



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 19, 2008

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

OR2008-15903

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# 328286.

The Texas Education Agency (the "agency") received a request for the instructor development curriculum of four specified driver education schools, specifically Colony Driving School ("Colony"), Driver Education Services ("DES"), El Paso Northeast Driving School ("El Paso"), and Quad-Cities Driver Training School, Inc. ("Quad-Cities"). You inform us the requested information pertaining to Colony and DES is subject to a previous determination. You claim a portion of the submitted information is excepted from disclosure under section 552.130 of the Government Code. Although you take no position as to disclosure of the remaining submitted information, you state the information may implicate the proprietary interests of El Paso and Quad-Cities. You also state, and provide documentation showing, you have notified these third parties of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *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 the applicability of exception to disclose under Act in certain circumstances). Representatives from El Paso and Quad-Cities have submitted comments to our office. We have also received comments from legal counsel for the new owner of Colony's materials. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us the requested information pertaining to DES and Colony was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-09110 (2008). In that ruling, we determined the agency must

withhold DES's teacher preparation course materials pursuant to section 552.110(a) of the Government Code and must withhold the information we marked under section 552.130 of the Government Code. We also determined the agency must release the remaining information at issue in that ruling, including Colony's materials, but any copyrighted material must be released in accordance with copyright law. You inform us there has been no change in the law, facts, and circumstances on which Open Records Letter No. 2008-09110 was based. Although we understand Colony's new owner to argue the previous ruling should not apply to Colony's materials because of the change in ownership, we note the materials themselves have not changed. Furthermore, we note the attorney for Colony's new owner is the same attorney who submitted comments on behalf of Colony's former owners in the previous ruling, and the same arguments were made in the previous ruling as were submitted for the present ruling. Thus, the arguments raised by the new owner of Colony's materials were considered and ruled upon in the prior ruling. Therefore, the agency must continue to comply with Open Records Letter No. 2008-09110 and withhold or release Colony's and EDS's materials in accordance with that ruling. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address the submitted arguments for the remaining information not subject to the previous determination.

Quad-Cities asserts its information should not be disclosed pursuant to the trade secret provision under section 382.041 of the Health and Safety Code.<sup>1</sup> Section 382.041 provides in relevant part that "a member, employee, or agent of [the Texas Commission on Environmental Quality (the "commission")] may not disclose information submitted to [the commission] relating to secret processes or methods of manufacture or production that is identified as confidential when submitted." Health & Safety Code § 382.041(a). By its own terms, section 382.041 only applies to certain information submitted to the commission, and is inapplicable in this instance. *See* Open Records Decision No. 652 (1997). Thus, none of Quad-Cities's information may be withheld on that basis.

Section 552.110 of the Government Code, which El Paso claims and is the appropriate exception for Quad-Cities to raise, protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the

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<sup>1</sup>Section 382.041 of the Health and Safety Code is encompassed by section 552.101 of the Government Code, which provides "information is excepted from [required public disclosure] if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.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); *see also Huffines*, 314 S.W.2d at 776. 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. The following are the six factors that the Restatement gives as indicia of whether information constitutes a trade secret:

- (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; 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office has held 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. ORD 552 at 5-6. However, we cannot conclude 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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *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).

Upon review, we conclude El Paso has established a *prima facie* case that portions of its information constitute trade secrets. Therefore, the agency must withhold this information, which we have marked, pursuant to section 552.110(a) of the Government Code. However, El Paso has failed to demonstrate that its remaining information meets the definition of a trade secret. *See* ORD 552 at 5-6. Furthermore, we find Quad-Cities has failed to demonstrate how any portion of its information meets the definition of a trade secret, nor has Quad-Cities demonstrated the necessary factors to establish a trade secret claim for its information. Thus, none of Quad-Cities’s information or El Paso’s remaining information may be withheld under section 552.110(a). Additionally, we find neither El Paso nor Quad-Cities has made the specific factual and evidentiary showing required by section 552.110(b) that release of the information at issue would cause the company substantial competitive harm. *See* ORD 661 at 5-6 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the agency may not withhold any of Quad-Cities’s information or El Paso’s remaining information under section 552.110(b) of the Government Code.

We note some of the remaining information is 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 continue to rely to Open Records Letter No. 2008-09110 and withhold or release Colony’s and DES’s materials in accordance with that ruling, to the extent the information is responsive to the present request for information. The agency must withhold El Paso’s information we have marked under section 552.110(a) of the Government

Code.<sup>2</sup> The remaining submitted information must be released, but any information protected by copyright must be released in accordance with copyright law.

You also ask this office to issue a previous determination permitting the agency to withhold driver's license numbers under section 552.130 of the Government Code, without the necessity of requesting a ruling from our office under the Act. *See* Gov't Code § 552.301(a); Open Records Decision No. 673 (2001) (previous determinations). We decline to issue such a previous determination at this time. Rather, 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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

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<sup>2</sup>As we are able to make this determination, we need not address the agency's argument against disclosure.

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,



Katherine M. Kroll  
Assistant Attorney General  
Open Records Division

KMK/eeg

Ref: ID# 328286

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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