



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 13, 2010

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

OR2010-06886

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# 379270.

The University of Texas at Tyler (the "university") received a request for specified bookstore management proposals and the executed contract. You state that the university is releasing some of the requested information, including the executed contract.¹ The university 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 Barnes & Noble College Booksellers, Inc. ("Barnes & Noble") and Nebraska Book Company d/b/a Valadis Resources ("Nebraska Book") (collectively, the "third parties"). Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request 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 correspondence from representatives of both of the third parties. We have considered the submitted arguments and have reviewed the submitted information.

Initially, 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 university are at issue in the pending litigation, with regard to a similar

¹You inform us that the requestor and Follett Higher Education Group ("Follett") have reached an agreement on Follett's information and the university is releasing Follett's information pursuant to that agreement.

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 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.

Nebraska Book raises "the exception related to personnel information" stating that the information in pages 65-76 of its proposal is personal to each of Nebraska Book's employees represented in those pages. Based on the substance of this argument, we understand Nebraska Book to raise section 552.102(a) of the Government Code, which excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a); *see also Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). Section 552.102 only applies to information in a personnel file of an employee of a governmental body. The information Nebraska Book seeks to withhold is not contained in the personnel file of a governmental employee. Thus, we determine that section 552.102 does not apply to any of Nebraska Books's information, and it may not be withheld on that basis.

However, section 552.102(a) utilizes the same test as the test for common-law privacy under section 552.101 of the Government Code, which can protect private individuals. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy. Common-law privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. We note that names, addresses, telephone numbers, educational history and work background of individuals are not highly intimate or embarrassing. *See* Open Records Decision No. 455 at 7 (1987) (birth dates, names, and addresses are not protected by privacy). Upon review, we find that pages 65-76 of Nebraska Book's proposal do not contain information that is highly intimate or embarrassing and of no legitimate public interest. Therefore, the university may not withhold any of Nebraska Book's personnel information under section 552.101 of the Government Code in conjunction with common-law privacy.

Nebraska Book also claims portions of its proposal are excepted under section 552.110 of the Government Code, which 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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.² 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. *See* Open Records Decision No. 402 (1983). We note that pricing information pertaining to a particular proposal or 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." *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).

²The 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).

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.*; see also Open Records Decision No. 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).

Having considered Nebraska Book’s arguments, we find that Nebraska Book has established a *prima facie* case that some of its customer information, which we have marked, constitutes trade secrets. Therefore, the university must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note that Nebraska Book has published the identities of many of its customers on its website. Thus, Nebraska Book has failed to demonstrate that the information it has published on its website is a trade secret. Further, Nebraska Book has failed to demonstrate that any of the remaining information it seeks to withhold meets the definition of a trade secret, nor has Nebraska Book demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Upon review of Nebraska Book’s arguments and its information at issue, we find that Nebraska Book has established that the pricing and discounting information we have marked in its proposal constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the university must withhold the marked information in Nebraska Book’s proposal under section 552.110(b) of the Government Code. However, we find Nebraska Book has made only conclusory allegations that the release of the remaining information it seeks to withhold would result in substantial damage to its competitive position. Thus, Nebraska Book has not demonstrated that substantial competitive injury would result from the release of any of the remaining information. See Open Records Decision Nos. 661, 509 at 5 (1988) (because 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). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

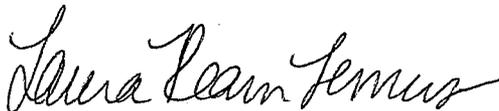
We note that some of Nebraska Book’s remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM- 672 (1987). A governmental body must allow 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, we decline to issue a decision with respect to Barnes & Noble's proposal and will allow the trial court to resolve the issue of whether any portion of Barnes & Noble's proposal must be released to the public. The university must withhold the information we have marked in Nebraska Book's proposal under section 552.110 of the Government Code. Nebraska Book's remaining information 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, toll free, at (888) 672-6787.

Sincerely,



Laura Ream Lemus
Assistant Attorney General
Open-Records Division

LRL/jb

Ref: ID# 379270

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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