



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2012

Mr. R. Brooks Moore
Managing Counsel, Governance
The Texas A&M University System
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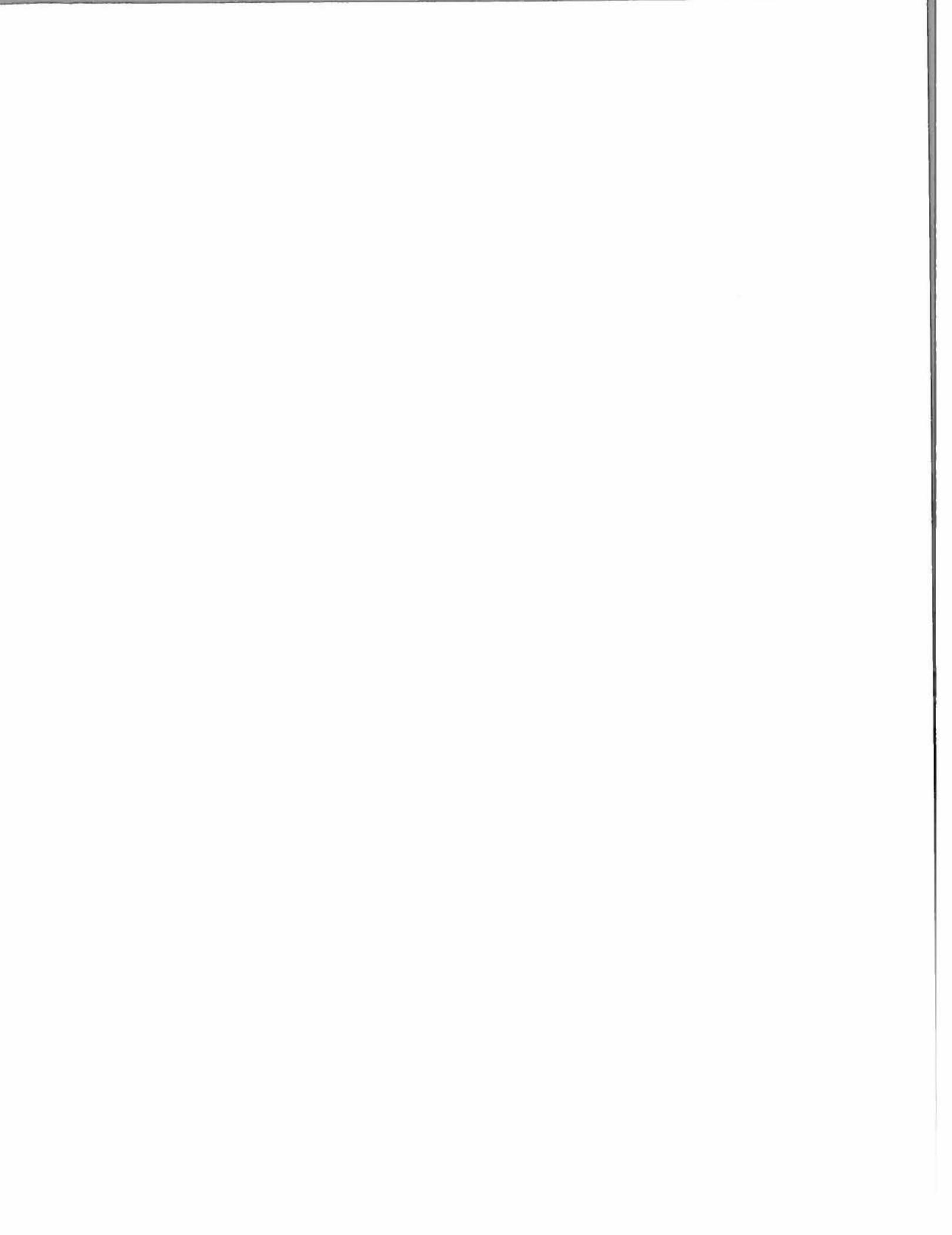
OR2012-18794

Dear Mr. Moore:

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# 471719 (TEEX 13-01).

The Texas Engineering Extension Service of the Texas A&M University System (the "system") received a request for copies of any past or current agreements and/or studies that the system performed for or contracted with Union Pacific Railroad ("Union Pacific") within a specified period of time. You claim portions of the requested information are excepted from disclosure under section 552.101 of the Government Code. You also state the submitted information may implicate the proprietary interests of Union Pacific. Accordingly, you inform us you notified Union Pacific of the request and of the company's right to submit comments to this office as to why the requested information should not be released to the requestor. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances).* We have received comments from Union Pacific. We have considered the submitted arguments 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." Gov't Code § 552.101. This section encompasses information protected by other statutes, such as section 51.914 of the Education Code, which provides, in pertinent part:



(a) In order to protect the actual or potential value, the following information is confidential and is not subject to disclosure under [the Act] or otherwise:

...

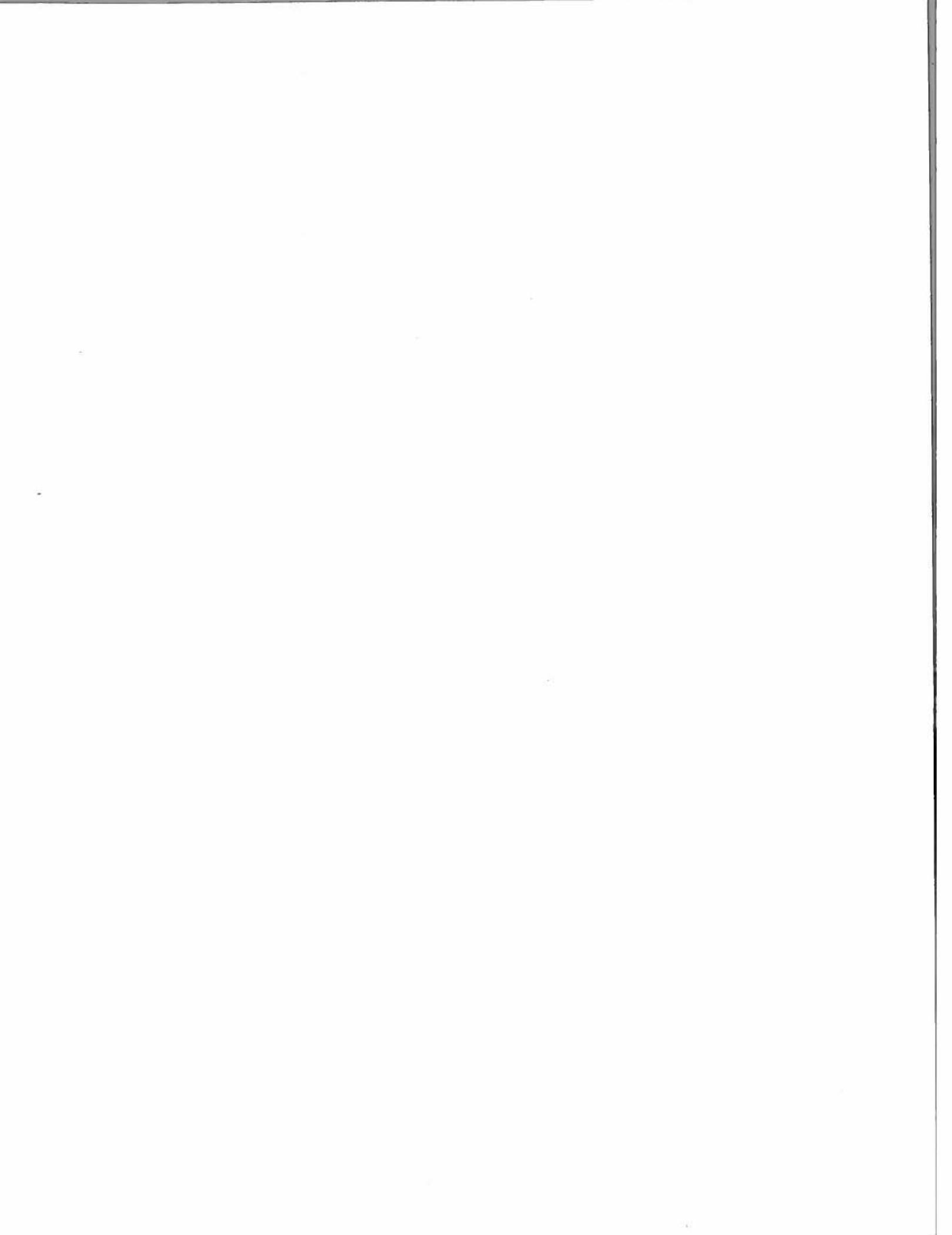
(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(a)(2). We note that section 51.914 is not applicable to working titles of experiments or other information that does not reveal the details of the research. *See* Open Records Decision Nos. 557 at 3 (1990), 497 at 6-7 (1988).

You state the submitted information details “a research study to be performed by [the system] on behalf of [Union Pacific] using [Union Pacific]’s proprietary information.” You further state “a draft research study report was produced by [the system] using [Union Pacific]’s proprietary information.” You also inform us, and the submitted information reflects, that the system entered into an agreement with Union Pacific that prohibits the system from disclosing proprietary information to outside parties. Based on your representations and our review, we agree that some of the information at issue, which we have marked, is confidential under section 51.914(a)(2) of the Education Code, and the system must withhold it under section 552.101 of the Government Code.¹ However, we find the system has failed to explain how the remaining information at issue, which consists of budgetary information, the identities of individuals involved in the research, a memorandum of agreement, an agreement for use and non-disclosure of confidential/proprietary information, and a contract between the system and a third party, falls within the scope of section 51.914(a)(2). Accordingly, the system may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 51.914(a)(2) of the Education Code.²

¹As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

²We note Union Pacific adopts the system’s argument under section 552.101 of the Government Code in conjunction with section 51.914(a)(2) of the Education Code.



Union Pacific asserts the remaining information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). 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. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

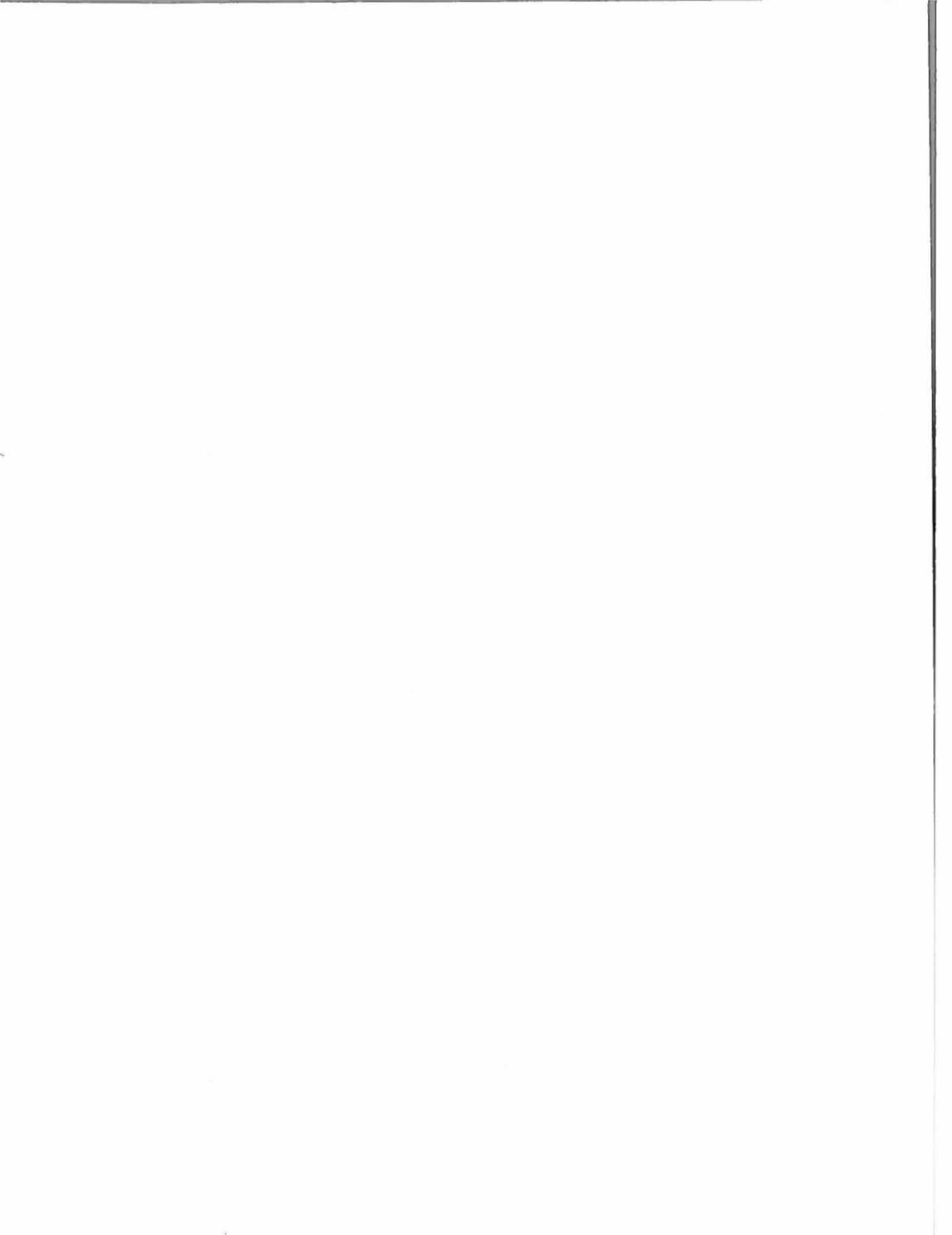
any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, 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.³ 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* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable

³The 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).



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).

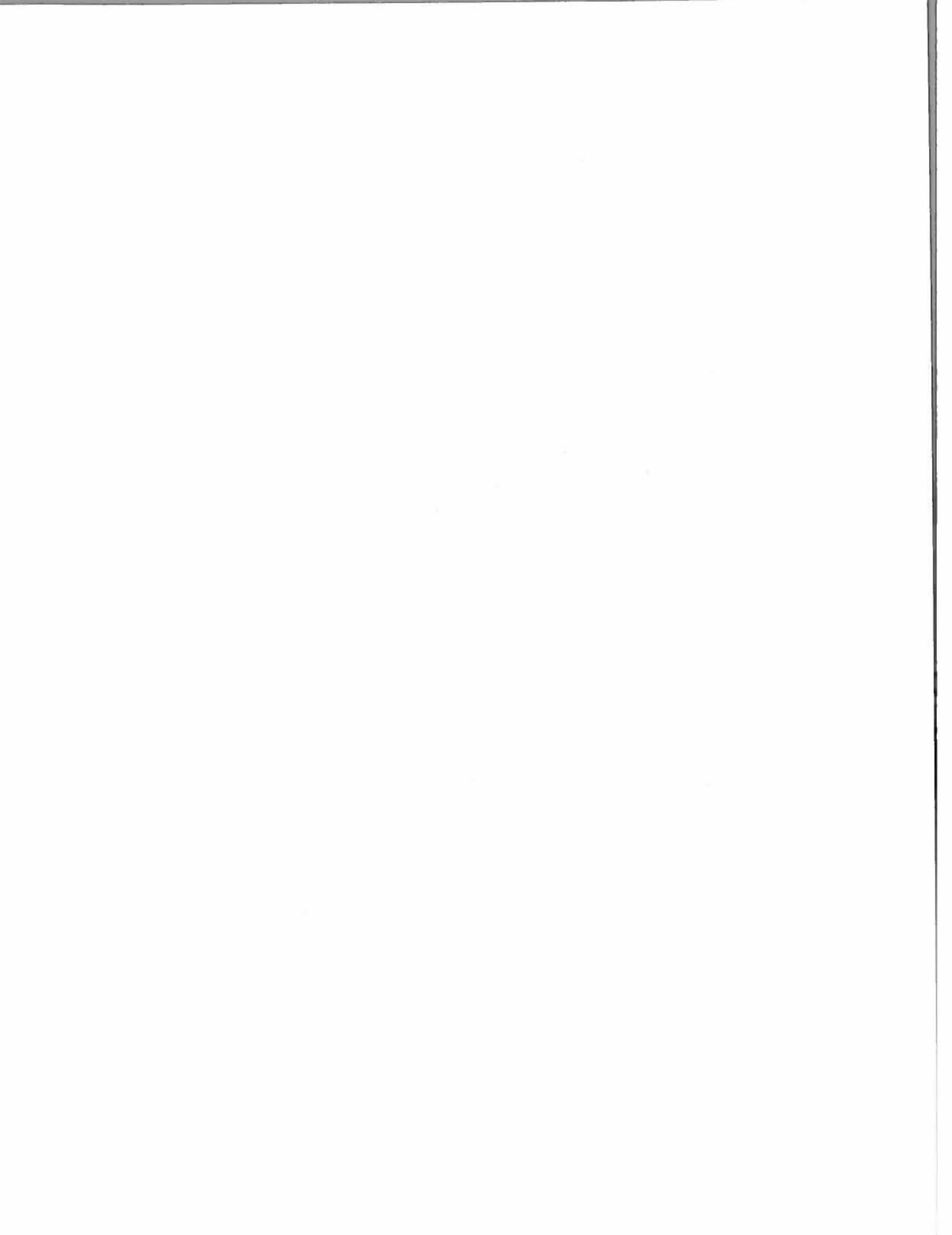
Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires 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. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find Union Pacific has failed to demonstrate how any portion of the remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Therefore, the system may not withhold any of Union Pacific’s remaining information pursuant to section 552.110(a) of the Government Code. Furthermore, we find Union Pacific has not demonstrated how release of any of the remaining information would cause it substantial competitive injury. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Consequently, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the system must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 51.914 of the Education Code. The system must release the remaining information.

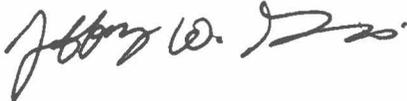
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 471719

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Fred Wilson
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(w/o enclosures)

