



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2012

Ms. Leena Chaphekar
Assistant General Counsel
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2012-03334

Dear Ms. Chaphekar:

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# 447108.

The Employees Retirement System of Texas (the "system") received a request for all final responses to RFP No. 327-94656-100719. You state the system will release some of the requested information. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. You also inform us that release of the submitted information may implicate the proprietary interests of Blackrock; Bank of New York Mellon ("BNY"); Deutsche Bank; Securities Trust Finance Trust Company d/b/a eSecLending ("eSecLending"); the Northern Trust Company ("Northern"); Pacific Investment Management Company, L.L.C. ("PIMCO"); State Street Bank & Trust Company; and Wells Fargo. Accordingly, you notified these companies 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 § 552.305(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 Act in certain circumstances). We have received comments from BNY, eSecLending, Northern, and PIMCO. We have considered the submitted arguments and reviewed the submitted information.

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 information relating to that party should be withheld from public disclosure. *See*

Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only BNY, eSecLending, Northern, and PIMCO have submitted comments to this office explaining why their information should not be released. Therefore, we have no basis to conclude the remaining companies have a protected proprietary interest in the submitted information. *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, the system may not withhold any portion of the submitted information based upon the proprietary interests of the remaining companies.

Northern raises section 552.101 of the Government Code in conjunction with common-law privacy for portions of its employees' information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *See Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *See id.* at 681-82. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *See id.* at 683. We note an individual's name, home address, and telephone number are generally not private information under common-law privacy. *See* Open Records Decision Nos. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy), 455 at 7 (1987) (home addresses and telephone numbers not protected under privacy). Upon review, we find Northern has not demonstrated how any portion of its employees' information is highly intimate or embarrassing and not of legitimate public concern. Thus, no portion of this information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

Northern also generally raises section 552.101 of the Government Code for portions of its information. As noted above, section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Northern has not pointed to any law, nor are we aware of any, that would make any of the information at issue confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, none of Northern's information may be withheld under section 552.101 of the Government Code.

Further, Northern asserts section 552.104 of the Government Code for portions of its information. This section excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the system does not seek to withhold any information pursuant to this exception, no portion of the submitted information may be withheld under section 552.104 of the Government Code.

Although the system argues the submitted information is excepted under section 552.110 of the Government Code, this exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the system’s arguments under section 552.110. We will, however, address the arguments made under this section by BNY, eSecLending, Northern, and PIMCO. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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.¹ 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. *See* 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.*; *see also* ORD 661 at 5-6.

BNY, eSecLending, Northern, and PIMCO contend that their submitted information consists of commercial and financial information that is excepted from disclosure under section 552.110(b). Upon review of these companies’ arguments and the information at issue, we conclude BNY, eSecLending, Northern, and PIMCO have established that some of their information constitutes commercial or financial information that would cause these companies substantial competitive harm if released. Thus, the system must withhold this information, which we have marked, under section 552.110(b) of the Government Code. We note, however, that eSecLending has made a portion of its remaining information publicly available on its website. Because eSecLending itself published this information, we are unable to conclude that release of such information would cause the company substantial competitive harm. Furthermore, we find BNY, eSecLending, Northern, and PIMCO have made only conclusory allegations that release of their remaining information would cause substantial competitive injury, and have not made a factual or evidentiary showing in support of such allegations. *See* Gov’t Code § 552.110; Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future

¹The 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).

contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Accordingly, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Furthermore, we find BNY, eSecLending, Northern, and PIMCO have not demonstrated how any of their remaining information meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for this information. *See* RESTATEMENT OF TORTS § 757 cmt. b; ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3. Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

Northern raises section 552.139 of the Government Code for portions of its remaining information. This section provides:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report;

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139. Section 2059.055 of the Government Code provides in pertinent part:

(b) Network security information is confidential under this section if the information is:

- (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
- (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
- (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). Northern claims that portions of its remaining information relate to computer network security. However, Northern has not demonstrated how the information at issue relates to computer network security, or to the design, operation, or defense of the systems's computer network as contemplated in section 552.139(a). Further, we find Northern has failed to explain how this information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the system may not withhold any of the remaining information under section 552.139 of the Government Code.

We note that some of the submitted information may be 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 copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, 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.

In summary, the system must withhold the information we have marked under section 552.110 of the Government Code. The system must release the remaining information, but any information protected by copyright may be released only in accordance with copyright law.

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, 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,



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Assistant Attorney General
Open Records Division

KLC/dls

Ref: ID# 447108

Enc. Submitted documents

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