



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 21, 2011

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2011-00764A

Dear Mr. Hargrove:

This ruling examines Open Records Letter No. 2011-00764 (2011) and whether certain information is subject to required public disclosure under chapter 552 of the Government Code.

The Office of the Attorney General (the "OAG") received requests for the letters loan servicers or mortgage servicing companies sent in response to the OAG's letter to said companies regarding foreclosures.¹ The OAG has released some information to the requestors and takes no position as to disclosure of the information. Because release of the information may implicate the proprietary interests of JPMorgan Chase Bank, N.A.; MGC Mortgage, Inc. ("MGC"); American Home Mortgage Servicing, Inc. ("AHMSF"); EMC Mortgage Corporation; Vanderbilt Mortgage and Finance, Inc.; and Nationstar Mortgage LLC ("Nationstar"), the OAG notified the companies of the requests and of their right to submit arguments to this office as to why their information should not be released. Gov't Code § 552.305(d) (permitting third party with proprietary interest to submit to attorney general reasons why requested information should not be released). In Open Records Letter No. 2011-00764, we concluded the OAG may not withhold Nationstar's information because it failed to submit arguments why its information should be withheld. However, Nationstar has informed this office it did submit arguments. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted

¹The OAG assigned these requests PIR Nos. 10-29304, 10-29449, 10-29516, 10-29703.

in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of this chapter). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on January 14, 2011.

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 AHMSI, Nationstar, and MGC have submitted arguments to this office explaining why their information should not be released. We thus have no basis to conclude release of the information will harm the other companies' proprietary interests. *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 (1990). Accordingly, the OAG may not withhold the other companies' information based on any proprietary interests they may have.

First, MGC asserts its 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 OAG does not raise section 552.112, this section is not applicable to the requested information.

Next, MGC asserts its information is confidential under section 552.101 of the Government Code in conjunction with section 12.154 of the Business Organizations Code. 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 information protected by other statutes. Section 12.153 of the Business Organizations Code authorizes the OAG to "investigate the organization, conduct, and management of a filing entity . . . and determine if the entity has been or is engaged in acts or conduct in violation of: . . . (2) any law of this state." Bus. Org. Code § 12.153. In order to examine the entity's business, "the attorney general shall make a written request to a managerial official, who shall immediately permit the attorney general to inspect, examine, and make copies of the records of the entity." *Id.* § 12.152. Information the OAG maintains and derives in the course of an examination of the entity's records is confidential. *Id.* § 12.154. After review of the submitted information, we find this office has no representation from the OAG that it conducted an examination or made a request to examine

MGC's records pursuant to sections 12.152 and 12.153. Thus, we conclude section 12.154 is inapplicable to MGC's information.

Lastly, AHMSI, Nationstar, and MGC seek to withhold their letters under section 552.110(b) of the Government Code. Section 552.110(b) excepts from public disclosure commercial 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. The interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). After reviewing AHMSI's, Nationstar's, and MGC's briefs, we find they failed to demonstrate their information is commercial or financial information the release of which would likely result in substantial competitive injury. Accordingly, the OAG may not withhold AHMSI's, Nationstar's, and MGC's information under section 552.110(b).

Nationstar also contends section 552.110(a) of the Government Code excepts its responses to inquiries three through six and eight from public disclosure. Section 552.110(a) protects the property interests of private persons by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. 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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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). 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

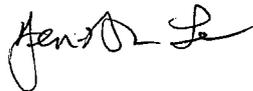
cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

After reviewing Nationstar's arguments and the information at issue, we conclude Nationstar failed to demonstrate its responses to inquiries three through six and eight constitute trade secrets under section 552.110(a). Thus, the OAG may not withhold Nationstar's information under section 552.110(a). The OAG must release the requested information.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

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²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (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.

Ref: ID# 406302

Enc: Submitted documents

c: 4 Requestors
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