



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 16, 2004

Mr. David A. Anderson  
General Counsel  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2004-6955

Dear Mr. Anderson:

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# 207159.

The Texas Education Agency (the "agency") received two requests for information related to the agency's selection of a vendor to develop the Exit Level Individualized Focus Study Guides for the Texas Assessment of Knowledge and Skills Program, for which the agency has sought proposals under RFP #701-04-007. Specifically, one requestor seeks a copy of the winning proposal, and the second requestor seeks copies of proposals submitted by all potential vendors for the project. The first requestor also requests completed reviewer evaluation forms for one proposal and a list of expert reviewers. You state that the bid proposal has not been awarded and, therefore, no contract has yet been signed. You further state that the agency takes no position as to whether release of the requested information would implicate the privacy or property interests of the third party vendors. However, you claim that the release of some of the requested information may implicate the privacy or proprietary rights of these interested third parties. Accordingly, you indicate that you notified The Grow Network ("Grow Network"), Thomson Peterson's, a division of Thomson Learning, Inc. ("Thomson Peterson's"), Kaplan, Inc. ("Kaplan"), The University of Texas System (the "System"), and The Princeton Review ("Princeton Review") of the requests for information pursuant to section 552.305 of the Government Code and of their rights to submit arguments explaining why the information concerning them should not be released. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general

reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). We have received comments from Thomson Peterson's and Kaplan and reviewed the submitted information.

Initially, we note that you did not submit completed reviewer evaluation forms for the specified proposal or a list of expert reviewers. Further, you have not indicated that such information does not exist or that you wish to withhold any such information from disclosure. Therefore, to the extent information responsive to this aspect of the request exists, we assume that you have released it to the requestor. If you have not released any such information, you must release it to the requestor at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that an interested third party is allowed ten business days after the date of its receipt of a 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, neither Grow Network, the System, nor Princeton Review have submitted comments to us explaining why any portion of the submitted information should not be released. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate Grow Network's, the System's, or Princeton Review's proprietary interests. *See, e.g.,* Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the agency may not withhold any portion of the submitted information on the basis of any proprietary interest that Grow Network, the System, or Princeton Review may have in the information.

Thomson Peterson's argues that its proposal is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the interests of a governmental body, not third parties. Open Records Decision No. 592 (1991). As the agency does not raise section 552.104, this section is not applicable to the requested information. *Id.* Therefore, the requested information pertaining to Thomson Peterson's may not be withheld under section 552.104.

Thomson Peterson's and Kaplan argue that some of their information is excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and

commercial or financial information whose release would cause a third party substantial competitive harm.

Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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.); *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 secret factors. Restatement of Torts § 757 cmt. b (1939).<sup>1</sup> A governmental body asserting section 552.110(a) must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See* Open Records Decision No. 402 at 3 (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); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982).

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<sup>1</sup>The following are the six factors that the Restatement gives 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 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 [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(b) excepts from disclosure “[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.” Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* 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). We also note that pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors).

Having considered the submitted arguments of Thomson Peterson’s, we find that the information we have marked in Thomson Peterson’s proposal is a trade secret; therefore, this information is excepted from release under section 552.110(a). However, none of the remaining information in Thomson Peterson’s proposal is excepted from release under section 552.110(a). *See* Open Records Decision No. 402 (1983). Additionally, we find that Thomson Peterson’s has established that release of a portion of the information, specifically the information contained in Appendix A of the proposal and a portion of the information contained in Appendix G of the proposal, would likely cause substantial competitive harm to Thomson Peterson’s. Further, we find that Kaplan has established that release of a portion of its information, specifically the information we have marked on pages 31 through 37 of Kaplan’s proposal, would likely cause substantial competitive harm to Kaplan. We find, however, that Thomson Peterson’s and Kaplan have not established that the release of any of the remaining information would likely cause substantial competitive harm to Thomson Peterson’s or Kaplan; therefore, none of the remaining information is excepted from release under section 552.110(b). *See* Gov’t Code §§ 552.110(b), 552.022(a)(3) (contracts with governmental body expressly made public); *see also* Open Records Decision No. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (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).

Additionally, Thomson Peterson’s argues that the HUB Subcontracting Plan and Certificate contained in Appendix G and H of its proposal are excepted from disclosure under section 552.128(a) of the Government Code. Section 552.128(a) applies to information “submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov’t Code § 552.128(a). We have no indication that any of the information at issue was submitted to the agency in connection with an application for certification under such a program. Further, section 552.128(c) states

c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128(c). The submitted HUB Subcontracting Plan and Certificate do not relate to an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program. Thus, the information at issue may not be withheld under section 552.128.

Finally, we note that some of Grow Network's, Princeton Review's and Kaplan's materials 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. 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 agency must withhold the information we have marked in Thomson Peterson's proposal under section 552.110(a) and (b) of the Government Code. The agency must withhold the information we have marked in Kaplan's proposal under section 552.110(b) of the Government Code. All remaining information must be released to the requestors; however, in doing so, the agency must comply with the applicable copyright law for the portion of the information which is copyrighted.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Cary Grace". The signature is written in a cursive style and is positioned above the typed name.

Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID#207159

Enc. Submitted documents

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