



ATTORNEY GENERAL OF TEXAS
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December 5, 2014

Ms. Audra G. Welter
Attorney and Public Information Coordinator
Office of the General Counsel
The University of Texas System
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OR2014-22031

Dear Ms. Welter:

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# 545761 (U.T. OGC# 158472).

The University of Texas at Austin (the "university") received a request for copies of the contracts between twenty-three named corporate sponsors and the university's athletic department, including any contracts negotiated by IMG College, L.L.C. ("IMG"). You state the university will release some of the requested information to the requestor. You contend some of the submitted information may be subject to copyright law. Additionally, you state the release of the remaining requested information may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the university notified the third parties of the request for information and of their right to submit arguments stating why their information should not be released.¹ See Gov't Code § 552.305 (permitting

¹The third parties notified pursuant to section 552.305 are the following: American Campus Communities Operating Partnership L.P.; AT&T Services, Inc. ("AT&T"); Chevrolet Motor Division, General Motors L.L.C.; Clear Channel Communications, Inc. Austin; The Coca-Cola Company; Cytosport, Inc.; Pon Material Handling North America d/b/a Equipment Depot; HEB Grocery Company, L.P. ("HEB"); IMG; MillerCoors, L.L.C. ("MillerCoors"); Restaurant Management Company (Pizza Hut); RICOH; SiriusXM Satellite Radio, Inc.; Southwest Airlines Co. ("Southwest"); St. David's Healthcare Partnership, L.P., LLP; The Gatorade Company; Stubhub, Inc. ("StubHub"); The Hershey Company ("Hershey's"); University Federal Credit Union; and UPS.

interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by AT&T, HEB, Hershey's, IMG, MillerCoors, Southwest, and StubHub.² We have also received and considered comments submitted by a representative of the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, the third parties who submitted comments contend the requested information is not subject to disclosure under the Act. The Act is applicable only to "public information." *See id.* §§ 552.002, 552.021. Section 552.002(a) defines "public information" as the following:

[I]nformation that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body;
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

²We note the university failed to comply with the procedural requirements of section 552.301(e) of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(e) (requiring governmental body to submit within fifteen business days of receiving request for information comments explaining applicability of raised exceptions, copy of request for information, signed statement of date governmental body received request or evidence sufficient to establish date, and copy of information governmental body seeks to withhold or representative samples). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake in this instance, we will consider the arguments against disclosure of the information at issue, notwithstanding the university's violation of section 552.301 in requesting this decision.

Id. § 552.002(a). Section 552.002(a-1) also provides the following:

Information is in connection with the transaction of official business if the information is created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a governmental function on behalf of a governmental body, and pertains to official business of the governmental body.

Id. § 552.002(a-1). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987); *cf.* Open Records Decision No. 499 (1988). The third parties who submitted comments assert the submitted information is not subject to the Act because it was generated by the third parties, which are not governmental bodies subject to the Act, and it consists of agreements between private parties that do not involve the university. *See* Gov't Code § 552.003(1)(A) (defining "governmental body"). We note, however, the submitted agreements relate to the university's athletic program and sponsorship of the university. IMG informs us the university approves the sponsors and the sponsorship components, and IMG enters into sponsorship agreements with the sponsors. We further note the submitted information is in the possession of the university. Moreover, the university has submitted this information as being subject to the Act. Thus, we find the university collected, assembled, or maintains this information in connection with the transaction of its official business. We therefore conclude the submitted information is subject to the Act and must be released, unless it is demonstrated that the information falls within an exception to disclosure under the Act. *See id.* §§ 552.006, .021, .301, .302.

Next, 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, this office has received comments from only AT&T, HEB, Hershey's, IMG, MillerCoors, Southwest, and StubHub, and has not received comments from the remaining third parties explaining why their information should not be released to the requestor. Thus, we have no basis to conclude the release of the submitted information would implicate the interests of the remaining third parties, and none of the submitted information may be withheld on that basis. *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.

Hershey's seeks to withhold certain information the university did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the university. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

HEB and Southwest assert their submitted contracts are excepted from disclosure because they are subject to confidentiality clauses. We note information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the contracts fall within an exception to disclosure, they must be released, notwithstanding any expectations or agreements specifying otherwise.

AT&T, HEB, Hershey's, IMG, MillerCoors, Southwest, and StubHub all submit arguments against disclosure of their information under section 552.110 of the Government Code. 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD at 2. Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *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 *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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.*; ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

AT&T, HEB, Hershey’s, IMG, MillerCoors, Southwest, and StubHub each contend portions of their information are commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review of these arguments, we conclude AT&T, HEB, Hershey’s, IMG, MillerCoors, Southwest, and StubHub have established the release of some of the information at issue would cause the companies substantial competitive injury. Accordingly, the university must withhold the information

³There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (2) the extent to which it is known by employees and others 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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by

others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

we have marked and indicated under section 552.110(b).⁴ However, we find AT&T, HEB, Hershey's, IMG, MillerCoors, Southwest, and StubHub have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *See* Open Records Decision Nos. 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), 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the university may not withhold the remaining information at issue under section 552.110(b).

AT&T, Hershey's, IMG, MillerCoors, Southwest, and StubHub claim their remaining information at issue constitutes trade secrets. We note 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." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776. Upon review, we find AT&T, Hershey's, IMG, MillerCoors, Southwest, and StubHub have failed to demonstrate the remaining information at issue 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 the remaining information at issue under section 552.110(a).

The university contends, and we agree, some of the remaining information appears to be subject to copyright law. 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.

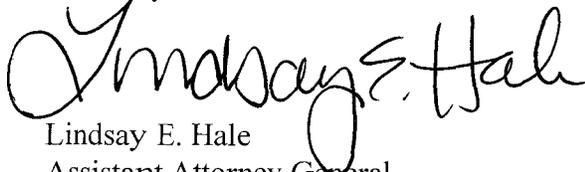
In summary, the university must withhold the information we have marked and indicated under section 552.110(b) of the Government Code. The university must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

⁴As our ruling is dispositive, we need not address the remaining arguments of AT&T, Hershey's, IMG, MillerCoors, Southwest, and StubHub against disclosure of this information.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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LEH/akg

Ref: ID# 545761

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