



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 1, 2008

Ms. Sandy Poel
Public Information Officer
Texas Guaranteed Student Loan Corporation
P.O. Box 83100
Round Rock, Texas 78683-3100

OR2008-10458

Dear Ms. Poel:

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# 318247.

The Texas Guaranteed Student Loan Corporation (the "corporation") received a request for the winning proposals from a specified request for proposals.¹ You state that you will release some of the requested information to the requestor. You claim that some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. Additionally, you assert that the requested information may implicate the proprietary interests of third parties. Pursuant to section 552.305 of the Government Code we understand you to have notified Account Control Technology ("ACT"), Windham Professionals, Inc. ("Windham"), and Regional Adjustment Bureau, Inc. ("RAB") of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* 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 under Act in certain circumstances). We have received arguments on behalf of ACT. We have considered the submitted arguments and reviewed the information you have submitted.

Initially, we note that the requestor agreed to waive receipt of "information contained in the proposals that has been designated as confidential and/or proprietary by the third-party who submitted the proposal." Therefore, any information in the submitted proposals that has been designated as confidential or proprietary by ACT, Windham, or RAB is not responsive to the instant request for information. This ruling does not address the public availability of the

¹We note that the corporation sought and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

submitted information that is not responsive to the requests, and the corporation need not release that information.

Next, you state that the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2005-08435 (2005). Based on your representation, we conclude that, if information in the current request is identical to the information previously requested and ruled upon by this office, and the law, facts, and circumstances on which the prior ruling was based have not changed, the corporation must continue to rely on that ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2005-08435. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted responsive information is not identical, we will consider the submitted arguments.

Next, we note 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, neither Windham nor RAB have submitted to this office any reasons explaining why their information should not be released. Thus, we have no basis for concluding that any portion of the submitted responsive information pertaining to Windham or RAB constitutes the proprietary information of those companies, and none of it may be withheld on that basis. *See id.* § 552.110; 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).

ACT raises section 552.104 of the Government Code as an exception to disclosure. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104 is a discretionary exception that protects 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 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 government), 522 (1989) (discretionary exceptions in general). As the corporation did not submit any arguments in support of withholding any information pursuant to section 552.104, the corporation may not withhold any of ACT's responsive information pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Next, we understand ACT to claim that some of its information is excepted from disclosure under section 552.110 of the Government Code, which protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 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* ORD 552 at 2. Section 757 provides that a trade secret is

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); *see also Huffines*, 314 S.W.2d at 776. 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. RESTATEMENT OF TORTS § 757 cmt. b (1939). The following are the six factors that the Restatement gives 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 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; 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, 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) excepts from disclosure “[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). 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 requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

After reviewing its arguments and the information at issue, we find that ACT has failed to demonstrate how any portion of the submitted responsive information meets the definition of a trade secret. *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”). We therefore determine that no portion of ACT’s responsive information is excepted from disclosure under section 552.110(a).

Further, we find that ACT has not made the specific factual and evidentiary showing required by section 552.110(b) that release of the information at issue would cause the company substantial competitive harm. *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, the corporation may not withhold any of ACT’s responsive information under section 552.110 of the Government Code.

We now address the corporation’s argument that the submitted responsive information is protected from disclosure under copyright law. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and it encompasses information protected by other statutes. Gov’t Code § 552.101. But copyright law does not make information confidential for the purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who

wishes to make copies of copyrighted information 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 at 8-9 (1990). Thus, the corporation may not withhold the submitted information under section 552.101 of the Government Code in conjunction with copyright law, but any information that is protected by copyright may only be released in accordance with copyright law.

We note that some of the submitted responsive information is excepted from disclosure under section 552.136 of the Government Code.² 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. The corporation must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, to the extent the information at issue in the present request is identical to the information addressed in Open Records Letter No. 2005-08435, the corporation must continue to follow that ruling as a previous determination with respect to such information. The corporation must withhold the information we have marked pursuant to section 552.136 of the Government Code. The corporation must release the remaining responsive information, but any information protected by copyright must 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). If the governmental body does not file suit over 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

²The Office of the Attorney General will raise a mandatory exception like section 552.136 of the Government Code on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

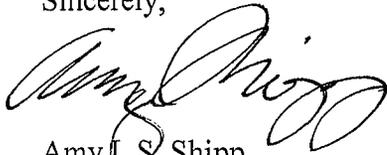
statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 318247

Enc. Submitted documents

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