



OFFICE of *the* ATTORNEY GENERAL
GREG ABBOTT

May 27, 2003

Mr. David Anderson
General Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2003-3535

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181701.

The Texas Education Agency (the "agency") received requests from five requestors for vendor responses to the Public Education Information Management System Renovation Program Request for Information #701-0000015172.¹ You assert that twelve third-parties may have proprietary interests in the responsive information. Although you take no position regarding the proprietary nature of this information, you have notified these third-parties of the requests for information and their opportunity to submit comments to this office. 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 to disclosure in certain circumstances). Accenture and Business Objects Americas ("BOA") argue that their information is excepted from disclosure under section 552.110 of the Government Code. We have considered these third-parties' arguments and have reviewed the submitted information.

¹We note that four of the requestors seek all of the responses received by the agency, while one of the requestors only seeks the responses of IBM, Chancery and SAIC.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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 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 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to

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.

the application of the trade secret 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). After reviewing Accenture's arguments and the information at issue, we conclude that Accenture has established a *prima facie* case that a portion of the information in section 13.0 of its proposal pertaining to its customer list is a trade secret. See Open Records Decision Nos. 552 (1990); 437 (1986); 306 (1982); 255 (1980) (customer lists may be withheld under predecessor to section 552.110). Because we have received no argument to rebut Accenture's claim as a matter of law, you must withhold the information in section 13 of Accenture's proposal which lists Accenture's "specialized clients" under section 552.110(a). Further, we find that Accenture has demonstrated that the release of the remaining information in section 13.0, as well as in sections 1.0-6.0, sections 9.0 and 10.0, sections 14.0 and 15.0, and the foldout Benefits and Conceptual Design graphics, would cause it substantial competitive harm.³ Thus, this information is excepted from disclosure in its entirety under section 552.110(b).

With regard to the information you have submitted pertaining to BOA, we find that BOA has not demonstrated the applicability of either prong of section 552.110 to this information, and thus, you may not withhold the submitted information pertaining to BOA under section 552.110.

As of the date of this letter, Chancery, iGATE, Sungard, Spherion Technology Services, SAIC, IBM Corporation, JDL Technologies, bea Systems, Inc., Sbi. and Company, and Ajilon Consulting have not submitted to this office their reasons explaining why their requested information should not be released. Furthermore, we have reviewed these third parties' e-mails to the agency, which you have forwarded. In the e-mails, these companies generally object to the release of certain information in their submissions to the agency. However, although some of these companies indicate that some of their information is proprietary, they do not specifically claim that such information is protected under any of the exceptions to disclosure in the Public Information Act. Thus, these companies have provided this office with no basis to conclude that the responsive information is excepted from disclosure. See, e.g., Gov't Code 552.110(b) (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); Open Records Decision Nos. 552 at

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).

³Accenture states in its brief to this office that it "is not seeking to exempt Sections 7.0, 8.0, 11.0 and 12.0 of its Response, or the transmittal letter, cover page, and cover letter accompanying its Response, from disclosure under the [Public Information] Act."

5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). As neither you nor any of these third-parties have raised an exception to disclosure, we have no basis for finding their information confidential. We therefore conclude that the agency must release the submitted information pertaining to Chancery, iGATE, Sungard, Spherion Technology Services, SAIC, IBM Corporation, JDL Technologies, bea Systems, Inc., Sbi. and Company, and Ajilon Consulting to the requestors, subject to the following exceptions.

We note that portions of the submitted information not otherwise excepted under section 552.110 are excepted from disclosure under section 552.137 of the Government Code. Section 552.137 provides that “[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act].” Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, the agency must withhold the e-mail addresses in the remaining submitted information, a representative sample of which we have marked.

Finally, we note that some of the materials are indicated 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. Attorney General Opinion JM-672 (1987). A governmental body must 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).

In summary, the agency must withhold Accenture’s customer list in section 13.0 under section 552.110(a) and the remaining information in section 13.0, as well as in sections 1.0–6.0, sections 9.0 and 10.0, sections 14.0 and 15.0, and the foldout Benefits and Conceptual Design graphics, in its entirety, under section 552.110(b). We have marked a sample of the e-mail addresses the agency must withhold under section 552.137. The remaining responsive information must be released to the requestors, but the agency must comply with federal copyright laws in doing so.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 181701

Enc: Submitted documents

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