

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

May 1, 2009

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

OR2009-05759

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# 341926.

Stephen F. Austin State University (the "university") received a request for all proposals submitted in response to a specified RFP. Although the university takes no position as to the disclosure of the submitted information, you state that it may contain proprietary information subject to exception under the Act. Accordingly, you provide documentation showing that the university has notified six interested third parties of the request for information and of their right to submit arguments to this office as to why the submitted 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 received comments from Flash Photography, Inc. ("Flash"), and have reviewed the submitted arguments and information.

Initially, we note that 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has only received comments from Flash regarding how the release of the submitted information will affect its proprietary interests. Thus, we have no basis to conclude that the release of any

portion of the other third parties' submitted information would implicate their proprietary interests.¹ *See, e.g.*, 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). Accordingly, the university may not withhold any portion of the submitted information on the basis of any proprietary interest the third parties who did not submit comments to this office may have in the information.

Flash contends portions of its information are excepted from disclosure under section 552.110(a) of the Government Code. 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 Gov't Code § 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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

¹The remaining third parties are Jolesch Photography, Southern Exposure Photography, Interstate Candid Photography, Inc., Iota Image Photography, and Chappell Studio.

- (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* ORD 232. 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 rebuts the claim as a matter of law. 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).

Upon review, we find that Flash has made a *prima facie* case that portions of the submitted information pertaining to its customers are protected as trade secrets. Moreover, we have received no arguments that would rebut this claim as a matter of law. Thus, we have marked the information that the university must withhold pursuant to section 552.110(a). We note, however, some of the customers Flash seeks to withhold are acting as references for the company. We find that Flash has not established that this customer information is excepted from disclosure under section 552.110(a). *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Further, we find that Flash has failed to establish how any of its remaining information constitutes trade secrets under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes "a process or device for continuous use in the operation of the business"). Thus, no portion of the remaining information may be withheld under section 552.110(a) of the Government Code.

We note portions of the remaining information are 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).

In summary, the university must withhold the information marked under section 552.110(a) of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.²

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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/dls

²We note that the remaining information contains 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.

Ref: ID# 341926

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Anthony Grandinetti
Southern Exposure Photography
126 West Hopkins, Suite 2
San Marcos, Texas 78666
(w/o enclosures)

Mr. David Kanner
Interstate Candid Photography, Inc.
P.O. Box 8331
The Woodlands, Texas 77387
(w/o enclosures)

Mr. Ronald L. Abrams
Iota Image Photography
1150 North Loop 1604 West #108-428
San Antonio, Texas 78248
(w/o enclosures)

Ms. Jennifer Fitzgerald
Chappell Studio
2280 West Tyler
Fairfield, Iowa 52556
(w/o enclosures)

Ms. Carol Strong
Flash Photography
6517 Hillcrest Avenue, Suite 102
Dallas, Texas 75205
(w/o enclosures)

Ms. Katie Anderson
Strasburger Attorneys at Law
901 Main Street
Dallas, Texas 75202-3794
(w/enclosures)

CAUSE NO. D-1-GN-09-001528

FLASH PHOTOGRAPHY, INC.,
Plaintiff,

V.

ATTORNEY GENERAL OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 201ST JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

JL AUG 30 2010

At 8:40 AM
Amalia Rodriguez-Mendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties moved for entry of an agreed final judgment. Plaintiff Flash Photography, Inc. (Flash) and Defendant Greg Abbott, Attorney General of Texas, 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 requestor, Joe Jolesch, Jolesch Photography, was sent reasonable notice of this setting and of the parties' agreement that Stephen F. Austin State University must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the 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. The information at issue, bracketed in red on the pages of Flash's proposal, as indicated in Exhibit A to this Agreement, is excepted from disclosure by Tex. Gov't Code § 552.110(a).

2. Stephen F. Austin State University must withhold from the requestor the information described in Paragraph 1 of this Judgment.

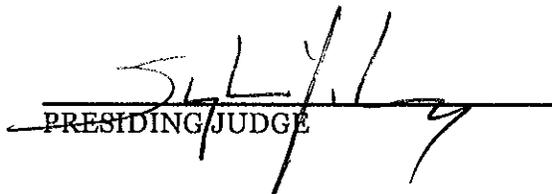
3. Flash no longer contests the disclosure of the remaining information at issue in this lawsuit. The University must release to the requestor Flash's proposal that is responsive to her request for information and that is not held excepted from disclosure by an Attorney General Letter Ruling OR2009-05759 or by Paragraph 1 of this Judgment.

4. All costs of court are taxed against the parties incurring the same;

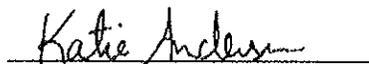
5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 30 day of August, 2010.


PRESIDING JUDGE

APPROVED:


KATIE ANDERSON
Strasburger & Price, LLP
901 Main Street, Suite 4400
Dallas, Texas 75202
Telephone: (214) 651-4300
Fax: (214) 651-4330
State Bar No. 00789631

ATTORNEY FOR PLAINTIFF


BRENDA LOUDERMILK
Chief, Open Records Litigation
Environmental Protection and
Administrative Law Division
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: 475-4292
Fax: 320-0167
State Bar No. 12585600

ATTORNEY FOR DEFENDANT

EXHIBIT A

Pages containing information excepted by § 552.110(a)

UT-004204	SFA-001528 (pdf page #'s)	UT Arlington- 003298 (pdf page #'s)	UTEP-000648 (pdf page #'s)
General Proposal (pdf page #'s)			
pp. 6, 13, 14,15 17, 18, 26-40	5-12	5-8 10, 11, 14	2, 8-10, 14, 15, 17, 18, 20, 21, 23, 24-26
Benefits Package (document page #'s)			
Table of Contents		✓	✓
pp. 2-17, 19-22, 24-31, 33		3, 5-7, 10, 12-19	4-5, 7-10, 12, 14- 21
Products and Services Catalogue (pdf page #'s)			
pp. 3-6, 8,10			