



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2010

Mr. Mark Adams
Office of the General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2010-11641

Dear Mr. Adams:

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# 388902.

The Office of the Governor (the "governor") received a request for compliance reports filed by Texas Enterprise Fund grantees "that address grantee employment levels after December 31, 2008." You raise no exception to disclosure on behalf of the governor, but you state the submitted information may implicate the proprietary interests of interested third parties. Accordingly, pursuant to section 552.305 of the Government Code, you state you have notified these third parties of the request and of each party's right to submit arguments to this office as to why its information should not be released.¹ See Gov't Code

¹The third parties that were notified pursuant to section 552.305 are the following: ADP Tax Credit Services ("ADP"); Associated Hygienic Products L.L.C. ("AHP"); Albany Engineered Composites ("Albany"); Allied Production Solutions L.P. ("Allied"); Authentix, Inc. ("Authentix"); Caterpillar, Inc. ("Caterpillar"); CITGO Petroleum Corp. ("CITGO"); Comerica, Inc. ("Comerica"); Fidelity Global Brokerage Group, Inc. ("Fidelity"); Grifols, Inc. ("Grifols"); FlightSafety International, Inc. ("FlightSafety"); HelioVolt Corp. ("HelioVolt"); Hilmar Cheese Co. ("Hilmar"); Home Depot, Inc. ("Home Depot"); Huntsman Corp. ("Huntsman"); INEOS USA L.L.C. ("INEOS"); JPMorgan Chase Bank, N.A., as successor in interest to Washington Mutual Bank ("Chase"); JTEKT Automotive Texas, L.P.; KLN Steel Products Co., L.L.C.

§ 552.305(d); see also 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 to disclosure under Act in certain circumstances). We have received comments from an attorney on behalf of FlightSafety. We have considered the submitted arguments and reviewed the submitted information.

You state you are withdrawing your request for a ruling on information pertaining to ADP; AHP; Albany; Allied; Authentix; Caterpillar; Chase; Comerica; Fidelity; Grifols; HelioVolt; Home Depot; Huntsman; JTEKT; KLN; Lexicon; Martifer; McLane; Medtronic; Motiva; Newly Weds; Rackspace; Ruiz; Samsung; Sanderson; Santana; Scott & White; Superior; TIGM; T-Mobile; Torchmark; Trace; Tyson; USBC; UTHSC; Vought; and Zarges. You state the requestor has narrowed the request for information and you have released the information subject to the more narrowly tailored request. Accordingly, this ruling does not address the information relating to these third parties.

You inform us that some of the remaining requested information is the subject of a previous ruling issued by this office.² See Open Records Letter No. 2010-10000 (2010). We understand that the pertinent facts and circumstances have not changed since the issuance of that prior ruling. Thus, we determine that the governor must continue to rely on our ruling in Open Records Letter No. 2010-10000 as a previous determination and withhold or release the information at issue in accordance with that decision. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note that a portion of FlightSafety's submitted information appears to have been the subject of another prior ruling issued by this office. See Open Records Letter

("KLN"); East Texas Lee Container, L.P. ("Lee"); Lexicon Pharmaceuticals ("Lexicon"); Lockheed Martin Space Systems Co. ("Lockheed"); Martifer-Hirschfeld Energy Systems, L.L.C., as successor in interest to Martifer Energy Systems, L.L.C. ("Martifer"); Maxim Integrated Products ("Maxim"); McLane Advanced Technologies, L.L.C. ("McLane"); MiniMed Distribution Corp.-Medtronic Diabetes ("Medtronic"); Motiva Enterprises, L.L.C. ("Motiva"); Newly Weds Foods, Inc. ("Newly Weds"); Rackspace US, Inc. ("Rackspace"); Raytheon Co. ("Raytheon"); Rockwell Collins, Inc. ("Rockwell"); Ruiz Food Products, Inc. ("Ruiz"); Samsung Austin Semiconductor ("Samsung"); Sanderson Farms, Inc. ("Sanderson"); Santana Textiles, L.L.C. ("Santana"); Scott & White; Superior Essex Communications L.P. ("Superior"); Texas Energy Center ("TEC"); Texas Institute for Genomic Medicine/Texas A&M System ("TIGM"); T-Mobile USA, Inc. ("T-Mobile"); Torchmark Corp. ("Torchmark"); Trace Engines, L.P. ("Trace"); Tyson Foods, Inc. ("Tyson"); United States Bowling Congress ("USBC"); University of Texas System - Health Science Center Houston ("UTHSC"); Vought Aircraft Industries, Inc. ("Vought"); and Zarges Aluminum Systems, L.L.C. ("Zarges").

²The third parties whose information was addressed in the prior ruling are the following: CITGO; Hilmar; INEOS; Lee; Lockheed; Maxim; Raytheon; Rockwell; and TEC.

No. 2010-07377A (2010) (portions of FlightSafety's information excepted from disclosure under section 552.110(b)). We have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the submitted information is identical to that previously ruled upon by this office, the governor must continue to rely on Open Records Letter No. 2010-07377A as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling. *See* ORD 673. To the extent the submitted information was not previously requested or ruled upon by this office, we will address the arguments against disclosure of the information.

FlightSafety raises section 552.110 of the Government Code for portions of the company's information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm.

Section 552.110(a) 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). 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[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). 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 requested information. *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).

After reviewing the company's arguments and the information at issue, we find that FlightSafety has not demonstrated that any of the submitted information constitutes a trade secret under section 552.110(a). *See* ORD 552 at 5 (party must establish *prima facie* case that information is trade secret), 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Thus, the governor may not withhold any portion of FlightSafety's information under section 552.110(a) of the Government Code.

We further determine FlightSafety has established that portions of its information, which we have marked, constitute commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, the governor must withhold the information we have marked under section 552.110(b) of the Government Code. However, we also find FlightSafety has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the company substantial competitive harm. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of

³The 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;
- (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, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the governor may not withhold any of the remaining information under section 552.110(b) of the Government Code. As no further exception to disclosure is raised, the governor must release FlightSafety's remaining submitted information.

To summarize, the governor must continue to rely on our ruling in Open Records Letter No. 2010-10000 as a previous determination and withhold or release the information at issue in accordance with that decision. To the extent FlightSafety's information is identical to that previously ruled upon by this office, the governor must continue to rely on Open Records Letter No. 2010-07377A as a previous determination and continue to treat the previously ruled upon information in accordance with that ruling. To the extent FlightSafety's information was not previously requested or ruled upon by this office, the governor must withhold the marked information under section 552.110 of the Government Code. In that case, the remainder of FlightSafety's 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, toll free, at (888) 672-6787.

Sincerely,



Cindy Nettles
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CN/dls

Ref: ID# 388902

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