



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 4, 2011

Mr. Ronny H. Wall
Associate General Counsel
Texas Tech University System
P.O. Box 42021
Lubbock, Texas 79409-2021

OR2011-16268

Dear Mr. Wall:

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# 435341.

Texas Tech University (the "university") received a request for all e-mail correspondence for the e-mail addresses of the university's named president and athletic director to or from various named individuals that include the terms ESPN, Fox, Longhorn Network, SEC, NCAA, Pac-12, Pac-16, or realignment and that are limited to a specified period of time. You do not take a position as to whether the submitted information is excepted from disclosure under the Act. However, in correspondence to this office, a representative of the Big 12 Conference (the "Big 12"), which is an interested third party, asserts some of the requested information is either not subject to the Act or is excepted from disclosure under sections 552.107, 552.110, 552.131, and 552.137 of the Government Code. We have considered submitted arguments and reviewed the submitted information.

The Big 12 contends the submitted information is not subject to disclosure under the Act. Section 552.021 of the Government Code provides for public access to "public information," *see* Gov't Code § 552.021, which is defined by section 552.002 of the Government Code as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or

has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988). We understand the Big 12 to contend its communications with the members of the Big 12's board of directors, in their capacities as members of the board, were not collected, assembled, or maintained in connection with the transaction of any official business of the university. Having considered the Big 12's arguments and reviewed the information at issue, we find the information we have marked was not "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business" by or for the university. Gov't Code § 552.002; *see* Open Records Decision No. 635 (1995) (statutory predecessor not applicable to personal information unrelated to official business and created or maintained by state employee involving *de minimis* use of state resources). We therefore conclude the marked information is not subject to the Act and the university is not required to release this information in response to the instant request for information.¹

We also understand the Big 12 to contend the remaining information is not subject to the Act because the information was generated by the Big 12, which is not a governmental body subject to the Act. *See* Gov't Code § 552.003(1)(A) (defining "governmental body"). We note, however, the remaining information at issue was sent to university administrators and is in the university's possession. Moreover, the university has submitted this information as being subject to the Act. We find the university collected, assembled, or maintains this information in connection with the transaction of its official business. We therefore conclude the remaining information is subject to the Act and must be released, unless the Big 12 demonstrates the information falls within an exception to disclosure under the Act. *See id.* §§ 552.006, 552.021, 552.301, 552.302.

The Big 12 asserts some of the submitted information is excepted from disclosure under section 552.107 of the Government Code. Section 552.107 excepts from disclosure "information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Evidence or the Texas Disciplinary Rules of Professional Conduct." Gov't Code § 552.107(1). However, section 552.107 protects the interests of governmental bodies, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107), 522 (1989) (discretionary exceptions in general). As the university does not raise section 552.107 for any portion of the submitted information, we will not consider the Big 12's argument under this exception. *See* ORD 630.

The Big 12 also asserts the information at issue 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

¹As we are able to make this determination, we need not address the Big 12's other arguments against disclosure of the marked information.

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.² 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 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

²The 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).

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 the Big 12's arguments and reviewed the information at issue, we find the Big 12 has not shown any of the remaining information 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 the Big 12 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 university may not withhold any of the remaining information pursuant to section 552.110.

The Big 12 also raises section 552.131(a) of the Government Code. Section 552.131(a) relates to economic development information and provides the following:

Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) 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.

Id. § 552.131(a). Section 552.131(a) excepts from disclosure only "trade secret[s] of [a] business prospect" 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." *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b). The Big 12 has failed to explain how any of the remaining submitted information consists of economic development negotiations that relate to a trade secret or commercial or financial information involving it and the university. *See id.* § 552.131. Accordingly, the university may not withhold any of the remaining information under section 552.131 of the Government Code.

The Big 12 seeks to withhold the e-mail addresses of its representatives under section 552.137 of the Government Code. However, the Big 12 has a contractual relationship with the university. Section 552.137(c)(1) of the Government Code states an e-mail address "provided to a governmental body by a person who has a contractual

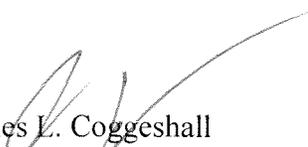
relationship with the governmental body or by the contractor's agent" is not excepted from public disclosure. *Id.* § 552.137(c)(1). Thus, the e-mail addresses of the Big 12 representatives that the Big 12 seeks to withhold are subject to section 552.137(c)(1). Accordingly, the university may not withhold the e-mail addresses of the Big 12 representatives under section 552.137 of the Government Code.

To conclude, the university is not required to release the information we have marked that is not subject to the Act. The university 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, 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# 435341

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)