



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2007

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2007-04951

Dear Mr. Meitler:

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# 277538.

The Texas Education Agency (the "agency") received a request for the certification exams taken by a named individual on June 29, 2006 (the "June exam"), and January 5, 2007 (the "January exam"). The agency takes no position on whether the requested certification exams are excepted from disclosure, but you state that release of this information may implicate the proprietary interests of Educational Testing Service ("ETS") and National Evaluation Systems ("NES"). Accordingly, you inform us that you notified ETS and NES of the request and of the right of each to submit arguments to this office as to why its information should not be released. *See* Gov't Code § 552.305(d) (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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). ETS has responded to the notice and argues that the submitted certification exams are excepted from disclosure under

sections 552.110 and 552.122.¹ We have reviewed the submitted certification exams and considered the submitted arguments.

Initially, we note, and you acknowledge, that the agency has not complied with the time periods prescribed by section 552.301(b) and section 552.301(e) of the Government Code in requesting a decision from this office. When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See Gov't Code § 552.302; Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling reason to withhold the information. *See Gov't Code § 552.302; Hancock*, 797 S.W.2d at 381. Because the third party interests at issue here can provide compelling reasons to overcome the presumption of openness, we will address the arguments submitted by ETS.

ETS contends that both exams are its proprietary information excepted from disclosure by section 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code § 552.110(a)–(b)*. Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A “trade secret”

may consist of 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.

¹Although ETS raises section 552.101 of the Government Code it does not explain to us how this section applies to the submitted information. Therefore, no part of ETS's information may be withheld on this basis. *See Gov't Code §§ 552.301, .302.*

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.); Open Records Decision Nos. 552 at 2 (1990), 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 (1982), 306 (1982), 255 (1980), 232 (1979)*. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that *rebutts the claim as a matter of law*. Open Records Decision No. 552. However, we cannot conclude that section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.* § 552.110(b); Open Records Decision No. 661 (1999).

ETS asserts that both of the submitted certification exams constitute trade secrets for the purpose of section 552.110(a). After reviewing ETS's arguments and the submitted certification exams, we agree that ETS has presented a *prima facie* claim that the January exam qualifies as a trade secret under section 552.110(a). We have received no arguments that rebut the company's trade secret claims as a matter of law for this certification exam. However, we note that the June exam was administered by NES, not ETS. Further, we understand that NES was the developer of the June exam. Because ETS has not demonstrated how NES' June exam constitutes ETS' proprietary information, the June exam may not be withheld under section 552.110(a).

In addition, because ETS is not the proper party to present proprietary arguments with regard to NES' June exam, this information may not be withheld as ETS' proprietary information under section 552.110(b). We further note that NES, as the developer of the June exam, was properly notified of its right to submit arguments to this office explaining why its proprietary information should not be released.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from NES explaining why the requested information should not be released. We thus have no basis for concluding that any portion of the June exam, which was developed by NES, constitutes its proprietary information protected under section 552.110, and none of it may be withheld on that basis. *See Gov't Code* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

ETS also raises section 552.122 of the Government Code for the June exam. Section 552.122 of the Government Code excepts from required public disclosure "a test item developed by a . . . governmental body[.]" *Gov't Code* § 552.122(b). Section 552.122 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As the agency did not submit any arguments in support of withholding any information pursuant to section 552.122, the agency may not withhold the June exam pursuant to section 552.122 of the Government Code. *See* Open Records Decision No. 665 at 2 n. 5 (2000) (discretionary exceptions generally).

However, some of the remaining materials are copyrighted. 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 the January exam under section 552.110(a). The June exam must be released to the requestor in accordance with copyright law.

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).

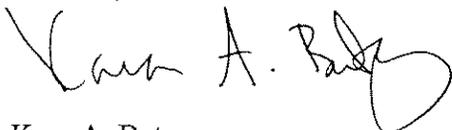
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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

Sincerely,



Kara A. Batey
Assistant Attorney General
Open Records Division

KAB/mcf

Ref: ID# 277538

Enc. Submitted documents

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