



ATTORNEY GENERAL OF TEXAS
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March 26, 2014

Ms. Leena Chaphekar
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OR2014-05059

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# 517849.

The Employees Retirement System of Texas (the "system") received a request for nine categories of information from the system's payroll database; information pertaining to employee bonuses; information pertaining to the amounts and dates of changes in annuity payments; specified reports and budgets; and contracts, written agreements, purchase orders or invoices for external management of any funds, assets, or accounts managed externally over a specified time period. You state the system will release some of the requested information. You claim the remaining requested information is excepted from disclosure under section 552.110 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified AllianceBernstein L.P. ("AllianceBernstein"); Baring International Investment Ltd. ("Baring"); CenterSquare Investment Management ("CenterSquare"); Franklin Templeton Institutional ("Templeton"); Fisher Investments Institutional Group ("Fisher"); Herndon Capital Management, L.L.C. ("Herndon"); J.P. Morgan Asset Management ("JPMorgan"); Lazard Asset Management, L.L.C. ("Lazard"); Leading Edge Investment Advisors, L.L.C. ("Leading Edge"); and Omega Advisors, Inc. ("Omega") 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 the Act in certain circumstances). We have

received comments from AllianceBernstein, Baring, Templeton, Fisher, Herndon, JPMorgan, Lazard, Leading Edge, and Omega. We have considered the submitted arguments and reviewed the submitted information.

We note Leading Edge and Fisher seek to withhold information the system has not submitted for our review. This ruling does not address information beyond what the system has submitted to us for review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the system submitted as responsive to the request for information. *See id.*

Although the system argues the submitted 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 do not address the system's argument under section 552.110.

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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from CenterSquare explaining why its information should not be released. Therefore, we have no basis to conclude CenterSquare has 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 of the information at issue on the basis of any proprietary interest CenterSquare may have in it.

Fisher raises section 552.102(a) of the Government Code as an exception to disclosure of portions of its proposal. Section 552.102(a) 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). We understand Fisher to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code. Section 552.101 encompasses common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668,685 (Tex. 1976). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the Third Court of Appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court expressly disagreed with *Hubert's*

interpretation of section 552.102(a) and held its privacy standard differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts*, 354 S.W.3d at 342 (Tex. 2010). The Supreme Court then considered the applicability of section 552.102, and held section 552.102(a) exempts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *See id.* at 346. In this instance, the information at issue is related to a private entity, Fisher. Therefore, the system may not withhold any portion of Fisher's proposal under section 552.102(a) of the Government Code.

Fisher raises section 552.104 of the Government Code as an exception to disclosure for its proposal. This section exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which 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 a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the system does not seek to withhold any information pursuant to section 552.104, no portion of Fisher's information may be withheld on this basis.

Next, AllianceBernstein, Baring, Templeton, Fisher, Herndon, JPMorgan, Lazard, Leading Edge, and Omega each claim their information is excepted under section 552.110 of the Government Code, which 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. 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.

We note Herndon claims the release of its information at issue could deter companies such as Herndon from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, Herndon appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of

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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) of the Government Code by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Herndon's interests in its information.

AllianceBernstein, Templeton, Fisher, Herndon, JPMorgan, Leading Edge, and Omega claim portions of their information constitute trade secrets. Upon review, we find Herndon and JPMorgan have established a *prima facie* case their customer information constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information at issue is not publicly available on Herndon's or JPMorgan's website, the system must withhold the customer information at issue under section 552.110(a). However, we find AllianceBernstein, Templeton, Fisher, Herndon, JPMorgan, Leading Edge, and Omega have failed to demonstrate that any of the remaining information each company seeks to withhold 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* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, none of AllianceBernstein's, Templeton's, Fisher's, Herndon's, JPMorgan's, Leading Edge's, or Omega's remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Upon review of AllianceBernstein's, Baring's, Templeton's, Fisher's, Herndon's, JPMorgan's, Lazard's, Leading Edge's, and Omega's arguments and the information at issue, we find each company has made only conclusory allegations that the release of the remaining information each seeks to withhold would result in substantial damage to their competitive position. Thus, these companies have not demonstrated that substantial competitive injury would result from the release of any of the remaining information. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). We note that although AllianceBernstein, Baring, Templeton, Fisher, Herndon, JPMorgan, Lazard, Leading Edge, and Omega seek to withhold their pricing information, each of these companies was a winning bidder for the contracts at issue, and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by

government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Fisher asserts its remaining information is excepted from disclosure pursuant to section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Gov't Code § 552.112. Section 552.112 protects the interests of a governmental body, rather than the interests of third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.—Austin 1999, pet. denied) (section 552.112 is permissive exception that governmental body may waive in its discretion). Therefore, because the system does not raise section 552.112, this section is not applicable to the remaining information.

We note portions of the remaining information are subject to sections 552.101 and 552.136 of the Government Code.² Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. As previously discussed, section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy 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. *Indus. Found.*, 540 S.W.2d 668, 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We note that common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex.

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

App—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)) (corporation has no right to privacy).

Upon review, we find the information we have marked satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code states that “[n]otwithstanding 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. This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, we find the system must withhold the submitted insurance policy numbers, bank account numbers, and ABA numbers under section 552.136 of the Government Code.

We note some of the materials at issue 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.

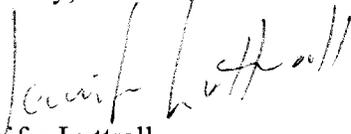
In summary, to the extent Herndon’s and JPMorgan’s customer information is not publicly available on Herndon’s or JPMorgan’s website, the system must withhold the customer information at issue under section 552.110(a) of the Government Code. The system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The system must withhold the submitted insurance policy numbers, bank account numbers, and ABA numbers under section 552.136 of the Government Code. The remaining information must be released, but any information protected by copyright may only be released 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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JL/akg

Ref: ID# 517849

Enc. Submitted documents

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