



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 14, 1995

Mr. David Anderson
Chief Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR95-1423

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36676.

The Texas Education Agency (the "agency") received an open records request for "a list of each [driving] course provider in Texas and the number of certificates purchased by that provider from June 30, 1995 through September 30, 1995." You inform us that the agency has released to the requestor a list of the driver training schools in Texas. You seek to withhold, however, pursuant to sections 552.104 and 552.110 of the Government Code, the number of "uniform certificates of completion" each of the schools has purchased from the agency.¹

¹You originally sought an open records decision from this office pursuant to section 552.305 of the Government Code, which authorizes governmental bodies to rely exclusively on the arguments of affected third parties. In accordance with the practice of this office established in Open Records Decision No. 575 (1990), this office advised each of the driving schools of the open records request and of their responsibility to submit to this office *legal* reasons as to why information about their respective schools should not be released to the public. Of the fifty schools we notified, only fourteen responded asking that the number of certificates they had purchased from the agency not be released to the public. However, most of those responses consisted only of conclusory statements as to why the requested information should be withheld from the public and thus failed to establish under the guidelines described in our notice that section 552.110 protects the requested information from required public disclosure. You informed us in subsequent correspondence that the agency wished to assert on each of the schools' behalf the arguments contained in one of the letters the agency received. It is those arguments that this office considered in making our determination here.

You first contend that the number of certificates sold to the individual driving schools is excepted from public disclosure by section 552.104 of the Government Code. Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 generally was not intended to protect business entities that are in competition in the private sector. The purpose of section 552.104 is to protect the *government's* interests when it is involved in commercial transactions. For example, section 552.104 is generally invoked to except from disclosure information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.,* Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract.

In this instance, you have not argued that the agency has any commercial interest in withholding the requested information. Where no governmental interests are involved, section 552.104 does not apply. Open Records Decision No. 541 (1990). Consequently, section 552.104 does not apply to the requested information.

You also contend that the requested information comes under the protection of section 552.110 of the Government Code, which excepts from required public disclosure

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information.

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which defines a "trade secret" to be

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) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the six factors² necessary to establish a trade secret claim is present, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

This office has considered your arguments for non-disclosure but has concluded that the requested information does not meet the definition of a trade secret as established in the Restatement. The number of certificates purchased by the respective driving schools is not a "formula, pattern, [or] device." Although the number of certificates purchased may be a "compilation of information," it is not information "for continuous use in the operation of the business" but rather is information as to a "single or ephemeral event in the conduct of" the driving schools. Therefore, the requested information is not protected from disclosure under section 552.110 as a trade secret.

Section 552.110 also protects "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Commercial or financial information is excepted from disclosure only if it is deemed confidential by the common or statutory law of Texas. Open Records Decision No. 592 (1991). We are unaware of any statute or judicial decision that would make the requested information confidential. We conclude that section 552.110 does not except the information from disclosure. The agency therefore must release the information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

²These six factors are

- 1) the extent to which the information is known outside of [the company's] business;
- 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 to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information;
- and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Todd Reese". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Todd Reese
Assistant Attorney General
Open Records Division

RTR/RWP/ch

Ref.: ID# 36676

Enclosures: Submitted documents

cc: Ms. Ginger Hill
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(w/o enclosures)