ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2006

Mr. Mark C. Goulet
Walsh, Anderson, Brown, Schulze & Aldridge, P.C.
P.O. Box 2156
Austin, Texas 78768

OR2006-11015

Dear Mr. Goulet:

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# 259932.

The Belton Independent School District (the "district"), which you represent, received a request for the district policy manual, the personality assessment administered by the district in evaluating prospective teachers, and applications submitted by recently hired teachers at a specified campus. You claim that the district is relieved of the burden of providing the submitted information under section 552.027 of the Government Code. You also claim that the submitted information is excepted from disclosure under sections 552.104, 552.110, and 552.122 of the Government Code.[1] In addition, pursuant to section 552.305 of the Government Code, you notified the Gallup, Inc. ("Gallup") of the request and of its opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should

[1]Although you raise section 552.228(b)(3) of the Government Code, this section is not an exception to disclosure under the Act. Gov't Code § 552.228(b)(3); *see also* Gov't Code § 552.301(a) (noting that exceptions to disclosure under Act are found at subchapter C of chapter 552 of Government Code). Although you also raise section 552.305 of the Government Code, we note that section 552.305 is not an exception to disclosure. Rather, section 552.305 is a procedural provision permitting a governmental body to decline to release information that may implicate a person's privacy or property interests for the purpose of requesting a decision from this office as provided under the Act. *See* Gov't Code § 552.305(a); Open Records Decision No. 542 at 1-3 (1990) (discussing statutory predecessor).

not be released); 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 applicability of exception to disclosure in certain circumstances). We have considered the arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that you have not submitted information responsive to the request for the policy manual or applications submitted by recently hired teachers. We therefore assume that, to the extent it existed on the date of the request, any information maintained by the district that is responsive to the request for the policy manual or applications submitted by recently hired teachers at a specified campus has been released to the requestor. If not, the district must release such information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that Gov't Code § 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances). *But see Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (the Act does not require a governmental body to disclose information that did not exist at the time the request was received). We now address your arguments with respect to the information you have submitted.

Next, we address the district's claim that the submitted information is not subject to disclosure under the Act because the information is commercially available to the requestor. Section 552.027 of the Government Code provides:

> (a) A governmental body is not required under [the Act] to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.
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> (b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.
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> (c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. This section is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and

periodicals. The legislative history of this provision notes that section 552.027 should exclude from the definition of public information

> books and other materials that are also available as research tools elsewhere *to any member of the public*. Thus, although public library books are available for public use, the library staff will not be required to do research or make copies of books for members of the public.

INTERIM REPORT TO THE 74TH LEGISLATURE OF THE HOUSE STATE AFFAIRS COMM., 74th Leg., R.S., SUBCOMMITTEE ON OPEN RECORDS REVISIONS 9 (1994) (emphasis added). You state that the purchase order submitted as Exhibit E demonstrates the applicability of section 552.027 to the submitted information. However, upon review we find that Exhibit E relates to the purchase of training for the use of the submitted materials rather than for the purchase of the materials themselves. Therefore, because the district has not established that the submitted information is commercially available to any member of the public, we find that you have failed to demonstrate the applicability of section 552.027 to any of the submitted information. *See* Gov't Code § 552.027. Accordingly, we conclude that this information is public information subject to disclosure under the Act. Thus, we will address your claimed exceptions to disclosure.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except information relating to competitive bidding situations once a bid has been awarded and a contract has been executed. *See id.*

You assert that the submitted information is excepted from disclosure under section 552.104 because Gallup's competitor's might use the information "to develop competing products and services." Upon review, however, we find that you have not established that the district has a competitive interest that would be harmed by release of the information at issue. Accordingly, we conclude that you have not demonstrated that public release of the information at issue would cause specific harm to the district's interests in a particular competitive bidding situation. Therefore, the district may not withhold the submitted information from public disclosure under section 552.104 of the Government Code.

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 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, Gallup has not submitted

to this office any reasons explaining why its information should not be released. However, we will consider the district's claim that portions of the submitted information must be withheld under section 552.110.

Section 552.110 of the Government Code protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is the following:

> 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.[2] *Id.* This office must accept a claim

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

> (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.

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).

that information subject to the Act 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). We cannot conclude that section 552.110(a) applies 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) 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.* § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue).

Upon review, we find that the district has failed to demonstrate that any portion of the submitted information meets the definition of trade secret. Furthermore, we find that the district has made only conclusory allegations that release of the submitted information would cause Gallup substantial competitive injury and has not provided a specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110(b). Therefore, the district may not withhold any portion of the submitted information on the basis of any proprietary interest that Gallup may have in the information.

You also assert that submitted information is excepted under section 552.122 of the Government Code. Section 552.122(b) excepts from disclosure test items developed by a licensing agency or governmental body. In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated, but does not encompass evaluations of an employee's overall job performance or suitability. Whether information falls within the section 552.122 exception must be determined on a case-by-case basis. Open Records Decision No. 626 at 6 (1994). None of the submitted interview questions consists of a test item for purposes of section 552.122(b); therefore, the district may not withhold any of the submitted information under section 552.122. Instead, the district must release the submitted information to the requestor.

Finally, you note that the submitted information includes notice of copyright protection. 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 materials that are subject to copyright protection 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). Accordingly, in releasing the submitted information the district must release copyrighted information only in accordance with copyright law.

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); *Texas 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 Office of the Attorney General 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,

L. Joseph James

L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/dh

Ref: ID# 259932

Enc. Submitted documents

c: Mr. Scott Jordan
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(w/o enclosures)