



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 22, 2010

Mr. W. Montgomery Meitler
Assistant Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2010-05758

Dear Mr. Meitler:

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# 376634 (TEA PIR# 12616).

The Texas Education Agency (the "agency") received a request for the proposals, excluding any exhibits, submitted by three named companies in response to RFP No. 701-09-004, Global Custody and Securities Lending Services for the Texas Permanent School Fund. Although you take no position on the public availability of the submitted information, you state that it may contain proprietary information. You state that you have notified The Bank of New York Mellon ("N.Y. Mellon"), JPMorgan Chase Bank ("JPMorgan"), and The Northern Trust Company ("Northern Trust") of the request and of their opportunity to submit comments to this office as to why the submitted information should not be released to the requestor. *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 disclose under Act in certain circumstances). Northern Trust has submitted comments to our office. We have considered the arguments and reviewed the submitted information.

Initially, we note a portion of the submitted information is not responsive to the request, which excludes exhibits. Accordingly, the submitted exhibits are not responsive to the request. This ruling does not address the public availability of nonresponsive information, and the agency is not required to release nonresponsive information in response to this request.

Next, 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, N.Y. Mellon and JPMorgan have not submitted comments to this office explaining why any portion of

their submitted information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to N.Y. Mellon or JPMorgan would implicate their proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the agency may not withhold any portion of N.Y. Mellon and JPMorgan's information on the basis of any proprietary interests that they may have in the information.

We now address Northern Trust's arguments against disclosure of portions of its information. 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. Northern Trust raises section 552.101 in conjunction with section 5/48.1 of chapter 205 of the Illinois Compiled Statutes. However, section 552.101 does not incorporate the confidentiality provisions of other states' statutes and regulations because those laws only govern the disclosure of information held by entities of those states. *But see* Open Records Decision No. 561 at 6-7 (1990) (noting that if agency of federal government shares its information with Texas governmental entity, Texas entity must withhold information that federal agency determined to be confidential under federal law). Accordingly, the agency may not withhold any of the information at issue under section 552.101 in conjunction with Illinois state law.

Northern Trust also raises section 552.110 of the Government Code. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Gov't Code § 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* ORD 552 at 2. 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).

The following are the six factors that the Restatement gives 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 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 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.

Id.; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). 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 result from release of the information at issue. *Id.*; *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661.

Upon review of Northern Trust’s arguments under section 552.110(a) and the information at issue, we find that Northern Trust has shown that portions of its information pertaining to borrower selection procedures are protected trade secrets under section 552.110(a). Accordingly, the agency must withhold the information we have marked under section 552.110(a). However, we conclude that Northern Trust has failed to establish that

any of the remaining information at issue is a trade secret protected by section 552.110(a). *See* ORD Nos. 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 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the agency may not withhold any of the remaining information at issue under section 552.110(a).

Upon review of Northern Trust's arguments under section 552.110(b) and the information at issue, we conclude Northern Trust has established that release of its pricing and customer information would cause it substantial competitive injury; therefore, the agency must withhold this information, which we have marked, under section 552.110(b). However, Northern Trust has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. Accordingly, we determine none of the remaining submitted information may be withheld under section 552.110(b) of the Government Code.

Next, section 552.136 of the Government Code provides 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."¹ Gov't Code § 552.136. Accordingly, the agency must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. We also note the submitted information appears to contain a bank account and routing number and wire transfer numbers. The agency must also withhold these numbers under section 552.136, provided that the account numbers are real.² Fictitious account numbers may not be withheld under section 552.136.

We note that some of the submitted information is 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

¹The 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).

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers and bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the agency must withhold the information we have marked under section 552.110 of the Government Code. The agency must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code, as well as the bank account and routing numbers and wire transfers numbers, provided that these account numbers are real. The remaining information must be released, but any information protected by copyright must 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.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,



Tamara H. Holland
Assistant Attorney General
Open Records Division

THH/jb

Ref: ID# 376634

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Ben Alivio
Vice President
The Bank of New York Mellon
One Wall Street
New York, New York 10286
(w/o enclosures)

Mr. Robert Garcia
Vice President
JPMorgan Chase Bank, N.A.
2200 Ross Avenue, Floor 6
Dallas, Texas 75201
(w/o enclosures)

Ms. Nancy J. Brown
Assistant General Counsel
The Northern Trust Company
50 South LaSalle Street
Chicago, Illinois 60603
(w/o enclosures)