



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 8, 1993

Mr. Kevin T. O'Hanlon
Chief Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR93-747

Dear Mr. O'Hanlon:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ Your request was assigned ID# 22092.

The Texas Education Agency (the "agency") has received a request for information relating to applications for the approval of driving safety course materials reviewed and approved under section 6701d(143A)(d), V.T.C.S. Specifically, the requestor seeks "the home video tape USA Driver Safety Course that is under consideration by T.E.A., including tapes, course outline, times of various section proposals any and all materials presented for approval [*sic*]." We understand that the availability of some of the requested information under the act was determined in Open Records Ruling OR93-382 (1993). That ruling is dispositive of this information. Some of the information at issue here, however, has come into the agency's possession subsequent to our determination in Open Records Ruling OR93-382. You have submitted this information to us for review. You do not seek to withhold this information under the act, but believe that the information implicates third-party interests are implicated that warrant our review.

Pursuant to section 552.305 of the Government Code, we have notified the attorneys representing U.S.A. Training Company, Inc. ("U.S.A. Training"). In response, we have received a letter from U.S.A. Training, which claims that section 552.110 excepts the submitted information from required public disclosure. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or

¹We note that the Seventy-Third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

financial information obtained from a person and privileged or confidential by statute or judicial decision. U.S.A. Training claims that the information submitted to us for review constitutes "trade secrets." Accordingly, we need only address the trade secret branch of section 552.110.

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, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. 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, . . . [but] 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. [Emphasis added.]*

RESTATEMENT OF TORTS § 757, cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.²

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

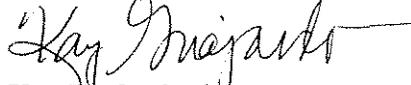
- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information 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, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding

The documents at issue here were submitted to the agency for purposes of evaluating proposed driving safety courses and determining if the proposed courses comply with rules promulgated by the State Board of Education. See V.T.C.S. art. 6701d, § 143A(d); 19 T.A.C. § 176 *et seq.* The documents include proposed course materials and procedures, including video tapes and video scripts, forms issued by the agency and completed by the applicant, and correspondence from the agency to the applicants concerning the agency's review and evaluation of the submitted materials. On the basis of the arguments submitted on behalf of U.S.A. Training, and having examined the information submitted to us for review, we conclude that U.S.A. Training has made a *prima facie* case establishing that some of the submitted information contains "trade secrets" that must be withheld from required public disclosure under section 552.110 of the act. However, U.S.A. Training has *not* made a *prima facie* case that the "Application for Approval" (not including attachments) and "Notice of Approval for a Six-Hour Driving Safety Course" issued by the agency contain trade secrets. We conclude that these records do not fall within the protection of section 552.110 and must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

KHG/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 22092
ID# 22605

cc: Mr. Roger Allan Taylor, Sr.
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(w/o enclosures)

(footnote cont'd.)

factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. See Open Records Decision No. 402 (1983) at 2.

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