



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 5, 2009

Ms. Neera Chatterjee
Public Information Coordinator
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-10860

Dear Ms. Chatterjee:

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# 351096.

The University of Texas System (the "system") received a request for signed bundled site licenses pertaining to 10 named publishers. You state you have no signed bundled site license contracts with Cambridge University Press, Emerald, Sage, or Taylor & Francis.¹ You take no position with respect to the public availability of the requested information, but believe that the request may implicate the proprietary interests of American Chemical Society ("ACS"); Houston Academy of Medicine ("HAM"); Oxford University Press ("Oxford"); Springer-Verlag New York, Inc. ("Springer-Verlag"); Science Direct, Div. of Reed Elsevier, Inc. ("Elsevier"); Wiley Europe ("Wiley"); John Wiley & Sons, Inc. ("John Wiley"); Blackwell Publishing, Inc. ("Blackwell"); and Springer Science + Business Media, L.L.C. ("Springer"). We have received comments from Springer and Elsevier. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that, among other things, the requestor seeks answers to several factual questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open

¹ The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). You state that information responsive to the requestor's questions is contained in the submitted documents. Accordingly, we will address whether the submitted information is excepted from disclosure.

Next, we note the requestor has agreed to the redaction of IP addresses. As such, those types of information are not responsive to the present request and will not be addressed by this ruling.

Next, we note that 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, we have not received correspondence from ACS, HAM, Oxford, Springer-Verlag, Elsevier, Wiley, John Wiley, or Blackwell explaining why their information should not be released. Thus, we have no basis for concluding that any portion of the submitted information pertaining to these third parties constitutes proprietary information, and the system may not withhold any portion of their 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).

Springer asserts its contracts are governed by a strict confidentiality provision. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110 of the Government Code). Consequently, unless the responsive information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Springer asserts its information should not be disclosed pursuant to the trade secret provision under section 382.041 of the Health and Safety Code.² Section 382.041 provides in relevant part that “a member, employee, or agent of [the Texas Commission on Environmental

² Section 382.041 of the Health and Safety Code is encompassed by section 552.101 of the Government Code, which provides “information is excepted from [required public disclosure] if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101.

Quality (the "commission") may not disclose information submitted to [the commission] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). By its own terms, section 382.041 only applies to certain information submitted to the commission, and is inapplicable in this instance. *See* Open Records Decision No. 652 (1997). Thus, none of Springer's information may be withheld on that basis.

We understand Elsevier and Springer to assert that portions of their submitted information are excepted 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. Open Records Decision No. 552 at 2 (1990). 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* ORD 661 at 5-6.

After reviewing the submitted information and the arguments, we determine that Elsevier and Springer have failed to demonstrate that any portion of the submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of business,” rather than “a process or device for continuous use in the operation of the business.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, no portion of the submitted information may be withheld under section 552.110(a).

In addition, we conclude that Elsevier and Springer have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information at issue would cause them substantial competitive harm. *See* ORD 661, 319 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We note that the pricing information of entities contracting with a governmental body, such as Elsevier and Springer, is generally not excepted under section 552.110(b).

This office considers the prices charged in government contract awards to be a matter of strong public interest. *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). Moreover, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). We, therefore, conclude that the system may not withhold any of the information at issue under section 552.110(b).

We note the remaining submitted information contains bank account numbers. 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."³ Gov't Code § 552.136(b). Accordingly, the system must withhold the information we have marked under section 552.136 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/cc

³ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 351096

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

American Chemical Society
Attn: Library Relations Specialist
1155 Sixteenth Street Northwest
Washington, DC 20036
(w/o enclosures)

Houston Academy of Medicine
Attn: Greg Bernica
1313 John Freeman Boulevard
Houston, Texas 77004-7126
(w/o enclosures)

Oxford University Press
Attn: M.J. Richardson
Great Clarendon Street
Oxford, OX2 6DP
United Kingdom
(w/o enclosures)

Springer-Verlag New York, Inc.
Attn: Dennis Looney
175 Fifth Avenue
New York, New York 10010-7858
(w/o enclosures)

Science Direct
Division of Reed Elsevier, Inc.
Attn: Roy Jakobs
P.O. Box 945
655 Avenue of the Americas
New York, New York 10159-0945
(w/o enclosures)

Wiley Europe
Attn: C.J. Dicks
The Atrium
Southern Gate
Chichester, West Sussex
PO 19 8SQ
United Kingdom
(w/o enclosures)

Wiley Subscription Services
c/o John Wiley & Sons, Inc.
Attn: Mr. Reed Elfenbein
111 River Street
Hoboken, New Jersey 07030
(w/o enclosures)

Blackwell Publishing, Inc.
Commerce Place
350 Main Street
Malden, Massachusetts 02148-5018
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Springer Science+Business Media, LLC
Attn: Syed Hasan
233 Spring Street
New York, New York 10013-1578
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