



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 2, 2011

Ms. Jena R. Abel  
Assistant General Counsel  
Texas Board of Nursing  
333 Guadalupe Street, Suite 3-460  
Austin, Texas 78701

OR2011-01710

Dear Ms. Abel:

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# 408203.

The Texas Board of Nursing (the "board") received a request for a specified proposal to establish a vocational nursing program. Although you take no position with respect to the public availability of the submitted information, you state release of this information may implicate the proprietary interests of International Business College, Inc. ("IBC"). You inform us, and provide documentation showing, pursuant to section 552.305 of the Government Code, you have notified IBC of the request and of its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 applicability of exception in certain circumstances). We have received comments from IBC. We have considered the submitted arguments and reviewed the submitted information.

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, which 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. The types of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. See *id.* at 683. In addition, this office has found personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate and embarrassing and of no legitimate public interest. See Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note, however, the names, addresses, and telephone numbers of members of the public are not excepted from required public disclosure under common-law privacy. See Open Records Decision Nos. 554 at 3 (1990) (disclosure of person's name, address, or telephone number not an invasion of privacy).

IBC asserts the nursing director qualification form and the resumés of proposed program faculty members are protected by common-law privacy in their entirety. Upon review, we find a portion of this information, which we have marked, relates solely to an individual's employment relationship with private companies. This information does not pertain to public employees, a governmental entity, or the receipt or expenditure of public funds. Therefore, we find the information we have marked is highly intimate or embarrassing and of no legitimate public concern, and the board must withhold it under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find IBC has failed to explain how any portion of the remaining information constitutes highly intimate or embarrassing information that is not of legitimate public interest, and the board may not withhold it under section 552.101 on that basis.

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 No. 552 at 2 (1990). Section 757 provides 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.<sup>1</sup> 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. ORD 552 at 5-6. 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).

IBC contends its projected two-year budget, its 2009 audited financial statement, its organization chart, and its faculty and student handbooks constitute trade secrets under section 552.110(a) of the Government Code. After reviewing the company's arguments and the information at issue, we conclude IBC has failed to establish a *prima facie* case that any of its information is a trade secret protected by section 552.110(a). *See Open Records*

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<sup>1</sup>The following are the six factors 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)*.

Decision Nos. 402 (1983) (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), 319 at 2 (1982) (information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted under section 552.110). Thus, the board may not withhold any portion of IBC's information under section 552.110(a) of the Government Code.

IBC also contends its projected two-year budget and its 2009 audited financial statement are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, however, we find IBC has not made the specific factual or evidentiary showing required by section 552.110(b) establishing that the release of any of its 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 section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the board may not withhold any portion of IBC's information under section 552.110(b).

We note a portion of the remaining information is subject to section 552.130 of the Government Code, which provides that information relating to a motor vehicle operator's license or driver's license issued by a Texas agency is excepted from public release.<sup>2</sup> Gov't Code § 552.130(a)(1). Accordingly, the board must withhold the Texas motor vehicle record information we have marked under section 552.130.

We note the remaining information contains personal e-mail addresses. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Therefore, the board must withhold the e-mail addresses we have marked under section 552.137, unless their owners consent to their release.<sup>3</sup>

In summary, the board must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The board must withhold the Texas motor vehicle record information we have marked under section 552.130 of the Government Code. The board must withhold the e-mail addresses we have marked

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<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>In Open Records Decision No. 684 (2009), this office issued a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

under section 552.137 of the Government Code, unless their owners consent to their release. The board must release the remaining information.

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](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/em

Ref: ID# 408203

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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