



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 8, 2012

Mr. Damon C. Derrick
General Counsel
Stephen F. Austin State University
P.O. Box 13065 SFA Station
Nacogdoches, Texas 75962-3065

OR2012-01978

Dear Mr. Derrick:

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# 444990.

Stephen F. Austin State University (the "university") received a request for contracts or agreements (1) between the athletic departments of the university and of other institutions for men's and women's basketball games and (2) between the university's athletics department or its affiliates, including the university, and third parties regarding food concessions and trademark licensing. You state some of the submitted information is the subject of a previous open records letter ruling. Although you take no other position on the public availability of the submitted information, you believe it may implicate the interests of ARAMARK Educational Services, LLC ("ARAMARK"). You inform us ARAMARK was notified of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released.¹ We received correspondence from ARAMARK.² We have considered ARAMARK's arguments and reviewed the information you submitted.

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

²We note Aramark has submitted the information the company contends should be withheld from disclosure. This decision is applicable only to the information the university submitted in requesting this decision. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision must submit specific information at issue or representative samples if information is voluminous).

We first note the submitted information consists of a food service agreement with ARAMARK and four amendments to the agreement. We therefore assume the university has released any other information responsive to the present request that existed on the date of the university's receipt of the request. If not, then the university must release any such information immediately.³ See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Next, we address your representations regarding our previous ruling on some of the submitted information. You inform us the university requested a ruling involving its May 2006 contract with ARAMARK and the April 22, 2008 contract amendment, as a result of which this office issued Open Records Letter No. 2009-05247 (2009). In connection with its request for the previous ruling, the university notified ARAMARK pursuant to section 552.305 of the Government Code, but ARAMARK did not submit any arguments to this office against disclosure of the information that was at issue. We therefore concluded the university must release the information that was at issue in the previous ruling. We assume the university did so. Since the issuance of Open Records Letter No. 2009-05247 on April 21, 2009, ARAMARK has not disputed this office's conclusion regarding the information that was at issue in the previous ruling. Thus, we find ARAMARK has not taken the necessary measures to protect any of that information so as to permit this office to conclude that any portion of the information now qualifies as either a trade secret or commercial or financial information, the release of which would cause ARAMARK substantial competitive harm. See Gov't Code § 552.110(a)-(b), RESTATEMENT OF TORTS § 757 cmt. b (1939); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). Therefore, the university may not now withhold any of the submitted information that was at issue in Open Records Letter No. 2009-05247 under section 552.110 of the Government Code.

Next, we consider ARAMARK's arguments against disclosure of the rest of the submitted information, which is contained in contract amendments dated June 27, 2011, July 2, 2010, and April 14, 2009. Among other things, ARAMARK appears to believe some of the remaining information is not responsive to the present request. We note a governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. See Open Records Decision No. 561 at 8-9 (1990). Thus, as the university has submitted the information it deems to be responsive to the present request, we will address the public availability of the remaining submitted information.

³We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” 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.” Gov’t Code § 552.110(a)-(b).

The Supreme Court of Texas has adopted the definition of a “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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.⁴ *See* ORD 552 at 5. We cannot conclude section 552.110(a) is applicable, however, unless the information is shown to meet the definition of a trade secret and the necessary factors have

⁴The 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).

been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

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 information at issue. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

ARAMARK contends portions of the remaining information constitute trade secrets under section 552.110(a). ARAMARK also contends the information in question is protected by section 552.110(b).⁵ Having considered the company's arguments and reviewed the information at issue, we note pricing information pertaining to a particular contract with a governmental body is generally not a trade secret under section 552.110(a) because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 2 (1982), 306 at 2. Likewise, the pricing aspects of a contract with a governmental entity are generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dept of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act exemption reason that disclosure of prices charged government is a cost of doing business with government). We also note the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). We find ARAMARK has not demonstrated any of the information at issue constitutes a trade secret under section 552.110(a). We also find ARAMARK has not demonstrated section 552.110(b) is applicable to any of the information at issue. We therefore conclude the university may not withhold any of the information in

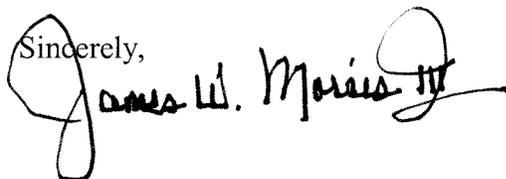
⁵In its arguments under section 552.110(b), ARAMARK notes the company's "understanding that, in applying the 'commercial or financial information' branch of section 552.110, [our] office follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552.(b)(4)." *See National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); *see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110 of the Government Code, that standard was overturned by the Third Court of Appeals in holding *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we consider only ARAMARK's interests in withholding the information at issue.

the contract amendments dated June 27, 2011, July 2, 2010, and April 14, 2009 under section 552.110 of the Government Code and must release that information.

In summary, the university (1) must release the May 2006 contract and the April 22, 2008 contract amendment in accordance with Open Records Letter No. 2009-05247 and (2) must also release the rest of the submitted 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 W. Morris, III
Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 444990

Enc: Submitted documents

c: Requestor
(w/o enclosures)

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