



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 3, 2011

Mr. W. Montgomery Meitler
Assistant Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2011-05271A

Dear Mr. Meitler:

This office issued Open Records Letter No. 2011-05271 on April 15, 2011. In that ruling we determined, among other things, that because American Safety Council, Inc. ("ASC") had not submitted any arguments against the disclosure of its information, we had no basis to conclude ASC had any proprietary interest in its information, and, thus, none of ASC's information may be withheld on that basis. However, ASC has informed this office it did submit arguments. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on April 15, 2011.

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 421699 (TEA PIR# 14679).

The Texas Education Agency (the "agency") received a request for the applications and associated documents for the traditional driving safety course and the alternative delivery method for six driving safety courses.¹ You state the agency will redact information subject to section 552.117 of the Government Code as permitted by section 552.024(c) of the

¹We note the agency received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify request).

Government Code.² You also state the agency has redacted Texas driver's license and license plate numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).³ You assert that a portion of the submitted information is not subject to the Act. While you take no position with respect to the public availability of the remaining information, you state that release of this information may implicate the proprietary interests of A Safe Driver ("ASD"); I DRIVE SAFELY, L.L.C. ("IDS"); ASC; Comedy Driving Inc. ("Comedy"); Drive Safe America, L.L.C. ("DSA"); and Ticket Stop. Accordingly, you notified these entities of this request for information and of their right to submit arguments to this office as to why the 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). IDS, ASC, Comedy, DSA, and Ticket Stop responded to the notice and argue that some or all of their information is excepted from disclosure. We have considered the submitted arguments and reviewed the submitted information.

First, we address your contention that some of the submitted information is not public information subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and, thus, is subject to the Act. *Id.*

²Section 552.024(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the home address, home telephone number, social security number, and family member information of a current or former employee who properly elected to keep this information confidential. *See* Gov't Code § 552.024(c); *see id.* § 552.024(c-1) (requestor may appeal governmental body's decision to withhold information under section 552.024(c) to attorney general), .024(c-2) (governmental body withholding information pursuant to section 552.024(c) must provide certain notice to requestor).

³Open Records Decision No. 684 authorizes a governmental body to withhold ten categories of information, including Texas driver's license and license plate numbers under section 552.130 of the Government Code and e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. We note that because the agency is redacting Texas driver's license and license plate numbers and e-mail addresses of members of the public, we need not address the third parties' arguments against the disclosure of that information.

§ 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You assert that the user names and passwords in the submitted information are not subject to the Act. Based on your representations and our review of the submitted information, we agree that the user names and passwords you have marked, as well as those we have marked, do not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 581 (1990) (certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information that is made public under section 552.021 of the Act). Therefore, the marked user names and passwords are not subject to the Act, and the agency need not release that information in response to this request.⁴

You state the agency will redact the account numbers you have marked in the remaining information under section 552.136 of the Government Code pursuant to Open Records Decision No. 684. This decision authorizes governmental bodies to withhold credit card, debit card, charge card, insurance policy, bank account, and bank routing numbers under section 552.136 of the Government Code without the necessity of requesting an attorney general decision. We note the account numbers you have marked are delivery service account numbers. Open Records Decision No. 684 does not authorize governmental bodies to withhold this type of account number without requesting an attorney general decision. Because Open Records Decision No. 684 does not authorize the withholding of the type of account number you have marked, this information may not be withheld under section 552.136 of the Government Code pursuant to Open Records Decision No. 684.

Section 552.136 of the Government Code states “[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. The agency must withhold the delivery service account numbers you have marked under section 552.136 of the Government Code. ASC also raises section 552.136 of the Government Code for its information. However, upon review we find none of ASC’s information constitutes access device numbers for purposes of section 552.136, and the agency may not withhold any of ASC’s information on that basis.

Next, 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 information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from ASD explaining why its submitted information should not be released. Therefore, we have no basis to conclude that ASD has a protected proprietary interest in its submitted information. *See id.* § 552.110; 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

⁴As we are able to make this determination, we do not address Comedy’s arguments against the disclosure of this information.

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. Accordingly, the agency may not withhold any portion of the submitted information based upon the proprietary interests of ASD. As no exceptions to the disclosure of this information have been raised, the agency must release it to the requestor.

Ticket Stop raises section 552.026 of the Government Code as an exception to disclosure of the educational records of its students. However, section 552.026 is not an exception to disclosure. Rather, section 552.026 provides that the Act does not require the release of information contained in education records except in conformity with the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. Gov't Code § 552.026. We note section 552.114 of the Government Code exempts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114.

ASC raises section 552.114 of the Government Code as an exception to disclosure of its course materials. This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information under FERPA. "Education records" are those records, files, documents, and other materials which

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

20 USC § 1232g(a)(4)(A). Neither ASC's nor Ticket Stop's information contains any "education records" as defined by FERPA. *See* Open Records Decision No. 390 (1983). Accordingly, section 552.114 of the Government Code is not applicable to any of ASC's or Ticket Stop's information.

DSA claims its information is confidential under section 552.101 of the Government Code, which exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, DSA has not directed our attention to any law, nor are we aware of any law, under which any of the information at issue is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the agency may not withhold any of DSA's information under section 552.101 of the Government Code.

Section 552.101 encompasses information made confidential by other statutes, such as section 51.914 of the Education Code, which provides in relevant part:

In order to protect the actual or potential value, the following information shall be confidential and shall not be subject to disclosure under [the Act], or otherwise:

(1) all information relating to a product, device, or process, the application or use of such a product, device, or process, and all technological and scientific information (including computer programs) developed in whole or in part at a state institution of higher education, regardless of whether patentable or capable of being registered under copyright or trademark laws, that have a potential for being sold, traded, or licensed for a fee; [or]

(2) any information relating to a product, device, or process, the application or use of such product, device, or process, and any technological and scientific information (including computer programs) that is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties[.]

Educ. Code § 51.914(1)-(2). We understand Ticket Stop to assert its information is confidential under section 51.914 of the Education Code. However, Ticket Stop has failed to demonstrate that any of this information was either developed in whole or in part at a state institution of higher education or is the proprietary information of a person, partnership, corporation, or federal agency that has been disclosed to an institution of higher education solely for the purposes of a written research contract or grant that contains a provision prohibiting the institution of higher education from disclosing such proprietary information to third persons or parties. Accordingly, we conclude section 51.914 of the Education Code is not applicable to any of Ticket Stop's information, and none of it may be withheld under section 552.101 on that basis.

Section 552.101 encompasses the common-law right of privacy, which protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *See id.* at 681-82. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from disclosure under common-law privacy. *See Open Records Decision Nos. 600 (1992), 545 (1990)*. We note, however, the names, addresses, and telephone numbers of members of the public are not excepted from required public disclosure under common-law privacy. *See Open Records Decision Nos. 554 at 3 (1990)* (disclosure of person's name, address, or telephone number not an invasion of privacy). Upon review, we find the personal financial information

pertaining to percentage of ownership in the companies owned by two or more individuals, which we have marked, is highly intimate or embarrassing and not of legitimate public concern. Thus, the agency must withhold this marked information under section 552.101 of the Government Code in conjunction with common-law privacy. However, we conclude the remaining information is either not highly intimate or embarrassing or is of legitimate public concern. Accordingly, the agency may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with common-law privacy.

ASC raises section 552.102(a) of the Government Code for portions of its information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court recently held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the *Texas Comptroller of Public Accounts. Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, No. 08-0172, 2010 WL 4910163 (Tex. Dec. 3, 2010). Having carefully reviewed the information at issue, we find none of the information at issue constitutes information in a personnel file. Accordingly, none of the information at issue may be withheld under section 552.102 of the Government Code.

ASC and Ticket Stop also assert their information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, 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 governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As the agency does not seek to withhold ASC's or Ticket Stop's information under this exception, no portion of this information may be withheld on this basis.

IDS, ASC, DSA, and Ticket Stop all assert their information is confidential under section 552.110 of the Government Code. We also understand Comedy to assert its information is confidential under this exception. Section 552.110 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.⁵ 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.*; *see also* ORD 661 at 5.

Upon review, we find IDS has established that portions of its information, which we have marked, constitute trade secrets protected by section 552.110(a) of the Government Code. Accordingly, the agency must withhold the information we have marked under section 552.110(a). However, we conclude that IDS has failed to establish a *prima facie* case that any of its remaining information constitutes a trade secret. Additionally, we conclude ASC, Comedy, DSA, and Ticket Stop have also failed to establish a *prima facie* case that any portion of their remaining information constitutes a trade secret protected by

⁵The 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).

section 552.110(a). *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). We also conclude that none of these companies have made the specific factual or evidentiary showing required by section 552.110(b) that the release of any of the remaining information would cause substantial competitive harm. *See* ORD 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), 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). Therefore, the agency may not withhold any of IDS's remaining information or any of ASC's, Comedy's, DSA's, or Ticket Stop's information under section 552.110 of the Government Code.

Ticket Stop asserts that some of its information is excepted under section 552.115 of the Government Code, which excepts from disclosure "[a] birth or death record maintained by the bureau of vital statistics of the Texas Department of Health or a local registration official[.]" Gov't Code § 552.115(a). We note none of Ticket Stop's information consists of a birth or death record maintained by the bureau of vital statistics or a local registration official. Accordingly, section 552.115 of the Government Code is not applicable to any of the information at issue, and none of the remaining information may be withheld on that basis.

ASC seeks to withhold its information under section 552.122 of the Government Code, which excepts test items developed by an educational institution funded wholly or in part by state revenue or test items developed by a licensing agency or governmental body. Gov't Code § 552.122. We note, however, that section 552.122 is a discretionary exception, similar to section 552.104, that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* ORD 522 (discretionary exceptions in general). As the agency does not seek to withhold any information pursuant to section 552.122 of the Government Code, no portion of the submitted information may be withheld on that basis.

Ticket Stop also asserts some of its information is excepted from disclosure under section 552.139 of the Government Code. Section 552.139 provides that information is excepted from required public disclosure "if it is information that relates to computer network security, to restricted information under Section 2059.055, or to the design, operation, or defense of a computer network." Gov't Code § 552.139(a). Upon review, we find Ticket Stop has failed to demonstrate any of its remaining information at issue relates to computer network security, restricted information under section 2059.055 of the Government Code, or to the design, operation, or defense of a computer network for purposes of section 552.139(a). Accordingly, none of Ticket Stop's remaining information may be withheld under section 552.139 of the Government Code.

ASC also seeks to withhold its personnel information under section 552.147 of the Government Code, which excepts from disclosure the social security numbers of living individuals. Gov't Code § 552.147(a). Upon review, we find ASC's information does not contain social security numbers, and the agency may not withhold any of ASC's information on that basis.

We note some of the remaining information may 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, the agency need not release the marked user names and passwords that are not subject to the Act. The agency must withhold the account numbers you have marked under section 552.136 of the Government Code. The agency must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The agency must withhold IDS's information we have marked under section 552.110(a) of the Government Code. The agency must release the remaining information, but any information protected by copyright may only 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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/em

Ref: ID# 414686

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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