



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2009

Ms. Laura C. Rodriguez
Walsh, Anderson, Brown, Aldridge & Gallegos, P.C.
P.O. Box 460606
San Antonio, Texas 78246

OR2009-12058

Dear Ms. Rodriguez:

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# 353595.

The Lewisville Independent School District (the "district"), which you represent, received a request for any functional behavioral assessments, behavior intervention plans, training materials, and invoices submitted by the Central Texas Autism Center ("CTAC") for services rendered pertaining to specified contracts between the district and CTAC. You state the district has previously provided the requested invoices to this requestor in response to a previous request from this requestor. You also state the district has no information responsive to the requests for functional behavioral assessments and behavior intervention plans.¹ Although you indicate the district takes no position with respect to the public availability of the submitted training materials, you indicate their release may implicate the proprietary interests of CTAC. Accordingly, you state, and have provided documentation showing, you notified CTAC of the request and of the company's right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code*

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

§ 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered comments from CTAC and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note the requestor, in his request, specifically excludes student-identifying information. Thus, this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

CTAC claims the submitted training materials are excepted from disclosure under section 552.103 of the Government Code, which provides:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a); (c). Section 552.103, however, 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. 542 (1990) (statutory predecessor to section 552.103 does not implicate the rights of a third party), 522 (1989) (discretionary exceptions in general). As the cooperative does not seek to withhold any information pursuant to this exception, we find section 552.103 is not applicable to CTAC's information. *See* ORD 542 (governmental body may waive section 552.103).

²We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

CTAC claims its training materials are excepted 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) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial 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.” *Id.* § 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 a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5* (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the

definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.³ Open Records Decision No. 402 (1983).

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 information at issue. *See* 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).

CTAC contends the submitted training materials qualify as trade secret information under section 552.110(a). We find, however, that CTAC has not demonstrated any of the information in the submitted training materials meets the definition of a trade secret. Therefore, the district may not withhold the submitted training materials under section 552.110(a) of the Government Code.

We also find CTAC has failed to provide specific factual evidence demonstrating release of the submitted training materials would result in substantial competitive harm to the company. *See* Open Records Decision No. 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). Therefore, we determine the submitted training materials are not excepted from disclosure under section 552.110(b).

We note 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 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

³The 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 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;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

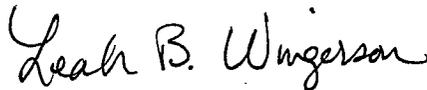
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990). Accordingly, as there are no further claimed exceptions to disclosure, the submitted training materials must be released to the requestor in accordance with copyright law.

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 353595

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)