



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 16, 1996

Ms. Kathleen A. Holden
Counsel
Texas Guaranteed Student Loan Corporation
P.O. Box 201725
Austin, Texas 78720-1725

OR96-1674

Dear Ms. Holden:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 37031.

The Texas Guaranteed Student Loan Corporation (the "corporation") received a request for "[t]he Request for Proposals recently sent out for law firms to do collection work, all the proposals and related documents that were submitted by interested firms, and the contract signed with the Linebarger firm." You state that the corporation will provide some of the requested information but claim that, as some of the bidders designated their information as confidential, the information may be excepted from disclosure.¹ Pursuant to section 552.305 of the Government Code, this office informed the bidders of the request and of their obligation to submit to this office their arguments as to why any claimed exception to disclosure applies to the requested documents. Two of the law firms responded, Heard, Goggan, Blair & Williams ("Heard, Goggan") and Calame Linebarger Graham & Peña, L.L.P. ("Calame Linebarger"), asserting that their financial statements are excepted from disclosure under section 552.110 of the Government Code. Heard, Goggan also claims that its financial statements are excepted from disclosure under section 30.007 of the Texas Civil Practice and Remedies Code, as incorporated by section 552.101 of the Government Code.

Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision. Calame Linebarger and Heard, Goggan argue that their financial statements are protected under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office

¹ We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.*, Open Records Decision No. 180 (1977).

established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

We have reviewed the arguments made by Calame Linebarger and conclude that it has established the applicability of the second prong of section 552.110 to its financial statement, as it has established that it actually faces competition and that release of its financial statement would cause substantial competitive injury. Therefore, the corporation must withhold Calame Linebarger's financial statement under the second prong of section 552.110 of the Government Code.

Although we believe that Heard, Goggan has established that it actually faces competition, we conclude that Heard, Goggan has not met its burden of establishing that it would suffer substantial competitive injury from release of its financial statements. Instead of "specific factual or evidentiary material," Heard, Goggan has offered only conclusory statements in support of its claim that it will be harmed by release of this information. Therefore, the corporation may not withhold Heard, Goggan's financial statements under the second prong of section 552.110.

We next address whether Heard, Goggan has established that its financial statements are trade secrets. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

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 a single or ephemeral event 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.

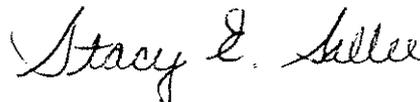
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.²

Here, we conclude that Heard, Goggan did not meet its burden of establishing that the requested financial statements are trade secrets under section 552.110 of the Government Code. Financial statements are not "a process or device for continuous use in the operation of the business" but, rather, are snapshots of the financial condition of a business at a particular point in time. Therefore, they are more of "a single or ephemeral event in the conduct of the business" and, consequently, do not fall within the Restatement's definition of a trade secret. Consequently, the corporation may not withhold Heard, Goggan's financial statements under the first prong of section 552.110 of the Government Code.

Finally, Heard, Goggan claims that section 30.007 of the Texas Civil Practice and Remedies Code makes this information confidential. Section 552.101 of the Government Code does not include discovery privileges. Open Records Decision No. 575 (1990). Therefore, the corporation may not withhold Heard, Goggan's requested financial statements from required public disclosure.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

² The 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 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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

SES/ch

Ref.: ID# 37031

Enclosures: Submitted documents

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