



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 11, 1997

Mr. Edward W. Dunbar  
Law Offices of Dunbar, Barill,  
Crowley & Hegeman, L.L.P.  
4726 Transmountain Drive  
El Paso, Texas 79924

OR97-1577

Dear Mr. Dunbar:

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# 107011.

El Paso Community College (the "college"), which you represent, received a request for all contracts between the college and Southwestern Bell and all documents from the past twelve months concerning any types of payments made by Southwestern Bell to the college. You request our decision whether the requested information is excepted from disclosure pursuant to Government Code section 552.110. You have submitted the information at issue to this office for review.

First, you assert that the college is contractually bound by a confidentiality provision in its Payphone Agreement with Southwestern Bell to protect the requested information. However, governmental bodies may not enter into contracts to keep information confidential except where specifically authorized to do so by statute. Open Records Decision Nos. 444 (1986), 437 (1986), 425 (1985). A contract cannot overrule the Open Records Act, but it may be evidence of a private party's attempt to keep information confidential, as, for example, would be useful for a showing under section 552.110 of the Government Code. Attorney General Opinion JM-672 (1987).

Next, you state that the requested information implicates the proprietary interest of a third party. Pursuant to section 552.305 of the Government Code, we notified Southwestern Bell of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. Southwestern Bell did not respond to our notice. Generally, when a third party fails to respond to our notice, we have no basis to conclude that the information for which section 552.110 is asserted is excepted from disclosure. See Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that

substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. However, the college has argued that the requested information is a trade secret protected by section 552.110 because “the location of the phones and their revenue constitute part of a formula, pattern, devise, [sic] and compilation of information assembled by [Southwestern Bell] in order to maximize telephone usage, and efficiently provide service.”

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

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.), 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 . . . . 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). 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. *Id.*<sup>1</sup> We must accept a claim for

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<sup>1</sup>The 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 Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

an exception under the trade secret branch of section 552.110 as valid if a *prima facie* case is made for the exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

After a review of the college's arguments, we conclude that the college has not demonstrated that the information is protected by section 552.110. Thus, the requested information must be released.

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

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

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Ref.: ID# 107011

Enclosures: Submitted documents

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