ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 15, 2010

Ms. Peggy Rudd
Director and Librarian
Texas State Library and Archives Commission
P.O. Box 12927
Austin, Texas 78711-2927

OR2010-03631

Dear Ms. Rudd:

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# 372814.

The Texas State Library and Archives Commission (the "commission") received two requests for all proposals submitted by vendors in response to request for proposals ("RFP") number 306-10-8007. The commission takes no position with regard to the release of the requested information. However, you indicate that the submitted information may implicate the proprietary interests of Online Computer Learning Center, Inc. ("OCLC"), SirsiDynix, Relais International ("Relais"), Innovative Interfaces, Inc. ("Innovative Interfaces"), and Auto-Graphics, Inc. ("Auto-Graphics"). Accordingly, the commission was required by section 552.305 of the Government Code to notify the third parties of the requests and of their opportunities to submit comments to this office explaining why the information at issue should be withheld from disclosure. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially we note that the commission has redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of our records indicate, that the commission is authorized to withhold any of the redacted information without first seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). In this instance, we can discern the nature of the redacted information; thus, being

deprived of that information does not inhibit our ability to make a ruling. In the future, however, the commission should refrain from redacting any information it is not authorized to withhold without requesting a ruling unless the information is the subject of a previous determination under section 552.301 of the Government Code. *See* Gov't Code §§ 552.301(e)(1)(D), .302. Failure to comply with section 552.301 may result in the information being presumed public under section 552.302 of the Government Code. *See id.*

Next, we note that as of the date of this letter, this office has not received comments from OCLC, SirsiDynix, or Auto-Graphics explaining why their submitted information should not be released. Furthermore, although you state Innovative Interfaces has marked certain information within its proposal as confidential, it has not raised any exceptions to disclosure under the Act or provided any arguments against disclosure. Therefore, we have no basis to conclude that these third parties have a protected proprietary interest in the submitted information. *See* Gov't Code § 552.110; 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. Accordingly, the commission may not withhold any portion of the submitted proposals based upon the proprietary interests of OCLC, SirsiDynix, Auto-Graphics, or Innovative Interfaces.

Relais argues that a portion of its information is excepted from disclosure under section 552.110. Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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." Gov't Code § 552.110(a)-(b).

The Supreme Court of Texas 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 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 .... [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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a third party's claim for exception as valid under section 552.110(a) if the third party establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law.[1] *See* Open Records Decision No. 552 at 5 (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. *See* 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).

Relais contends that its pricing information constitutes proprietary information and requests that the information not be released. Based on Relais' arguments and our review of the submitted information, we find that the commission must withhold the information we have marked under section 552.110(b) of the Government Code.

In summary, the commission must withhold Relais' pricing information under section 552.110(b) of the Government Code. The remaining information must be released.

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[1]The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at2 (1982), 255 at 2 (1980).

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,

Lauren J. Holmsley

Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/jb

Ref: ID# 372814

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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