



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 4, 2005

Mr. David L. Hay
Public Information Officer
Dallas County Community College District
701 Elm Street
Dallas, Texas 75202-3299

OR2005-02831

Dear Mr. Hay:

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# 221345.

The Dallas County Community College District (the "district") received a request for nine categories of information relating to four book publishers; invoices to any district campus by any bookstore; freight bills for shipments to or from publishers; money received from publishers; correspondence between a particular publisher and district employees; sales taxes relating to book sales; payments to a newspaper for advertising; any contract between any publisher and the district; and any lease agreement between the district and a named limited partnership. You inform us that the district will release some of the requested information. You have submitted other information that is responsive to the request. Although you take no position with regard to the public availability of the submitted information, you believe that it may implicate the proprietary interests of a third party under section 552.110 of the Government Code. You have notified the interested party of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released.¹ We also received correspondence from attorneys for the third party,

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

Plato Learning, Inc. (“Plato”).² We have considered Plato’s arguments and have reviewed the submitted information.³

Plato has submitted arguments under section 552.110.⁴ This exception protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and (2) “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.” See Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, 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 also *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If the governmental body takes no position on the application of the trade secrets aspect of section 552.110 to the information at issue, this office will accept a

²Plato notes in its brief that although it is not affiliated with the publisher whose correspondence with the district was requested, Plato and the district believe that the requestor seeks access to correspondence between the district and Plato’s parent entity, Academic Systems Corporation.

³You also state that the district has asked the requestor to narrow the scope of her request, because of the volume of responsive information. You do not indicate that the district has received a response from the requestor. Accordingly, this decision does not address the public availability of any other information that may be responsive to this request. Should the district receive a response from the requestor and wish to withhold any other information that may be responsive to her request, you must request another ruling. See Gov’t Code §§ 552.301, .302.

⁴We note that Plato’s arguments encompass information that the district did not submit to this office in requesting this decision. This decision is applicable only to the submitted information. See Gov’t Code § 552.301(e)(1)(D).

private person's claim for exception as valid if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.⁵ See Open Records Decision No. 552 at 5 (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. See Open Records Decision No. 402 (1983).

Section 552.110(b) 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. See also Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Plato asserts that the pricing information contained in the submitted e-mail is a trade secret under section 552.110(a). Plato also contends that this information is excepted from disclosure under section 552.110(b). Having considered Plato's arguments and reviewed the submitted information, we conclude that the district must withhold the information that we have marked under section 552.110(b). We find that Plato has not presented a *prima facie* claim that any of the remaining information at issue qualifies as a trade secret under section 552.110(a). We likewise find that Plato has not sufficiently shown that the release of any of the remaining information would be likely to cause Plato any substantial competitive harm. We therefore conclude that none of the remaining information is excepted from disclosure under section 552.110.

We note that the remaining information includes e-mail addresses that are subject to section 552.137 of the Government Code. This exception provides as follows:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

⁵The Restatement of Torts lists the following six factors 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 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137 excepts from public disclosure certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. Likewise, section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. We have marked e-mail addresses that the district must withhold under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure.

In summary: (1) the district must withhold the marked information that is excepted from disclosure under section 552.110(b); and (2) the district must withhold the marked e-mail addresses under section 552.137, unless the owner of the e-mail address has affirmatively consented to its public disclosure. The rest of 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 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).

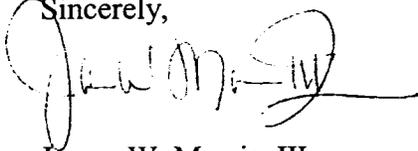
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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 appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 221345

Enc: Submitted documents

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