of information 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.

(6) the total amount of money, expressed in dollars, the governmental body received from any fund or investment entity in connection with an investment;

(7) the internal rate of return or other standard used by a governmental body in connection with each fund or investment entity it is or has invested in and the date on which the return or other standard was calculated;

(8) the remaining value of any fund or investment entity the governmental body is or has invested in;

(9) the total amount of fees, including expenses, charges, and other compensation, assessed against the governmental body by, or paid by the governmental body to, any fund or investment entity or principal of any fund or investment entity in which the governmental body is or has invested;

(10) the names of the principals responsible for managing any fund or investment entity in which the governmental body is or has invested;

(11) each recusal filed by a member of the governing board in connection with a deliberation or action of the governmental body relating to an investment;

(12) a description of all of the types of businesses a governmental body is or has invested in through a fund or investment entity;

(13) the minutes and audio or video recordings of each open portion of a meeting of the governmental body at which an item described by this subsection was discussed;

(14) the governmental body's percentage ownership interest in a fund or investment entity the governmental body is or has invested in;

(15) any annual ethics disclosure report submitted to the governmental body by a fund or investment entity the governmental body is or has invested in; and

(16) the cash-on-cash return realized by the governmental body for a fund or investment entity the governmental body is or has invested in.

Gov't Code § 552.0225(b). We agree the type of information you have highlighted is subject to section 552.0225(b).<sup>4</sup> Therefore, TRS must release the type of information you have highlighted pursuant to section 552.0225(b) of the Government Code.

TRS contends the remaining information in Exhibits 3, 4, and 5 is excepted from disclosure under section 552.143 of the Government Code. Section 552.143 provides in part:

(a) All information prepared or provided by a private investment fund and held by a governmental body that is not listed in Section 552.0225(b) is confidential and excepted from [required public disclosure].

*Id.* § 552.143 (a). You state the remaining information in Exhibits 3, 4, and 5 consists of information held by TRS that was prepared and provided by private investment funds. You also state portions of the information at issue consist of pre- and post-investment due diligence information about TRS's investments and proposed investment opportunities. You inform us the information you seek to withhold has not been publicly released and is not subject to section 552.0225(b). *See id.* § 552.0225(b) (listing categories of information held by governmental body relating to its investments that are public and not excepted from disclosure under the Act). Based on your representations and our review of the information at issue, we agree TRS must withhold the remaining information in Exhibits 3, 4, and 5 under section 552.143 of the Government Code.<sup>5</sup>

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Deutsche and eSec. We, thus, have no basis for concluding any portion of the remaining information constitutes the proprietary information of any of the remaining third parties. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, TRS may not

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<sup>4</sup>You state the information you have highlighted is a representative sample of the information that is deemed to be public under section 552.0225(b).

<sup>5</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

withhold any of the remaining information based on the proprietary interests of any of the remaining third parties.

Next, we note eSec submitted information with its arguments against disclosure that TRS did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by TRS. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Deutsche and eSec claim section 552.110 of the Government Code for portions of the information in Exhibit 2. 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. *Id.* § 552.110(a), (b). Section 552.110(a) protects the proprietary 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" has been defined as the following:

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) (citation omitted); *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 the 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* ORD 232. This office must accept a claim that information subject to the Act is exempted 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 at 2 (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); ORD 661.

Duestche and eSec argue portions of their information constitute trade secrets. Upon review, we find Duestche and eSec have established a *prima facie* case that portions of their submitted information in Exhibit 2, which we have marked, constitute trade secrets. Accordingly, TRS must withhold the information we have marked in Exhibit 2 under section 552.110(a) of the Government Code. However, we find Duestche and eSec have failed to demonstrate any of the remaining information for which they assert section 552.110(a) meets the definition of a trade secret, nor have the companies demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, TRS may not withhold any of the remaining information on the basis of section 552.110(a) of the Government Code.

Deutsche and eSec contend some of the remaining information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we conclude Deutsche and eSec have established the release of their pricing information, which we have marked, in Exhibit 2 would cause the companies substantial competitive injury; therefore TRS must withhold the information we have marked under section 552.110(b). However, we find Deutsche and eSec have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the companies substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience). We, therefore, conclude TRS may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note the remaining information in Exhibit 2 contains insurance policy numbers that are subject to section 552.136 of the Government Code.<sup>6</sup> Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Therefore, TRS must withhold the insurance policy numbers we have marked in Exhibit 2 under section 552.136 of the Government Code.<sup>7</sup>

In summary, TRS must release the type of information you have highlighted pursuant to section 552.0225(b) of the Government Code, but must withhold the remaining information in Exhibits 3, 4, and 5 under section 552.143 of the Government Code. TRS must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released.

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),

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<sup>6</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>7</sup>We note Open Records Decision No. 684 (2009) is a previous determination issued to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Burnett  
Assistant Attorney General  
Open Records Division

JB/dls

Ref: ID# 421384

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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