



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 13, 2007

Mr. Eric D. Bentley
Assistant General Counsel
Office of the General Counsel
University of Houston System
311 E Cullen Building
Houston, Texas 77204-2028

OR2007-16478

Dear Mr. Bentley:

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# 297326.

The University of Houston (the "university") received a request for "a copy of all health inspection reports for all Aramark dining facilities, including restaurants, at the University of Houston that have occurred since Aug. 1, 2006." Although you take no position with respect to the public availability of the requested information, you believe that this information implicates the proprietary interests of Aramark Educational Services, Inc. ("Aramark"). You state, and provide documentation showing, that you notified Aramark of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released.¹ Aramark claims that the submitted information is not subject to the Act. Alternatively, Aramark claims that the submitted information is excepted under sections 552.101, 552.110, 552.116, and 552.125 of the Government Code.² We have considered the submitted arguments and have reviewed the submitted information.

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).

²Aramark also raises section 552.022(a)(16) of the Government Code. However, section 552.022(a)(16) provides that certain information that is in a bill for attorney's fees is expressly public. Accordingly, section 552.022(a)(16) is not an exception to disclosure under the Act.

Aramark contends, among other things, that the submitted information is not subject to the Act. The Act is applicable to “public information,” as defined by section 552.002 of the Government Code. Section 552.002 provides that “public information” consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov’t Code § 552.002(a)(1)-(2). Thus, virtually all of the information that is in a governmental body’s physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also is applicable to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body and the governmental body owns the information or has a right of access to it. Gov’t Code § 552.002(a)(2); *see also* Open Records Decision Nos. 518 at 2-3 (1989), 462 at 4 (1987). The submitted information, which is held by the university, consists of “information collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by [the university].” Gov’t Code § 552.002(a)(1). Thus, the submitted information is public information for the purposes of section 552.002. Therefore, the information at issue is subject to the Act and must be released, unless it comes within an exception to public disclosure. *See id.* § 552.021.

Aramark claims that the submitted information should be withheld from disclosure under sections 552.116 and 552.125 of the Government Code. Section 552.116 excepts from disclosure “an audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.033, Education Code, a county, a municipality, or a joint board operating under Section 22.074, Transportation Code.” *Id.* § 552.116. Section 552.125 excepts “any documents or information privileged under the Texas Environmental, Health, and Safety Audit Privilege Act.” *Id.* § 552.125. Sections 552.116 and 552.125 are discretionary exceptions which protect only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As the university does not seek to withhold any information pursuant to sections 552.116 and 552.125, these sections are not applicable to the information at issue.

Next, Aramark asserts that some of the requested information should be excepted from disclosure under section 552.101 of the Government Code in conjunction with section 81.046 of the Health & Safety 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. Section 552.101 encompasses information made confidential by other statutes. Section 81.046 of the Health and Safety Code, in relevant part, states the following:

(a) Reports, records, and information furnished to a health authority or the [Texas Department of Health] that relate to cases or suspected cases of diseases or health conditions are confidential and may be used only for the purposes of this chapter.

(b) Reports, records, and information relating to cases or suspected cases of diseases or health conditions are not public information under Chapter 552, Government Code, and may not be released or made public on subpoena or otherwise except as provided by Subsection (c), (d), and (f).

Health & Safety Code § 81.046(a)-(b). In Open Records Decision No. 577 (1990), this office concluded that any information acquired or created during an investigation under chapter 81 of the Health and Safety Code is confidential and may not be released unless an exception set out in the statute applies. Upon review, we find Aramark has failed to establish that the submitted information is confidential under section 81.046 of the Health and Safety Code, and the university may not withhold this information under section 552.101 of the Government Code on that ground.

We next turn to Aramark’s claims under section 552.110 of the Government Code. Section 552.110 protects: (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). 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 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.); Open Records Decision Nos. 552 at 2 (1990), 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 Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979). This office must accept a claim that information subject to the Act is exempted 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. ORD 552. 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. 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); Open Records Decision No. 661 (1999).

Aramark seeks to withhold the submitted information under section 552.110(a) as trade secrets. However, Aramark has simply submitted general arguments and has failed to establish that the information meets the definition of a trade secret. Further, Aramark has not demonstrated the necessary factors to establish a trade secret claim. *See* ORD 552 at 5-6; *see also* Restatement of Torts § 757 cmt. b (1939) (information is generally not trade secret if it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business”). Accordingly, no portion of the submitted information may be withheld under section 552.110(a) of the Government Code.

Aramark also objects to the release of the same information based on section 552.110(b). We find that Aramark has failed to provide specific factual evidence demonstrating that release of any portion of the submitted information would result in substantial competitive harm. Accordingly, we determine that none of this information is excepted from disclosure under section 552.110(b). *See* ORD 661 (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). Accordingly, none of the submitted information is protected under section 552.110. As no other arguments against disclosure are raised, the 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Paige Savoie
Assistant Attorney General
Open Records Division

PS/ma

Ref: ID# 297326

Enc. Submitted documents

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