

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

February 22, 2010

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

OR2010-02592

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# 370937.

The University of Texas at El Paso (the "university") received two requests for information pertaining to a specified request for proposals. You state you have released some of the requested information. You also state you are withholding insurance policy numbers under section 552.136 of the Government Code pursuant to the previous determination issued to all governmental bodies in Open Records Decision No. 684 (2009). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). Although you take no position regarding the public availability of the submitted information, you state release of the information may implicate the rights of the third parties whose information has been requested. You state, and provide documentation showing, that you have notified the interested third parties of their right to submit arguments to this office as to why their submitted information should not be released.¹ *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 Jolesch stating it does not object to release of its information. We have also received arguments from

¹The third parties are: Ultimate Exposures; Chappell Studio; Commencement Photos Inc.; Flash Photography, In. ("Flash"); and Jolesch Photography LLC ("Jolesch").

a representative of Flash. We have considered the submitted arguments and reviewed the submitted information.²

Initially, the university acknowledges, and we agree, that it failed to comply with the procedural requirements of section 552.301 of the Government Code as they pertain to a portion of the submitted information. *See* Gov't Code § 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Because third party interests can provide a compelling reason to overcome the presumption of openness, we will consider whether or not the information at issue is excepted under the Act. We will also address the submitted arguments for the information that was timely submitted.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has only received arguments from Flash. Thus, the remaining third parties have not demonstrated that any of their information is proprietary for purposes of the Act. *See id.* § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold any of the remaining information on the basis of any proprietary interest that the third parties may have in the information at issue.

Flash argues its information is protected under section 552.110. Section 552.110(a) protects trade secrets 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 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:

²We note Flash has submitted additional information, a Benefits Package, that it seeks to have withheld from disclosure. This decision is applicable only to the information submitted to this office by the university. *See* Gov't Code § 552.301(e)(1)(D).

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.³ 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. *Id.* § 552.110(b); *see also* 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).

Flash contends that portions of its information qualify as trade secret information under section 552.110(a). Upon review, we find Flash has established a *prima facie* case that its customer information, contained in the submitted CD, constitutes a trade secret, and must

³The Restatement of Torts lists the following six factors 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 other 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).

be withheld under section 552.110(a). However, we find Flash has not demonstrated any of the remaining information it seeks to withhold meets the definition of a trade secret. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." See RESTATEMENT OF TORTS § 757 cmt. b (1939); *Hyde Corp. v. Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Therefore, the university may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Flash also contends that public disclosure of information provided to governmental bodies by potential vendors such as itself will result in "an inadvertent impact of discouraging businesses from offering their services to governmental entities." In submitting these arguments, Flash appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). See also *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Flash's interests in withholding its information.

We understand Flash to assert the remaining information it seeks to withhold is excepted under section 552.110(b). We find, however, Flash has failed to provide specific factual evidence demonstrating release of any of the remaining information at issue would result in substantial competitive harm to the company. 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Additionally, we note that the

pricing information of a winning bidder, such as Flash in this instance, is generally not excepted under section 552.110. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. Accordingly, none of the remaining information Flash seeks to withhold may be withheld under section 552.110(b).

Finally, we note that 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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 customer information contained in the submitted CD under section 552.110(a) of the Government Code. The remaining information must be released in accordance with copyright laws.

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, toll free, at (888) 672-6787.

Sincerely,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

Ref: ID# 370937

Enc. Submitted documents

cc: Requestors (2)

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

Ms. Holly Freeman
Ultimate Exposures
7011 Hayvenhurst Avenue, Suite C
Van Nuys, California 91408
(w/o enclosures)

Ms. Tricia Brenden
Commencement Photos, Inc
1348 Main Street
Tewksbury, Massachusetts 01876-2097
(w/o enclosures)

CAUSE NO. D-1-GN-10-000648

FLASH PHOTOGRAPHY, INC.,
Plaintiff,

v.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 345TH JUDICIAL DISTRICT

Filed in The District Court
of Travis County, Texas

JL AUG 30 2010
AL 8:49 M.
Anisia 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 The University of Texas-El Paso 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. The University of Texas-El Paso must withhold from the requestor the information described in Paragraph 1 of this Judgment.

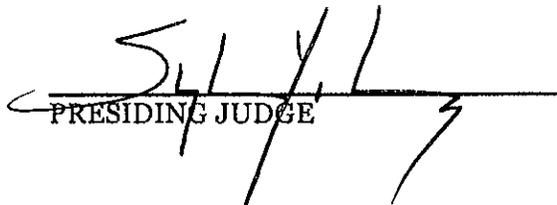
3. Flash no longer contests the disclosure of the remaining information at issue in this lawsuit. The University must release to the requestor Flash's proposal that is responsive to her request for information and that is not held excepted from disclosure by an Attorney General Letter Ruling OR2010-02592 or by Paragraph 1 of this Judgment.

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

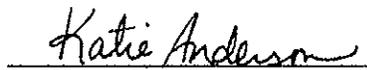
5. All relief not expressly granted is denied; and

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:



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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			