



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 20, 2010

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

OR2010-07311

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# 380010 (OGC # 129049).

The University of Texas at Tyler (the "university") received two requests for proposals submitted in response to RFP No. 750-08/09-10 for bookstore services, with the first requestor excluding the proposal submitted by Barnes & Noble College Booksellers, Inc. ("Barnes & Noble") and the second requestor excluding the proposal submitted by Follett Higher Education Group ("Follett"). The second requestor also seeks the resulting contract and a copy of committee notes and correspondence between the prospective or successful vendors and committee members. You state that the university is releasing some of the requested information, including the executed contract.<sup>1</sup> The university claims the submitted e-mails are excepted from disclosure under section 552.111 of the Government Code. You state the university will redact insurance policy numbers from the submitted proposals pursuant to Open Records Decision No. 684 (2009).<sup>2</sup> The university takes no position on

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<sup>1</sup>You inform us that the first requestor and Follett have reached an agreement on Follett's information and the university is releasing Follett's information pursuant to that agreement.

<sup>2</sup>We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

whether the remaining information in the submitted proposals is excepted from disclosure, but states that release of this information may implicate the proprietary interests of Barnes & Noble, Nebraska Book Company d/b/a Valadis Resources ("Nebraska Book"), and Texas Book Company ("Texas Book") (collectively, the "third parties"). Accordingly, you inform us, and provide documentation showing, that you notified the third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received correspondence from representatives of the third parties. We have considered the submitted arguments and have reviewed the submitted information.

Initially, we note a portion of the submitted information was the subject of a previous ruling issued by this office, Open Records Letter No. 2010-06886 (2010). In that ruling, this office declined to issue a decision on Barnes & Noble's proposal due to a pending lawsuit styled as *Barnes & Noble Booksellers, Inc. v. Greg Abbott*, Cause No. D-1-GN08-001978, District Court, 98th Judicial District, Travis County, Texas. We also determined that the university must withhold the information we marked in Nebraska Book's proposal under section 552.110 of the Government Code. We found, however, that the remaining information in Nebraska Book's proposal must be released in accordance with copyright law. As we have no indication that the law, facts, and circumstances on which this prior ruling was based have changed, you must continue to rely on this prior ruling as a previous determination and treat the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). With respect to the information that was not previously ruled upon in Open Records Letter No. 2010-06886, we will address the submitted arguments against disclosure.

Next, you claim the submitted e-mails are excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, opinion, and recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992,

no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

You state the information at issue relates to communications between university employees reflecting their deliberative and policymaking processes in ranking the bid proposals for bookstore services. Upon review of your arguments and the information at issue, we find the university may withhold the information we have marked under section 552.111 of the Government Code. However, the remaining information you have marked under section 552.111 is purely factual in nature. Thus, you have failed to demonstrate, and the remaining information does not reflect on its face, that it reveals advice, opinions, or recommendations that pertain to policymaking. Accordingly, we find none of the remaining information you have marked under section 552.111 is excepted from disclosure under that section, and it may not be withheld on that basis.

We note the remaining e-mails contain personal e-mail addresses subject to section 552.137 of the Government Code.<sup>3</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The addresses we have marked do not appear to be of types specifically excluded by section 552.137(c). Accordingly, the university must withhold the marked

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<sup>3</sup>The Office of the Attorney General will raise a mandatory exception like section 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

e-mail addresses under section 552.137, unless the owners of the addresses have affirmatively consented to their release.<sup>4</sup> *See id.* § 552.137(b).

We now turn to Texas Book's arguments against disclosure. Texas Book raises 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 which 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 this exception, no portion of Texas Book's information may be withheld on this basis.

Texas Book also claims its proposal is excepted under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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.

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<sup>4</sup>We note Open Records Decision No. 684 also authorizes a governmental body to withhold an e-mail address of a member of the public under section 552.137 without the necessity of requesting an attorney general decision.

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>5</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 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. *See* Open Records Decision No. 402 (1983). We note that pricing information pertaining to a particular proposal or 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); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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.*; *see also* Open Records Decision No. 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).

We note that Texas Book has published the identities of its customers on its website. Thus, Texas Book has failed to demonstrate that the information it has published on its website is a trade secret. Further, Texas Book has failed to demonstrate that any of the remaining information it seeks to withhold meets the definition of a trade secret, nor has Texas Book

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<sup>5</sup>The 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).

demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision No. 319 at 3 (1982) (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). Thus, none of Texas Book's information may be withheld under section 552.110(a) of the Government Code.

Next, upon review of Texas Book's arguments and the information at issue, we find that Texas Book has established that the pricing information we have marked in its proposal constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the university must withhold the marked information in Texas Book's proposal under section 552.110(b) of the Government Code. However, we find Texas Book has made only conclusory allegations that the release of the remaining information it seeks to withhold would result in substantial damage to its competitive position. Thus, Texas Book has not demonstrated that substantial competitive injury would result from the release of any of the remaining information. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

We note that some of Texas Book's remaining information appears 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 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 may withhold the information we have marked under section 552.111 of the Government Code. The university must withhold the information we have marked under sections 552.110 and 552.137 of the Government Code. The remaining information must be released, but any information protected by copyright must be released in accordance with copyright law.<sup>6</sup>

Finally, we note that the requestors seek the information at issue in electronic format. Section 552.228 of the Government Code requires that a governmental body provide a copy

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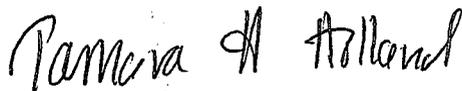
<sup>6</sup>We note Texas Book's proposal contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147.

of the public information in the requested medium if it has the technological ability to do so without the purchase of software or hardware. *See* Gov't Code § 552.228(b)(1), (2). You do not inform us that the university lacks the technological capability to provide the information in that requested electronic format. Accordingly, if the university has the technological capability to provide the information at issue in the requested electronic format, it must do so; if the university does not have the technological capability, it may release the requested information in the submitted paper format.

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](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,



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Open Records Division

THH/jb

Ref: ID# 380010

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

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