



November 19, 1999

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport
Post Office Drawer 619428
DFW Airport, Texas 75261-9428

OR99-3329

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129094.

The Dallas/Fort Worth International Airport (the "airport") received a request for "a copy of [the] Dun & Bradstreet Business Educational Services proposal." Although you express no opinion on the release of the requested information, you contend that section 552.110 of the Government Code may be implicated because Dun & Bradstreet has indicated that portions of its proposal contains proprietary information. You have released the remaining requested information.

Since the property rights of a third party may be implicated by the release of the requested information, this office notified Dun & Bradstreet of the request for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Public Information Act in certain circumstances).

Dun & Bradstreet submitted its arguments asserting that its "course content including techniques and strategies," on pages 1 through 38 of its proposal, is copyrighted material and valuable commercial information. Furthermore, Dun & Bradstreet contends that the identities of its customers and subcontractors and pricing information constitute commercial information and trade secrets. Section 552.110 protects the property interests of third parties

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.¹ In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, no pet. h.). Because Dun & Bradstreet has not cited to a statute or judicial decision that makes the commercial or financial information privileged or confidential, the airport may not withhold the requested information under the commercial or financial information prong of section 552.110.

Next, we consider whether Dun & Bradstreet's customer, subcontractors, and pricing information are protected under the trade secret prong of section 552.110.² The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be

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 a single or ephemeral event 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

¹The Seventy-sixth Legislature amended the commercial or financial information prong of section 552.110 of the Government Code to provide that it is excepted from public disclosure if "it is demonstrated that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 7, 1999 Tex. Sess. Law Serv. 4500, 4503 (Vernon) (to be codified as Gov't Code § 552.110(b)). The amendment applies to a governmental body's request for an attorney general decision made on or after September 1, 1999, the effective date of the amendment. Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 36, 1999 Tex. Sess. Law Serv. 4500, 4514 (Vernon).

²Dun & Bradstreet does not argue that its course content on pages 1 through 38 of the proposal is a trade secret.

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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). 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 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 at 5 (1990).³

We conclude that Dun & Bradstreet has established that the identities of its customers and subcontractors are protected as trade secrets under section 552.110. Thus, the airport must withhold the identities of Dun & Bradstreet’s customers and subcontractors under the trade secret prong of section 552.110. However, we do not believe that the pricing information at issue is within the Restatement definition of a trade secret. Dun & Bradstreet explains that the “pricing information involved here is customized pricing for a custom project.” Thus, the pricing information is not “a process or device for continuous use in the operation of the business;” it is information relating to a particular project, that is, a “single or ephemeral [event] in the conduct of the business.” Accordingly, the airport may not withhold the pricing information from disclosure as a trade secret. *See* Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

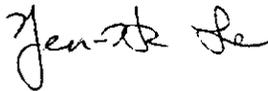
Lastly, we note that Dun & Bradstreet states that its course content is copyrighted material. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must, however, allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

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

³The 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 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.

Sincerely,

A handwritten signature in black ink, appearing to read "Yen-Ha Le". The signature is fluid and cursive, with the first name "Yen" and last name "Le" clearly distinguishable.

Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/ljp

Ref: ID# 129094

Encl.: Submitted documents

cc: Mr. Henry Ray
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