



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 12, 2011

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2011-14838

Dear Mr. Meitler:

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# 433495 (ORR# 15897).

The Texas Education Agency (the "agency") received a request for documents related to an exam taken by the requestor and a list of those who failed the exam, along with their scores. You claim the requested information is excepted from disclosure under sections 552.101 and 552.122 of the Government Code. We have also received comments from Education Testing Service ("ETS"), an interested third party, objecting to the release of the requested information. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the claimed exceptions 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." This section encompasses information protected by other statutes, including section 21.048 of the Education Code, which addresses teacher certification examinations. Section 21.048(c-1) provides the following:

(c-1) The results of an examination administered under this section are confidential and are not subject to disclosure under Chapter 552, Government Code, unless:

- (1) the disclosure is regarding notification to a parent of the assignment of an uncertified teacher to a classroom as required by Section 21.057; or
- (2) the educator has failed the examination more than five times.

Educ. Code § 21.048(c-1). You have marked portions of the submitted information that you state reflect the results of examinations administered under section 21.048. You further state subsections 21.048(c-1)(1) and (2) are not applicable to the information at issue. Based on your representations and our review, we agree the agency must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code.

The agency and ETS assert the remaining information is excepted from disclosure under section 552.122 of the Government Code. We note section 552.122 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, we will only address the agency's arguments under section 552.122. Section 552.122(b) excepts from disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994).

You state the remaining information consists of a standardized educator certification examination and the requestor's answer sheet for this examination. You explain such examinations are utilized to measure educators' knowledge and ability in a particular area. You further state release of the information at issue would compromise the effectiveness of future examinations. Having considered your arguments and reviewed the submitted information, we find the submitted examination qualifies as a test item under section 552.122(b). Therefore, the agency may withhold the submitted examination, which you have marked, pursuant to section 552.122(b) of the Government Code. However, we find the answer sheet you seek to withhold neither contains examination questions nor does

it provide any indication of the nature or content of the examination questions. Therefore, we find the answer sheet is not protected under section 552.122 and may not be withheld on that basis.

ETS asserts the answer sheet is excepted from disclosure under section 552.110 of the Government Code. 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) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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 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.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person’s claim for exception as valid under that branch 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

¹The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, 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 release of information would cause it substantial competitive harm).

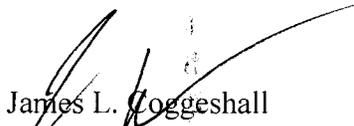
Having considered ETS’s arguments and reviewed the information at issue, we find ETS has not shown the answer sheet meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov’t Code § 552.110(a). We also find ETS has made only conclusory allegations that release of the information at issue would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See id.* § 552.110(b). Thus, the agency may not withhold the answer sheet pursuant to section 552.110.

To conclude, the agency must withhold the information you have marked under section 552.101 of the Government Code in conjunction with section 21.048(c-1) of the Education Code. The agency may withhold the submitted examination you have marked under section 552.122 of the Government Code. The agency must release the submitted answer sheet to the requestor.

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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/ag

Ref: ID# 433495

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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