



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2011

Mr. Cobby A. Caputo
For Austin Community College
Bickerstaff Heath Delgado Acosta LLP
Building 1, Suite 300
3711 South MoPac Expressway
Austin, Texas 78746

OR2011-16430

Dear Mr. Caputo:

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# 436004.

Austin Community College ("ACC"), which you represent, received a request for all contracts between ACC and Symplicity Corporation ("Symplicity"), all documents used in awarding these contracts, and all communications between ACC and Symplicity. ACC will release some of the requested information to the requestor. Although you take no position, you state that the release of the remaining information may implicate the proprietary interests of Symplicity. Accordingly, you provided notice of the request to Symplicity, notifying it 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 parties 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 considered the submitted arguments and reviewed the submitted information.

Symplicity asserts section 552.110(a) of the Government Code for the submitted information.¹ Section 552.110(a) protects trade secrets 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 Open Records Decision No. 552 at 5* (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown

¹Although Symplicity raises sections 552.101, 552.113, and 552.131 of the Government Code, it makes no arguments to support these exceptions. Therefore, we assume Symplicity has withdrawn its claim that these exceptions apply to the submitted information.

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 Open Records Decision Nos. 319 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Upon review, we find that Symplicity has established a *prima facie* case that portions of its information constitute trade secrets. ACC must withhold the customer information we have marked pursuant to section 552.110(a) of the Government Code. We note that Symplicity has made the remaining customer information it seeks to withhold publicly available on its website. Because Symplicity has published this information, it has failed to demonstrate this information is a trade secret. Additionally, we note that the pricing information pertaining to a particular solicitation or contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of business,” rather than “a process or device for continuous use in the operation of business.” *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. We also note this office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, ACC may not withhold Symplicity’s pricing information under section 552.110(a). Symplicity has failed to demonstrate any of its remaining information meets the definition of a trade secret. Symplicity has also failed to demonstrate the necessary factors to establish a trade secret claim for this information. Accordingly, ACC may not withhold the remaining information on that basis.

We note portions of the submitted information are 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. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). 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.

In summary, ACC must withhold the customer information we have marked under section 552.110(a). The remaining information must be released, but any copyrighted information may only be released 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,

A handwritten signature in black ink that reads "Cynthia G. Tynan". The signature is written in a cursive, slightly slanted style.

Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 436004

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Ariel Friedler
Simplicity
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Arlington, Virginia 22209
(w/o enclosures)