ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2008

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

OR2008-11545

Dear Mr. Kelly:

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# 319571.

The Texas A&M University System (the "system") received a request for Wells Fargo's response to RFP MAIN 08-0006. You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also indicate that the requested information may implicate the proprietary interests of Wells Fargo. You state, and provide documentation showing, that you have notified Wells Fargo of the request and of its right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 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 the applicability of exception to disclosure under the Act in certain circumstances). We have considered the exceptions you claim and arguments submitted by Wells Fargo, and reviewed the submitted information.

Initially, the system acknowledges, and we agree, that the system failed to raise section 552.104 within the ten business day deadline required by section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See 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); Open Records Decision No. 319 (1982). The presumption that information is public under section 552.302 can generally be overcome by demonstrating that the information is

confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). As the system acknowledges, section 552.104 is a discretionary exception to disclosure that protects a governmental body's interests and is generally waived by the governmental body's failure to comply with section 552.301 of the Government Code. Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). Therefore, the system has waived its claim under section 552.104, and it may not withhold any of the submitted information on that ground. However, the system also raises section 552.110 of the Government Code, which protects third party interests and can provide a compelling reason for non-disclosure under section 552.302 of the Government Code. Therefore, we will consider the system's argument, as well as the arguments submitted by Wells Fargo, under section 552.110 of the Government Code.

The system claims that the submitted information is excepted from disclosure under section 552.110 of the Government Code. By its terms, section 552.110 only protects the interests of the person from whom the information was obtained. This provision does not protect the interests of the governmental body that receives proprietary information, nor does it allow a governmental body to assert section 552.110 for information it creates. However, a governmental body may assert section 552.110 on behalf of an interested third party. Therefore, we will address the system's claim on behalf of Wells Fargo, along with Wells Fargo's arguments under section 552.110 of the Government Code.[1]

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 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"

> 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

[1]We note that Wells Fargo seeks to withhold certain information that the system has not submitted 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 the system. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

> 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;
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> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (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 Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Having considered Wells Fargo's arguments, and reviewed the submitted information, we determine that Wells Fargo has failed to demonstrate that any portion of the information at issue constitutes a trade secret for purposes of section 552.110(a). Accordingly, no portion of the submitted information may be withheld pursuant to section 552.110(a) of the Government Code.

The system and Wells Fargo also assert that parts of the submitted information constitute commercial or financial information that, if released, would cause substantial competitive harm. Upon review, we determine that both the system and Wells Fargo have failed to demonstrate, based on a specific factual or evidentiary showing, that release of the submitted information would cause substantial competitive harm. Accordingly, no part of the submitted information may be withheld pursuant to section 552.110(b) of the Government Code. As neither the system nor Wells Fargo make any further arguments against disclosure, the submitted information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,

Benjamin A. Diener
Assistant Attorney General
Open Records Division

BAD/jb

Ref: ID# 319571

Enc. Submitted documents

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