ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2013

Mr. Damon C. Derrick
General Counsel
Office of the General Counsel
Stephen F. Austin State University
P.O. Box 13065, SFA Station
Nacogdoches, Texas 75962-3065

OR2013-06654

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# 484908.

Stephen F. Austin University (the "university") received a request for the proposals submitted by nine specified companies in response to a specified request for proposals and any evaluator notes for the nine specified companies or the requestor's company. Although you take no position on the public availability of the submitted information, you state the submitted information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified Avant Marketing Group; BrandEra, Inc.; Mohr & Associates; Noel-Levitz; Phillips MediaSource; Simpson Scarborough; Stamats, Inc.; Steel Branding; and Zone 5 of the request and of their right to submit comments to this office as to why the submitted information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from Noel-Levitz. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the request for evaluator notes. To the extent information responsive to this portion of the request existed on the date the university received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

We note 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, we have only received comments from Noel-Levitz explaining why the company's submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the 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 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 university may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in it.

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, 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.[1] 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) of the Government Code 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 5-6.

Noel-Levitz asserts its submitted information contains trade secrets. Upon review, we find Noel-Levitz has failed to demonstrate any of their submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the university may not withhold any of Noel-Levitz's information under section 552.110(a) of the Government Code.

Upon review, we find Noel-Levitz has established that some of its submitted information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the university must withhold the information we have marked under section 552.110(b) of the Government Code.

---

[1]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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

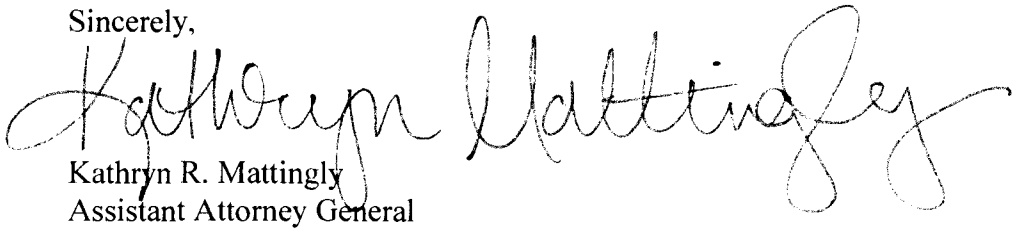
We note some of the information at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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 university must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released; however, any information subject to copyright may be released only 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, toll free at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

---

[2]We note the remaining information contains a social security number. 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. Gov't Code § 552.147(b).

Ref: ID# 484908

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Dana B. Edwards
Senior Consultant
Simpson Scarborough
1403 King Street
Alexandria, Virginia 22314
(w/o enclosures)

Mr. Ray Witkowski
Vice President
Zone 5
25 Monroe Street
Albany, New York 12210
(w/o enclosures)

Ms. Janene Panfil
Senior Vice President
Noel-Levitz
2350 Oakdale Boulevard
Coralville, Indiana 52241
(w/o enclosures)

Ms. Lisa Loeffler
Controller
Stamats, Inc.
615 Fifth Street Southeast
Cedar Rapids, Iowa 52401
(w/o enclosures)

Ms. Kirsten Cutshall
President
Steel Branding
6414 Bee Cave Road, Suite B
Austin, Texas 78746
(w/o enclosures)

Mr. Robert Phillips
President & CEO
Phillips MediaSource
750 North Saint Paul, Suite 1000
Dallas, Texas 75201
(w/o enclosures)

Mr. Matthew J. Mohr, Sr.
CEO
Mohr & Associates
17102 Spotted Eagle
San Antonio, Texas 78248
(w/o enclosures)

Ms. Elizabeth A. Owens
Principal
BrandEra, Inc.
1117 West Magnolia Avenue
Fort Worth, Texas 76104
(w/o enclosures)

Mr. Mark J. Vogel
Senior Partner
Avant Marketing Group
6 The Pines Court, Suite E
St. Louis, Missouri 63141
(w/o enclosures)