



July 11, 2001

Ms. R. Yvette Clark
General Counsel
Stephen F. Austin State University
P.O. Box 13065, SFA Station
Nacogdoches, Texas 75962-3065

OR2001-3002

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149337.

Stephen F. Austin State University (the "university") received a request for five categories of information relating to the winning bid to provide food services to the university, proposed by the Aramark Corporation ("Aramark").¹ Although the university does not raise any exceptions to disclosure, you advise this office that the requested information may involve the proprietary interests of Aramark and, therefore, the university is asking this office for a decision under section 552.305(a) of the Government Code. You have submitted a copy of a letter notifying Aramark about the request as required by section 552.305(d). *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions to the Public Information Act in certain circumstances). Aramark has submitted copies of the information and a brief asserting that the requested information is excepted from disclosure by section 552.110 of the Government Code. We have considered Aramark's arguments and reviewed the submitted information.

¹The requestor seeks 1) a videotape of the pre-bid meeting, 2) a videotape of the Aramark presentation, 3) the Aramark proposal, 4) the evaluation forms used to compare the proposals and the companies, and 5) the final recommendation comparison given to the university's board of regents.

We must first address certain procedural matters. Among other requirements, the university was required to submit to this office a copy of the specific information requested, or representative samples if the information is voluminous, not later than the fifteenth business day after the date of receiving the written request. *See* Gov't Code § 552.301(e)(1)(D). However, the university submitted no responsive information to this office. Instead, it appears that Aramark, at the direction of the university, has forwarded copies of the information held by Aramark that is responsive to categories two and three of the request.² Thus, the university failed to comply with section 552.301(e)(1)(D). Section 552.302 provides that if a governmental body does not request an attorney general decision as provided by section 552.301, "the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302; *see also Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); Open Records Decision No. 630 (1994). Generally, a compelling reason under section 552.302 is demonstrated only where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). To the extent that the university holds responsive information other than the information submitted by Aramark, we are unable to determine whether there is any compelling reason to withhold such information. Accordingly, such information must be released to the requestor pursuant to section 552.302. However, because Aramark's proprietary interests are at stake, we shall address the exception claimed by Aramark for its submissions.

Aramark contends that the submitted proposal and videotape of its presentation are excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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.

As to section 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

²In the notice the university sent to Aramark pursuant to section 552.305(d) (copied to this office), the university improperly added a notation that the university would not be submitting Aramark's information to this office, and further advising Aramark to submit to this office the information Aramark seeks to withhold.

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 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;
- (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 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 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, where no demonstration of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

Section 552.110(b), the commercial or financial branch of section 552.110, requires the entity arguing the exception to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Aramark contends that the manner in which it organizes, structures, and presents its bid and the information contained within the bid proposal and videotaped presentation are all proprietary information that constitutes a trade secret or protected commercial and financial information. Aramark also contends that the information, which is used continuously in the operation of its business and was gained over time and through its own experience and considerable investment, gives it a competitive advantage over its competitors. Aramark has made various arguments and representations with regard to the information at issue, including the above-stated trade secret factors and its contention that the release of the information would cause it substantial competitive harm. After reviewing the submitted information and considering the uncontroverted arguments, we conclude that Aramark has made a prima facie case that portions of the information at issue constitute trade secrets under section 552.110(a). Further, Aramark has demonstrated that substantial competitive harm would result from disclosure of portions of the information. Accordingly, we conclude that most of the information at issue, including the videotaped presentation, is excepted from disclosure under section 552.110 of the Government Code. For your convenience, we have marked that information that the university must withhold from required public disclosure.

In summary, the responsive information not submitted for our review must be released pursuant to section 552.302 of the Government Code. The university must withhold pursuant to section 552.110 the submitted videotaped presentation in its entirety and the information we have marked in the submitted bid proposal. The remaining submitted information must be released to the requestor.

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 appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

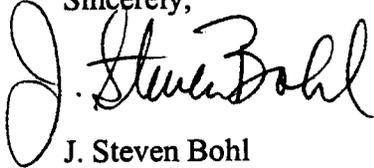
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public 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 General Services Commission 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,



J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 149337

Enc: Submitted documents

c: Mr. Doug Collins
Regional Sales Director
Chartwells
4301 North Beltwood Parkway
Dallas, Texas 75244
(w/o enclosures)