



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 7, 2008

Mr. John Lawhon
General Counsel's Office
Texas Woman's University
P.O. Box 425497
Denton, Texas 76204

OR2008-10792

Dear Mr. Lawhon:

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# 318203.

The Texas Woman's University (the "university") received a request for all documents and materials pertaining to RFP# 731-08-020-MD, other than those submitted by Barnes and Nobles College Booksellers, Inc., as well as the resulting contract to manage the university's campus bookstore. You raise no exception to disclosure on behalf of the university, but you indicate that release of the requested information may implicate the proprietary interests of third parties. You state and provide documentation showing, that you have notified Follett Corporation ("Follett") and Validis Resources ("Validis") of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *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 circumstances). Follett and Validis claim their submitted information is excepted from disclosure under section 552.110 of the Government Code.¹ We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you did not submit the resulting contract to manage the university's bookstore between the university and Follett. Follett indicates the current agreement is yet

¹Although, Validis also raises section 552.021 of the Government Code as an exception to disclosure, we note that this provision is not an exception to disclosure under the Act. *See* Gov't Code § 552.021 (providing that public information is available during normal business hours).

to be finalized and executed; therefore, it cannot be produced. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Next, we must address the university's obligation under section 552.301 of the Government Code. Within fifteen business days of receiving a request for information, a governmental body that wishes to withhold information from public disclosure must submit to this office a copy of the specific information requested or representative samples. *See Gov't Code* § 552.301(e)(1)(D). The university received the request for information on May 20, 2008, but did not submit the information at issue until July 2, 2008. Thus, the university failed to comply with the procedural requirement mandated by section 552.301.

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). This office has held that a compelling reason exists to withhold information when third party interests are at stake or when information is made confidential by another source of law. *See Open Records Decision No. 150* (1977). Because the proprietary interests of a third party can provide a compelling reason against the presumption of openness we will consider whether any of the submitted information can be withheld on that basis.

Follett and Validis each claim that portions of the requested information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: 1) trade secrets and 2) commercial or financial information the release of which would cause a third party substantial competitive harm. *Gov't Code* § 552.110.

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." *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

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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). 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. Open Records Decision No. 552 at 5-6 (1990). 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).

Having considered Follett's and Validis' arguments, we conclude that Validis has established a *prima facie* case that portions of its 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 Validis has made some of the information it seeks to withhold publicly available on its website, including customer information. Because Validis has published this information,

²The 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).

it has failed to demonstrate that this information is a trade secret. Further, Follett and Validis have each failed to demonstrate that any of the remaining information at issue constitutes a trade secret. *See* Open Records Decision No. 319 (1982) (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the university may not withhold the remaining information at issue under section 552.110(a) of the Government Code.

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. Gov’t Code § 552.110(b); *see also* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

Follett and Validis also claim their remaining information is commercial or financial information excepted under section 552.110(b) of the Government Code. Upon review, we find that Validis has established that release of some of its remaining information could cause the 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, Follett and Validis have made only conclusory allegations that the release of their remaining information would result in substantial damage to each company’s competitive position. Thus, these companies have not demonstrated that substantial competitive injury would likely result from the release of any of their remaining information. *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). Accordingly, the university may not withhold the remaining information under section 552.110(b) of the Government Code.

In summary, the university must withhold the information we have marked under section 552.110 of the Government Code. The remaining 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). 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 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,



Henisha D. Anderson
Assistant Attorney General
Open Records Division

HDA/mcf

Ref: ID# 318203

Enc. Submitted documents

c: Mr. Jay M. Dorman, Esq.
Bryan Cave, L.L.P.
1290 Avenue of the Americas
New York, New York 10104-3300
(w/o enclosures)

Suhaib Ghazi
Counsel
Follett Corporation
2233 West Street
River Grove, Illinois 60171-1895
(w/o enclosures)

Mr. Britt J. Ehlers
Attorney for Nebraska Book Company d/b/a/ Validis Resources
1201 Lincoln Mall, Suite 102
Lincoln, Nebraska 68508
(w/o enclosures)