



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 19, 2008

Mr. James R. Lindley
General Counsel
Central Texas College
P.O. Box 1800
Killeen, Texas 76540-1800

OR2008-13149A

Dear Mr. Lindley:

This office issued Open Records Letter No. 2008-13149 (2008) on September 24, 2008. On October 3, 2008, you submitted additional responsive documents that you state were not originally submitted due to a clerical error. We have examined this ruling and the newly submitted information and have determined that the ruling should be corrected. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on September 24, 2008. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")), chapter 552 of the Government Code.

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 329765.

Central Texas College (the "college") received five requests for the submitted proposals and resulting contract pertaining to proposal #2848, Bookstore Operations & Textbook Distribution Services. The college takes no position on whether the submitted information is excepted from disclosure, but states that release of this information may implicate the proprietary interests of Follet Higher Education Group ("Follet"), Barnes & Noble College Bookstores, Inc. ("Barnes & Noble"), MBS Direct ("MBS"), Validis Resources ("Validis") and Texas Book Company ("Texas Book"), (collectively "the bidders"). Accordingly, you

inform us, and provide documentation showing, that you notified the bidders of the requests and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received arguments from representatives of Follet, Barnes & Noble, MBS, Validis, and Texas Book. We have considered the submitted arguments and have reviewed the submitted information.

Initially, we must address the college's obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) states, within fifteen business days of receiving the request, the governmental body must submit to this office (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). The college timely submitted a set of documents in response to the requests. However, as discussed above, after the issuance of our ruling, the college submitted a second set of documents for our review. The college did not submit the second set of documents until October 3, 2008, well beyond the fifteen-day deadline for submitting this information. Consequently, we conclude that the college failed to comply with the requirements of section 552.301 of the Government Code with respect to the second set of documents.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the 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 id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third-party interests are at stake, we will address whether the submitted information must be withheld to protect the interest of the third party.

Next, we note that by letter dated September 22, 2008, Barnes & Noble informed this office that it does not object to the release of pages 5, 6, and 44 through 48 of its proposal. Additionally, by letter dated October 6, 2008, Barnes & Noble informed us that it does not object to the release of Exhibits B, D, H, and I. Therefore, this information must be released to the requestors. With respect to the remaining information in Barnes & Noble's proposal, we note that there is a pending lawsuit filed against our office: *Barnes & Noble Booksellers*,

Inc. v. Greg Abbott, Cause No. D-1-GN08-001978, District Court, 98th Judicial District, Travis County, Texas. The following sections of the proposal submitted by Barnes & Noble to the college are at issue in the pending litigation, with regard to a similar proposal from Barnes & Noble to another governmental body: Renovations and Store Design; Merchandising and School Spirit; Information Technology; Textbook and Trade; and Training and Development. These sections of the proposal and Barnes & Noble's arguments to withhold these sections are similar to the issues and information in the pending litigation. Accordingly, with respect to the remaining information in Barnes & Noble's proposal, we decline to issue a decision and will allow the trial court to resolve the issue of whether these and other portions of Barnes & Noble's proposal must be released to the public.

Texas Book raises section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. We note, however, that section 552.104 only protects the interests of a governmental body and is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). In this instance, the college does not argue that the release of any portion of the submitted information would harm its interests in a particular competitive situation under section 552.104. Accordingly, section 552.104 is not applicable to any portion of the proposal submitted by Texas Book.

Follett, MBS, Validis, and Texas Book argue that portions of their proposals 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. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets 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. 1957); *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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Follett, Validis, and Texas Book all contend that portions of their proposals are trade secrets excepted under section 552.110(a). Having considered Texas Book’s, Follett’s, and Validis’ arguments, we conclude that Texas Book and Validis have established a *prima facie* case that

¹The 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).

portions of their proposals, which we have marked, constitute trade secrets. Therefore, the college must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note that Validis and Texas Book have made some of the information they seek to withhold publicly available on their websites. Because Validis and Texas Book have published this information, they have failed to demonstrate that this information is a trade secret. Further, Follett, Validis, and Texas Book have each failed to demonstrate that any of the remaining information in their proposals fits within the definition of a trade secret. Follett, Texas Book, and Validis have also not established any of the trade secret factors with respect to the remaining information in their respective proposals. Thus, none of the remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Follett, MBS, Texas Book, and Validis contend that portions of their proposals are excepted under section 552.110(b). Upon review of the submitted arguments and information at issue, we find that Follett, Texas Book, and Validis have established that their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the companies substantial competitive harm. MBS argues that its consolidated balance sheet is excepted under section 552.110(b) because disclosure of it would allow "MBS's competitors to assess weaknesses in the company, understand better the value and size of its merchandise inventories, and design a strategy to exploit that weakness." Upon review of MBS's arguments and the consolidated balance sheet, we find that MBS has established that the portion of the balance sheet revealing its inventory assets, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the college must withhold the information we have marked under section 552.110(b) of the Government Code. However, Follett, MBS, Validis, and Texas Book have made only conclusory allegations that the release of the remaining information they seek to withhold 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 of 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). Accordingly, none of Follett, MBS, Validis, and Texas Book's remaining information may be withheld under section 552.110(b).

Next, we note that the remaining information contains insurance policy numbers that are excluded 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(b). Accordingly, the college must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

We note that some 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 copyrighted. 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 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).

In summary, pages 5, 6, and 44 through 48, as well as, Exhibits B, D, H, and I of Barnes & Noble’s proposal must be released. We decline to issue a decision with regards to the remaining information in Barnes & Noble’s proposal because it is information that is at issue in pending litigation. We will allow the court to determine whether this information must be released to the public. The college must withhold the information we have marked in the proposals submitted by Follett, MBS, Validis, and Texas Book under section 552.110 of the Government Code. The college must also withhold the marked insurance policy numbers under section 552.136 of the Government Code. The remaining information at issue must be released, but 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 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

²The 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).

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,



Laura E. Ream
Assistant Attorney General
Open Records Division

LER/jb

Ref: ID# 322680

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

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