



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2009

Ms. Neera Chatterjee
University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2902

OR2009-01113

Dear Ms. Chatterjee:

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# 333449.

The University of Texas at Brownsville (the "university") received a request for information relating to a Request for Proposals to provide the university with imaging software and related services. Although you take no position as to the disclosure of the submitted proposals, you state that release of this information may implicate the proprietary interests of Hyland Software, Inc. ("Hyland") and Perceptive Software, Inc. ("Perceptive"). You state, and provide documentation showing, that you have notified Hyland and Perceptive of the request and of each company's opportunity to submit comments to this office as to why its proposal 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). We have received comments submitted by Perceptive. We have considered Perceptive's arguments and reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has not received any correspondence from Hyland. We thus have no basis for concluding that any portion of the submitted proposal constitutes proprietary information of Hyland, and the university may not withhold any portion of the submitted information on that basis. See 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). We will, however, address Perceptive's comments.

Perceptive raises section 552.110(a) of the Government Code for portions of its proposal. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). 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. 1957); *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. RESTATEMENT OF TORTS § 757 cmt. b.

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;

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b.; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. 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).

Perceptive has specified portions of its proposal it asserts are trade secrets subject to section 552.110(a). After reviewing the information at issue and the submitted arguments, we find that Perceptive has made a *prima facie* case that its Scope Chart, as well as portions of its customer lists, are protected as trade secret information. This information, which we have marked, must be withheld under section 552.110(a) of the Government Code. We note, however, that Perceptive makes the identities of some of its customers publicly available on its website. In light of Perceptive's own publication of such information, we find Perceptive has failed to demonstrate that the identities of these customers qualify as trade secrets. Furthermore, although Perceptive discusses the six trade secret factors with regards to the remaining information within its proposal, we note that this information either pertains to Perceptive's personnel and organization or that it relates to this single Request for Proposals issued by the university. Accordingly, we find that Perceptive has failed to demonstrate that any portion of the remaining information meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b. (definition of trade secret does not include information relating to single or ephemeral events in the conduct of the business). Thus, the university must only withhold the information we have marked pursuant to section 552.110(a) of the Government Code.

We note that some of the submitted information is 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 university must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released, but any copyrighted information must be released in accordance with copyright law.

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

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 333449

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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