



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 29, 2005

Ms. Lona Chastain
Open Records Coordinator
Assistant General Counsel
Open Records Section
Texas Workforce Commission
101 East 15th Street, Room 266
Austin, Texas 78778-0001

OR2005-10689

Dear Ms. Chastain:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 237017.

The Texas Workforce Commission (the "commission") received a request for any information pertaining to RGI Learning, Inc ("RGI") regarding a specific bid proposal. Although you take no position with respect to the requested information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that you notified interested third party RGI of the request and of its 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); *see also* 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). We have considered the exceptions RGI claims and reviewed the submitted information.¹

¹We assume that, to the extent any additional responsive information existed on the date the commission received this request, such information has been released to the requestor. If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under circumstances).

Initially, we note that RGI seeks to withhold “Demonstrated Quality and Comprehensiveness of Proposed Curriculum Content” found on “Pages 28 - 32,” “Sample Course Structure” found on “Pages 33 - 34,” “How RGI Will Customize Course Content for the TWC” found on “Page 35,” and “Sample Training Materials and Handout Notes” found on “Pages 36 - 68” of its response. However, the commission did not submit this information to us for review. Accordingly, this ruling does not address information related to RGI beyond what the commission submitted to us for review and is limited to the information the commission submitted as responsive to the instant request. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information that other law makes confidential. *See* Open Records Decision Nos. 611 at 1 (1992)(common law privacy), 600 at 4 (1992)(constitutional privacy), 478 at 2 (1987)(statutory confidentiality). RGI has not directed our attention to any law, nor are we aware of one, that makes the information confidential for purposes of section 552.101. Therefore, the submitted information may not be withheld under section 552.101.

We now address RGI’s assertions under section 552.110 of the Government Code. 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. *See* Gov’t Code § 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, 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 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.1958). 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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to 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). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial 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." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). An interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of requested information. *See id.*

Upon review, we find that RGI has demonstrated that the release of certain portions of its information would cause the company substantial competitive harm for purposes of section 552.110(b). Thus, portions of the submitted information we have marked must be withheld under section 552.110 of the Government Code. However, we find that RGI has failed to demonstrate how the remainder of its information is a trade secret or commercial or financial information, the release of which would cause RGI substantial competitive harm. *See* Open Records Decision Nos. 552 at 5-6 (1990), 661 (1999) (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982)

² 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

(information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if it is “simply information as to single or ephemeral events in the conduct of the business” rather than “a process or device for continuous use in the operation of the business”). Accordingly, pursuant to section 552.110, the commission must withhold only those portions of the submitted information that we have marked.

RGI further raises section 552.131 of the Government Code. Section 552.131 relates to economic development information and provides in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “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.” *Id.* This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See* Gov't Code § 552.110(a)-(b). After reviewing the submitted information, we conclude that it does not relate to economic development negotiations involving the commission and a business prospect that the commission seeks to have locate, stay, or expand in or near the territory of the commission. *See* Gov't Code § 552.131. Accordingly, we conclude that the commission may not withhold any portion of the submitted proposal pursuant to section 552.131(a) of the Government Code. Furthermore, we note that section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Accordingly, no portion of the submitted proposal is excepted under section 552.131(b) of the Government Code.

In summary, the commission must withhold the information we have marked under section 552.110 of the Government Code. The remaining submitted information must be released to the requestor.

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 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. Although there is no statutory deadline for

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contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Lehmann". The signature is fluid and cursive, with the first name being the most prominent.

Michael A. Lehmann
Assistant Attorney General
Open Records Division

MAL/sdk

Ref: ID# 237017

Enc. Submitted documents

c: Ms. Molly McDonald-Ogden
P.O. Box 152889
Austin, Texas 78715-2889
(w/o enclosures)

Ms. Lisa Moretto
President & CEO
RGI Learning, Inc.
92 Sunset Drive
Rochester, New York 14618
(w/o enclosures)