

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 6, 2009

Mr. Damon C. Derrick
Staff Attorney
Stephen F. Austin State University
P.O. Box 13065, SFA Station
Nacogdoches, Texas 75962-3065

OR2009-02949

Dear Mr. Derrick:

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# 336690.

Stephen F. Austin State University (the "university") received four requests for copies of proposals submitted in response to a specified request for proposals. Although you take no position with respect to the requested information, you indicate that it may contain proprietary information. You state, and provide documentation showing, that you have notified ACS Education Services ("ACS"); Campus Partners; Educational Computer Systems, Inc. ("ECS"); and NCO Financial Systems, University Accounting Service ("NCO") 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). ACS and Campus Partners have submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, ECS and

NCO have not submitted comments to this office explaining why any portion of the submitted information relating to them should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to these companies would implicate their proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

Campus Partners raises section 552.110 of the Government Code for portions of its submitted proposal, and we understand ACS to also claim section 552.110 as an exception to disclosure of some of its proposal.¹ Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 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* ORD 552 at 2. 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.

¹ACS seeks to withhold six specified items from its proposal as "proprietary[.]"

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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). 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).

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. *See id.*; ORD 661; *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Upon review, we find that Campus Partners has demonstrated that release of its customer list would cause the company substantial competitive harm. Accordingly, we have marked the information that must be withheld under section 552.110(b). However, we conclude that ACS and Campus Partneres have made only conclusory allegations and have provided no specific factual or evidentiary showing to support their allegations that release of the remaining information at issue would cause their companies substantial competitive injury. *See* Gov’t Code § 552.110; *see also, e.g.*, Open Records Decision Nos. 661 at 5-6 (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), 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) (information relating to organization and personnel, market studies, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, no portion of the remaining information pertaining to these companies may be withheld under section 552.110(b).

²The 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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

We also find that ACS and Campus Partners have failed to make a *prima facie* case that any of the remaining information belonging to these companies constitutes a trade secret. Thus, no portion of the remaining information pertaining to these companies may be withheld under section 552.110(a).

We note that the remaining submitted information contains an insurance policy number, which is excepted from disclosure under section 552.136 of the Government Code.³ Section 552.136 provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. Accordingly, the university must withhold the insurance policy number we have marked in the submitted information under section 552.136 of the Government Code.

Finally, we note that some of the materials at issue appear 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 protected by copyright. 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 materials protected by copyright, 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).

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the university must withhold the information we have marked pursuant to sections 552.110 and 552.136 of the Government Code. The remaining information must be released to the requestor, but any copyrighted information may only 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jb

Ref: ID# 336690

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

Ms. Nancy D. Paris
ACS
900 Commerce Drive, Suite 320
Oak Brook, Illinois 60523
(w/o enclosures)

Mr. Richard K. Schnacker
ACS Education Services
One World Trade Center, Suite 2200
Long Beach, California 90831-2200
(w/o enclosures)

Mr. Paul R. Lombardo
Campus Partners
2400 Reynolds Road
Winston-Salem, North Carolina 27106
(w/o enclosures)

Mr. John W. Lynch
Educational Computer Systems, Inc.
181 Montour Run Road
Coraopolis, Pennsylvania 15108
(w/o enclosures)

CAUSE NO. D-1-GN-09-000848

EDUCATIONAL LOAN SERVICING, LLC
d/b/a CAMPUS PARTNERS,
Plaintiff,

V.

THE HONORABLE GREG ABBOTT,
ATTORNEY GENERAL OF TEXAS,
STEPHEN F. AUSTIN STATE
UNIVERSITY,
Defendants.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§
§ 126TH JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

MAR 24 2010 TH

At 8:47 A.M.
Amalia Rodriguez-Mendoza, Clerk

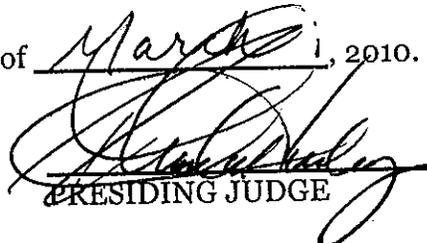
AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Educational Loan Servicing, LLC d/b/a Campus Partners (Campus Partners), and Defendants Greg Abbott, Attorney General of Texas, and Stephen F. Austin State University (the University) appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestors, NCO Financial Systems, Inc., ECSI, and ACS, were sent reasonable notice of this setting and of the parties' agreement that the University must withhold some of the information at issue; that the requestors were also informed of their right to intervene in the suit to contest the withholding of this information; and that none of the requestors have informed the parties of their intention to intervene. Neither has any requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

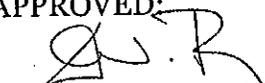
IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

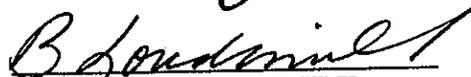
1. Some of the information at issue, specifically, Campus Partner's Dec. 31, 2007 Consolidated Financial Statement, is excepted from disclosure by Tex. Gov't Code § 552.110(b).
2. The University shall withhold from the requestors the information described in Paragraph 1 of this Agreement;
3. Campus Partners no longer contests the disclosure of the remaining information at issue in this lawsuit and it is available for public disclosure, subject to Campus Partners' claim of copyright on such information under the PIA;
4. All costs of court are taxed against the parties incurring the same;
5. All relief not expressly granted is denied; and
6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendants and is a final judgment.

SIGNED this the 24 day of March, 2010.


RESIDING JUDGE

APPROVED:


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