

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 27, 2008

Mr. Ronny H. Wall
Associate General Counsel
Texas Tech University System
Box 42021
Lubbock, Texas 79409-2021

OR2008-07179

Dear Mr. Wall:

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# 311003.

Angelo State University (the "university") received requests from the Texas Book Company ("Texas Book") and a representative of Barnes & Noble College Booksellers, Inc. ("Barnes & Noble") for information pertaining to a specified RFP, including the submitted proposals and resulting contract. You state that the resulting contract does not yet exist.¹ You do not take a position as to whether the submitted information is excepted under the Act; however, you state, and provide documentation showing, that you notified the two requestors, as well as Validis Resources ("Validis") and Follett Higher Education Group ("Follett"), of the university's receipt of the requests for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestors.² See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We note that the requestors have a right of access to their own proposals.

circumstances). We have received comments from Texas Book, Follet, and Validis. We have considered the submitted arguments and reviewed the submitted information.³

Initially, we note, and you acknowledge, that the university has failed to comply with section 552.301 of the Government Code in requesting this decision. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because third parties' interests are at stake, we will address whether the submitted information must be withheld to protect the interests of the third parties.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Barnes & Noble has not submitted to this office any reasons explaining why the submitted information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of this company, and the university may not withhold any portion of the submitted information on that basis. *See* Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

Texas Book asserts that some of its information is excepted under section 552.104 of the Government Code; however, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the

³Texas Book seeks to withhold certain financial information it provided to the university in a sealed envelope marked "Confidential." None of this information was submitted by the university to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the university. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

government), 522 (1989) (discretionary exceptions in general). As the university does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to the submitted information. *See* ORD 592 (governmental body may waive section 552.104). Therefore, the university may not withhold any of the submitted information pursuant to section 552.104.

Texas Book, Follett, and Validis claim that portions of their information are excepted from disclosure 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary 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. 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* ORD 232. This office must accept a claim 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. 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); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Having considered Texas Book’s, Follett’s, and Validis’ arguments, we conclude that Texas Book and Validis have established a *prima facie* case that portions of their submitted information, which we have marked, constitute trade secrets. Therefore, the university must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note that both Texas Book and Validis have made some of the information they seek to withhold publicly available on their websites. Because Texas Book and Validis have published this information, they have failed to demonstrate that this information is trade secret. Further, Texas Book, Follett, and Validis have each failed to demonstrate that any of the remaining information at issue constitutes trade secrets; thus, the remaining information at issue may not be withheld under section 552.110(a) of the Government Code.

Texas Book, Follett, and Validis also claim section 552.110(b) for portions of the remaining information. Upon review, we find that Texas Book and Validis have established that release of some of the remaining information at issue would cause each company substantial competitive injury; therefore, the university must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, Texas Book, Follett,

and Validis have made only conclusory allegations that the release of their remaining information at issue would result in substantial damage to each company's competitive position. Thus, these companies have not demonstrated that substantial competitive injury would result from the release of any their remaining information at issue. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We also note that the pricing information of a winning bidder, such as Follett in this instance, is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the university may not withhold the remaining information at issue under section 552.110(b) of the Government Code.

We note that a portion of the remaining information is subject to section 552.136 of the Government Code.⁴ Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, we find that the university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, we also note that a portion of the submitted information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, 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).

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the university must withhold the information we have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only be released 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 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/mcf

Ref: ID# 311003

Enc. Submitted documents

c: Mr. Jay M. Dorman
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CAUSE NO. D-1-GN-08-001978

BARNES & NOBLE COLLEGE
BOOKSELLERS, INC.,
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF THE STATE OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 98TH JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

MAR 08 2011 TS
At 2:00 P.M.
Amalia Rodriguez-Mendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Barnes & Noble College Booksellers, Inc. (B & N) and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestors, identified in Exhibit A, attached to this Judgment, were sent reasonable notice of this setting and of the parties' agreement that certain information that they requested is being withheld; that the requestors were also informed of their right to intervene in the suit to contest the withholding of this information; and that no requestor has informed the parties of his or her intention to intervene. Neither has any requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, certain provisions in B & N's proposals for bookstore services, as set out in Exhibit A to this Judgment, is excepted from disclosure

by Tex. Gov't Code § 552.110(b).

2. The governmental bodies identified in Exhibit A must withhold the information described in Exhibit A, from the requestors, who are identified in Exhibit A.

3. B & N represents that it does not contest the disclosure of the remaining information in its proposals that are identified in Exhibit A. The governmental bodies identified in Exhibit A must release to the requestors the remaining information in B & N's proposals that is not held excepted from disclosure Paragraph 1 of this Judgment and Exhibit A.

4. All costs of court are taxed against the parties incurring the same;

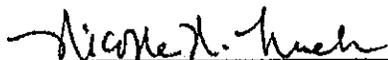
5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 8th day of MARCH, 2011.

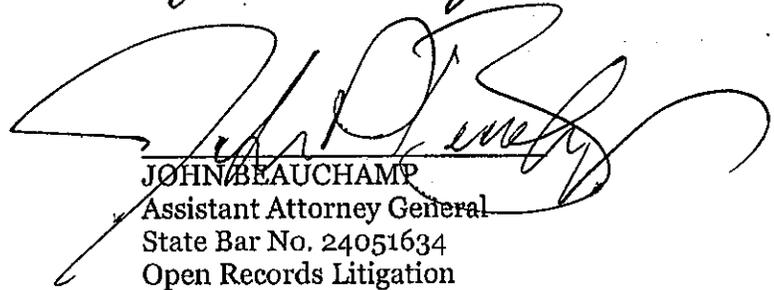

PRESIDING JUDGE

APPROVED:



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ATTORNEY FOR DEFENDANT

EXHIBIT A
PIA Requests for B & N Proposals for Bookstore Services

| GB | Date & Ruling | Information to be Withheld | Requestor |
|-----------|----------------------------|--|---|
| ASU | 5/27/2008 OR2008-07179 | B & N's Proposal for Bookstore Services, dated December 14, 2007, to Angelo State University pp. 26-32, 35-40, 42-46, 48-57, 59-64, 65-75, 109-10 (as marked) & Ex B (financial stmts) | Stacy Dyer, Director Marketing/Customer Rel. Texas Book Company |
| CTC | 9/24/2008 OR2008-13149 | B & N's Proposal #2648, for Bookstore Services, dated March 5 2008, to Central Texas College pp. 48-51, 53-55, 57-58, 78-82, 84-86, 88-92, 111-14 (as marked) & Ex. E (financial stmts) | Stacy Dyer, Director, Marketing/Customer Rel. Texas Book Company Bill Dampier, GM MBS Direct Textbooks Alan Stratman, V.P. Follett Higher Ed. Group |
| TWU | 10/23/2008 OR2008-14512 | B & N's Proposal #731-08-020-MD, for Bookstore Services, dated May 1, 2008, to TWU pp. 41-42, 56-58, 97-113, 127-33 (as marked) & Ex. A (financial stmts) | Britt J. Ehlers Rembolt Ludtke LLP |
| UT Pan Am | 4/15/2009 OR2009-04989 | B & N's Proposal # RR-05-001, for Bookstore Services, dated August 10, 2004 and February 25, 2005, to UT-Pan American pp. 36-38, 40-44, 47-51, 57-63, 72-73 (as marked) and Ex. A (financial stmts) | Sara Pillen Rembolt Ludtke LLP |
| TAMU | 7/15/2009 OR2009-9795 | B & N's Proposal, for Bookstore Services, dated August 24, 2004, Tex. A&M University pp. 8, 13-14, 37-38, 52-62, 65-67 (as marked) | Ryan Uher Nebraska Book Co. |
| LSCS | 8/6/2009 OR2009-10938 | B & N's Proposal # 08-226, for Bookstore Operation Services, to Lone Star College System pp. 38, 55-59, 63-65, 69, 71, 83, 93-96, 102-03, 105-08 (as marked) & Ex. C (financial stmts) | Ryan Uher Nebraska Book Co. |
| UT-Tyler | 5/13/2010 OR2010-6886 | B & N's Proposal, RFP No. 750-08/09-10, for Bookstore Services, to UT-Tyler pp. 62-63, 68-69, 90-93, 108-114, 123-131, 136-140, 142-149 (as marked) | Stacy Dyer, Director Marketing/Customer Rel. Texas Book Company |