



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 11, 2009

Ms. Neera Chatterjee
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-12883

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# 354974 (OGC# 120383).

The University of Texas Southwestern Medical Center at Dallas (the "university") received a request for information about the requestor that was furnished to the university police department during the hiring process by law enforcement agencies, financial institutions, consumer reporting agencies, or other persons. You claim that portions of the submitted information are excepted from disclosure under sections 552.101 of the Government Code. You claim the remaining information may implicate the proprietary interests of a third party. Thus you state, and provide documentation showing, that pursuant to section 552.305 of the Government Code, you have notified Law Enforcement Services, Inc. ("LESI") of the request and of its right to submit arguments to this office as to why the 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 received arguments from LESI. We have considered all of the submitted arguments and reviewed the submitted representative sample of information.¹

¹We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information protected by chapter 411 of the Government Code, which deems confidential criminal history record information ("CHRI") generated by the National Crime Information Center or by the Texas Crime Information Center. *Id.* § 411.083(a). CHRI means "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions." *Id.* § 411.082(2). Section 411.083 authorizes the Texas Department of Public Safety ("DPS") to disseminate CHRI to "noncriminal justice agencies authorized by . . . state statute to receive criminal history record information[.]" *Id.* § 411.083(b)(2). Section 411.094 of the Government Code provides in part:

(b) An institution of higher education is entitled to obtain from the [DPS] criminal history record information maintained by the [DPS] that relates to a person who is an applicant for a security-sensitive position.

(c) Criminal history record information obtained by an institution of higher education under Subsection (b) may be used only for the purpose of evaluating applicants for employment in security-sensitive positions.

(d) Criminal history record information received by an institution of higher education under Subsection (b) may not be released or disclosed to any person except on court order or with the consent of the person who is the subject of the criminal history record information.

Act of June 18, 1993, 73d Leg., R.S., ch. 790, § 35, 1993 Tex. Gen. Laws 3088, 3112, *amended by* Act of June 2, 2009, 81st Leg., R.S., ch. 1146, § 10.06, 2009 Tex. Sess. Law Serv. 3581, 3631 (Vernon) (to be codified as an amendment to Gov't Code § 411.094(d)). You state the university is an institution of higher education. Gov't Code § 411.094(a)(1) (defining "Institution of higher education"); Educ. Code § 61.003(5) (defining "Medical and dental unit"), (8) (defining "Institution of higher education"). You inform us the university obtained the CHRI of the requestor for the purpose of evaluating the requestor's application for a position as a peace officer in the university's police department, which you assert is a security-sensitive position since such an employee would have access to a computer terminal and would work in a location designated as a security-sensitive area. *See* Gov't Code § 411.094(a)(2) (defining "Security-sensitive position"). Upon review, we agree that portions of the information at issue constitute CHRI for the purposes of chapter 411. However, we note that section 411.094(d) allows the release of CHRI with the consent of the person who is the subject of the CHRI. *See id.* § 411.094(d). Therefore, pursuant to section 411.094(d) of the Government Code, the requestor is entitled to the release of her own CHRI.

You assert that under section 411.085 the university would commit an offense by releasing this information to the requestor. We note that the Eighty-first Legislature amended section 411.085, which now states in relevant part:

- (a) A person commits an offense if the person knowingly or intentionally:
 - (1) obtains criminal history record information in an unauthorized manner, uses the information for an unauthorized purpose, or discloses the information to a person who is not entitled to the information; or
 - (2) violates a rule of the [DPS] adopted under this subchapter.

Act of June 18, 1993, 73d Leg., R.S., ch. 790, § 35, 1993 Tex. Gen. Laws 3088, 3112, *amended by* Act of June 2, 2009, 81st Leg., R.S., ch. 1146, § 10.05, 2009 Tex. Sess. Law Serv. 3581, 3631 (Vernon) (to be codified as an amendment to Gov't Code § 411.085(a)). Because section 411.094(d) allows the university to release a person's CHRI to that person with his or her consent, the university would not commit an offense by releasing the CHRI at issue to the requestor in this instance.

Section 552.101 also encompasses section 1701.454 of the Occupations Code, which governs the release of reports or statements submitted to the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE"). Section 1701.454 provides as follows:

- (a) A report or statement submitted to the [TCLEOSE] under this subchapter is confidential and is not subject to disclosure under Chapter 552, Government Code, unless the person resigned or was terminated due to substantiated incidents of excessive force or violations of the law other than traffic offenses.
- (b) Except as provided by this subchapter, a [TCLEOSE] member or other person may not release the contents of a report or statement submitted under this subchapter.

Occ. Code § 1701.454. Upon review, the university must withhold the submitted F-5 forms we have marked pursuant to section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. You also seek to withhold additional documents pursuant to section 1701.454. However, the remaining information does not consist of reports or statements submitted to TCLEOSE for the purposes of section 1701.454. Accordingly, this information is not confidential under section 1701.454, and the university may not withhold it under section 552.101 on that ground.

The submitted information also includes a background investigator's report generated by an online questionnaire conducted by LESI as part of the requestor's application to the

university police department. LESI claims this report is a trade secret and thus is excepted under section 552.110 of the Government Code. Section 552.110 can protect trade secrets and certain commercial or financial information. See Gov't Code § 552.110(a), (b). 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 Open Records Decision 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. 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 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). 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 the business," rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

Upon review of the background investigator's report and LESI's arguments, we find that LESI has failed to establish a *prima facie* case that any portion of its background investigator's report constitutes a trade secret, nor has it demonstrated the necessary trade secret factors to establish a trade secret claim for this information. *See* ORD No. 402 (1983). Therefore, the university may not withhold the background investigator's report under section 552.110(a) of the Government Code.

However, we note the background investigator's report is 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 protected by copyright. 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 materials protected by copyright, 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, the university must withhold the F-5 Report of Separation of License Holder forms we have marked under section 552.101 of the Government Code in conjunction with section 1701.454 of the Occupations Code. The remaining information must be released to the requestor, but any copyrighted information may only be released in accordance with copyright law.²

²We note that this requestor has a special right of access to some of the information being released. *See* Gov't Code § 552.023(a) (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Therefore, if the university receives another request for this information from a person who does not have a special right of access to this information, the university should resubmit this same information and request another decision from this office. *See* Gov't Code §§ 552.301(a), 302; Open Records Decision No. 673 (2001).

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, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/eeg

Ref: ID# 354974

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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