



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 3, 2013

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2013-00117

Dear Mr. Meitler:

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# 475053 (TEA PIR No. 18514).

The Texas Education Agency ("TEA") received a request for the winning proposal submitted in response to TEA Request for Proposals No. 701-12-027. You state you will redact an insurance policy number under section 552.136(c) of the Government Code.¹ Although you take no position on the public availability of the submitted information, you state the submitted information may implicate the proprietary interests of the Texas Charter Schools Association ("TCSA"). Accordingly, you inform us, and provide documentation showing, you notified TCSA of the request and of the company's right to submit comments to this office as to why the submitted 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

¹Section 552.136 of the Government Code permits a governmental body to redact the information described in section 552.136(b) without the necessity of requesting a decision from this office. *See* Gov't Code § 552.136(c)-(e) (providing procedures for redaction of information).

certain circumstances). We have received comments from TCSA. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note a portion of the information TCSA seeks to withhold was not submitted by TEA to this office for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by TEA. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit a copy of specific information requested). However, we will address TCSA's arguments against disclosure of the information submitted by TEA.

TCSA claims section 552.110 of the Government Code for portions of its information. 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. *Id.* § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See 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. 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 [one] 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. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). 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. ORD 552 at 2. 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).

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.*; Open Records Decision No. 661 (1999).

TCSA argues some of its information constitutes trade secrets. TCSA asserts the information it seeks to withhold consists of materials developed by the company and shared only with TCSA’s members and entities under contract with TCSA. Upon review, we agree the information we have marked constitutes trade secret information under section 552.110(a); therefore, TEA must withhold this marked information under section 552.110(a). However, we find TCSA has failed to demonstrate any of the remaining information for which it asserts section 552.110(a) meets the definition of a trade secret, nor has TCSA demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, TEA may not withhold any of the remaining information at issue on the basis of section 552.110(a) of the Government Code.

TCSA contends some of its remaining information is commercial or financial information, release of which would cause substantial competitive harm to the company. Upon review, we conclude TCSA has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause the company

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).

substantial competitive harm. We therefore conclude TEA may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information appears to be 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). 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, TEA must withhold the information we have marked under section 552.110(a) of the Government Code. TEA must release the remaining information 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,



Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 475053

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Ms. Denise Nance Pierce
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