



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 15, 2009

Ms. Neera Chatterjee  
Public Information Coordinator  
University of Texas System  
201 West Seventh Street  
Austin, Texas 78701-2902

OR2009-04989

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# 339995.

The University of Texas-Pan American (the "university") received a request for four categories of information pertaining to the university's on-campus bookstore, including copies of the proposals submitted to the university for selection of the current bookstore operator. You state some information has been released to the requestor. You do not take a position as to whether the submitted proposals are excepted under the Act; however, you state, and provide documentation showing, that you notified Barnes & Noble College Booksellers, Inc. ("Barnes & Noble"), DBA Bookbee ("DBA"), Follett Higher Education Group ("Follett"), and Texas Book Company ("TBC") of the university's receipt of the request for information and of the right of each company to submit arguments to this office as to why its requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered comments received from Barnes & Noble and TBC, and we have reviewed the submitted proposals.

Initially, we note that there is a pending lawsuit filed against our office: *Barnes & Noble Booksellers, Inc. v. Greg Abbott*, Cause No. D-1-GN08-001978, District Court, 98th Judicial District, Travis County, Texas. At issue in this lawsuit is a Barnes & Noble bookstore

proposal that is similar to Barnes & Noble's proposal at issue in the present request. Accordingly, with respect to Barnes & Noble's proposal, we decline to issue a decision and will allow the trial court to resolve the issue of whether any portion of Barnes & Noble's proposal must be released to the public.

Next, 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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, DBA and Follett have not submitted to this office any reasons explaining why each company's proposal should not be released. We thus have no basis for concluding that any portion of these two proposals constitutes proprietary information of these companies, and the university may not withhold any portion of these two proposals 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 note, however, that Follett's proposal appears to contain information 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 materials that are subject to copyright protection 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).

We now address TBC's arguments against disclosure. TBC asserts that its entire proposal, as well as specified sections of its proposal, are excepted under section 552.104 of the Government Code. This section excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the university does not seek to withhold any information pursuant to section 552.104, we find this section does not apply to any portion of TBC's proposal. *See* ORD 592 (governmental body may waive section 552.104). Therefore, the university may not withhold any portion of TBC's proposal pursuant to section 552.104.

TBC also claims that its entire proposal, as well as specified sections of its proposal, are excepted from disclosure under section 552.110 of the Government Code. 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.

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.<sup>1</sup> 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

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<sup>1</sup>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).

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); *see also* ORD 661 at 5.

Having considered TBC’s arguments, we find that TBC has failed to demonstrate that its entire proposal meets the definition of a trade secret. We also find TBC has failed to demonstrate that any specific portion of its proposal meets the definition of a trade secret. *See* ORD 319 at 3 (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). Thus, none of TBC’s proposal may be withheld under section 552.110(a) of the Government Code.

We also find that TBC has failed to demonstrate that its proposal is subject to section 552.110(b) in its entirety. However, we find that TBC has established that release of its pricing and customer information, which we have marked, would cause it substantial competitive harm. Therefore, the university must withhold this information under section 552.110(b). TBC has made only conclusory allegations that release of the remaining specified portions of its proposal would result in substantial damage to its competitive position. Thus, TBC has not demonstrated that substantial competitive injury would result from the release of any of the remaining specified portions of its proposal, and none may be withheld under section 552.110(b). *See* Open Records Decision Nos. 661 (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), 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).

We note that a portion of TBC’s proposal is subject to section 552.136 of the Government Code.<sup>2</sup> Section 552.136 states that “[n]otwithstanding 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. This office has found that an insurance policy number constitutes an access device number for

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<sup>2</sup>The 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).

purposes of section 552.136. Accordingly, the university must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, with respect to Barnes & Noble's proposal, we decline to issue a decision and will allow the trial court to resolve the issue of whether any portion of Barnes & Noble's proposal must be released to the public. The university must withhold the information we marked within TBC's proposal under sections 552.110 and 552.136 of the Government Code. The remaining submitted information must be released to the requestor, but any copyrighted materials within Follett's proposal must be released in accordance with copyright law.<sup>3</sup>

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](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/cc

Ref: ID# 339995

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>3</sup>We note that DBA's and TBC's proposals contain social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. Gov't Code § 552.147.

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