



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 25, 2011

Mr. R. Brooks Moore
Assistant General Counsel
The Texas A&M University System
200 Technology Way, Suite 2079
College Station, Texas 77845

OR2011-05607

Dear Mr. Moore:

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# 415319.

Texas A&M University System (the "system") received three requests from the same requestor for ten categories of information related to all proposals, correspondence, and other documents provided by XanEdu and Barnes & Noble College Booksellers ("Barnes & Noble") over the past three years to the date of the request.¹ Although you take no position on whether the submitted information is excepted from disclosure under the Act, you state release of this information may implicate the proprietary interests of Barnes & Noble. Accordingly, you have notified Barnes & Noble of the request and of its right to submit arguments to this office as to why its 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 comments from Barnes & Noble. We have also received

¹The requestor informs us she withdrew her related requests to Texas A&M-San Antonio and Texas A&M International University.

and considered comments from the requestor.² *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released). We have reviewed the submitted arguments and the submitted information.

Initially, we note a portion of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to this request.

Barnes & Noble asserts that the submitted information pertaining to its company is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (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.

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

²Although the requestor asserts Barnes & Noble failed to comply with section 552.305(d), we note that a violation of section 552.305 does not result in the legal presumption that the requested information is public under section 552.302 of the Government Code.

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). 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.” RESTATEMENT OF TORTS § 757 cmt. b (1939).

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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Having considered Barnes & Noble’s arguments and reviewed the submitted information, we determine that Barnes & Noble has failed to demonstrate that any portion of the information at issue constitutes a trade secret for purposes of section 552.110(a). Accordingly, no portion of the submitted information may be withheld pursuant to section 552.110(a) of the Government Code. Furthermore, we find that Barnes & Noble has made only conclusory allegations that release of its information would cause it substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *See* ORD 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

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).

information at issue), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, we find Barnes & Noble has failed to establish that its information is excepted under section 552.110(b) of the Government Code. Accordingly, none of the information at issue may be withheld under section 552.110(b) of the Government Code.

We note the submitted information includes system employees' cellular telephone numbers that may be protected under section 552.117 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with the employee's funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The system may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We have marked system employees' cellular telephone numbers in the submitted information. You have not informed us whether the employees timely chose to restrict public access to their personal information. Furthermore, you have not informed us whether they paid for their cellular telephone service. Therefore, to the extent the employees timely requested confidentiality for their personal information and the cellular telephone numbers we have marked are not paid for by the system, the system must withhold the marked information pursuant to section 552.117(a)(1) of the Government Code. To the extent the employees did not timely request confidentiality or the marked cellular telephone numbers are paid for by the system, the marked information may not be withheld under section 552.117(a)(1) of the Government Code.

The submitted information includes e-mail addresses subject to section 552.137 of the Government Code, which 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

⁴The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not specifically excluded by section 552.137(c). As such, these e-mail addresses, which we have marked, must be withheld under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.

In summary, to the extent the employees whose information is at issue timely requested confidentiality for their personal information and the cellular telephone numbers we have marked are not paid for by the system, the system must withhold the marked information pursuant to section 552.117(a)(1) of the Government Code. To the extent the employees did not timely request confidentiality or the marked cellular telephone numbers are paid for by the system, the marked information may not be withheld under section 552.117(a)(1) of the Government Code. The system must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the addresses have affirmatively consented to their release.⁵ The remaining information must be released.

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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

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⁵We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 415319

Enc. Submitted documents

Requestor
(w/o enclosures)

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(w/o enclosures)