



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 25, 2012

Mr. Miles J. LeBlanc
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2012-11561

Dear Mr. LeBlanc:

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# 459899.

The Houston Independent School District (the "district") received a request for the e-mails and executive summaries sent to the Apollo school principals during a specified period. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.137 of the Government Code. You also notified the Education Innovation Lab at Harvard University ("Harvard") 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 arguments submitted by Harvard. We have considered the district's and Harvard's arguments and reviewed the submitted information, a portion of which consists of a representative sample.¹

Initially, we address Harvard's contention that the information should be withheld from public disclosure because of certain confidentiality agreements. Information is not confidential under the Act simply because the party that submits the information anticipates

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than those submitted to this office.

or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

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 section 21.355 of the Education Code, which provides, “[a] document evaluating the performance of a teacher or administrator is confidential.” Educ. Code § 21.355(a). This office has interpreted section 21.355 to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 at 3 (1996). Additionally, the Third Court of Appeals has concluded a written reprimand constitutes an evaluation for purposes of section 21.355 as it “reflects the principal’s judgment regarding [a teacher’s] actions, gives corrective direction, and provides for further review.” *North East Indep. Sch. Dist. v. Abbott*, 212 S.W.3d 364 (Tex. App.—Austin 2006, no pet.). We have also determined a “teacher” or “administrator” for purposes of section 21.355 means a person who is required to and does in fact hold a certificate or permit under chapter 21 of the Education Code and is teaching or performing the functions of an administrator at the time of the evaluation. *See* ORD 643 at 4.

You explain attachments 2 through 12 consists of observation reports prepared by Harvard personnel for principals of certain schools. These reports contain general observations of each campus, the overall strengths of the school, areas for improvement, and certain empirical data related to each campus. However, upon review, we find none of the reports evaluate the performance of a specific teacher or administrator, as is contemplated by section 21.355. Additionally, you have not demonstrated how the submitted information is otherwise subject section 21.355. Accordingly, we conclude the district may not withhold the submitted information under section 552.101 of the Government Code on that basis.

Harvard argues the submitted information is a trade secret. Section 552.110(a) of the Government Code 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 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 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 Harvard has not demonstrated any of the submitted information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. Accordingly, the district may not withhold any of the submitted information under section 552.110(a) of the Government Code.

Section 552.137 of the Government Code provides, "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address affirmatively consents to its release or the e-mail address is specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Accordingly, the district must withhold the e-mail addresses we have marked under section 552.137 of the Government

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.

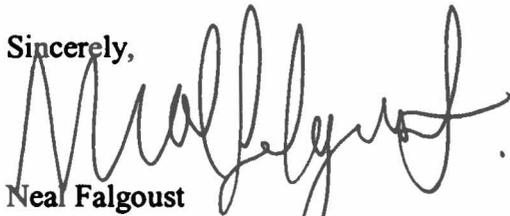
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Open Records Decision Nos. 319 at 2* (1982), 306 at 2 (1982), 255 at 2 (1980).

Code, unless the owners of the e-mail addresses affirmatively consent to their release.³ As no other exceptions are raised, the remaining information must be released.

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,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/dls

Ref: ID# 459899

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Peter Katz
University Attorney
Harvard University
Holyoke Center 980
1350 Massachusetts Avenue
Cambridge, Massachusetts 02138
(w/o enclosures)

³Open Records Decision No. 684 (2009) serves as a previous determination to all governmental bodies permitting them to withhold certain categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without requesting a decision from this office.