

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 26, 2006

Mr. David A. Anderson
Texas Education Agency
Office of Legal Services
Texas Education Agency
1701 N Congress Ave
Austin Tx 78701-1494

OR2006-04198

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# 247139.

The Texas Education Agency (the "agency") received a request for the proposals the agency received in response to its Texas Science Diagnostic Assessment System Request for Proposal No. 701-05-005 ("RFP #701-05-005"). You indicate that the submitted information may be subject to third-party proprietary interests, and thus, pursuant to section 552.305 of the Government Code, you have notified the following companies of the request and of each company's right to submit arguments to this office as to why the information should not be released: CTB/McGraw-Hill, L.L.C. ("CTB"), Riverside Publishing ("Riverside"), Vantage Learning ("Vantage"), Communication Specialists, Inc. ("CSI"), Pearson Educational Measurement ("Pearson"), Peoples Publishing Group, Inc. ("Peoples"), and Focus-Ed, L.L.C. ("Focus-Ed"). 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 reviewed the submitted proposals and considered the submitted arguments.

Initially, we note that some of the submitted proposals are not responsive to RFP #701-05-005 but, rather, are responsive to other RFPs issued by the agency. The submitted proposals from CTB, Riverside, and Pearson are not responsive to RFP #701-05-005 and, thus, are not responsive to the instant request. Information that is not responsive to this request need not be released. Moreover, we do not address such information in this ruling.

Next, we note that RFP #701-05-005 was the subject of a previous request for information to the agency, in response to which this office issued Open Records Letter No. 2005-06129 (2005). In that ruling, the agency was ordered to release the responses to RFP #701-05-005 received by the agency at the time of the prior request, to include the Vantage proposal. We note that the agency notified Vantage pursuant to section 552.305 when it received the previous request for information and that Vantage failed to submit any arguments that its information was excepted under the Act. However, Vantage now claims that its response to RFP #701-05-005 is protected confidential information under section 552.101 of the Government Code, confidential trade secret information under section 552.110(a) of the Government Code, and commercial and financial information protected under section 552.110(b) of the Government Code. Because information subject to sections 552.101 and 552.110 is deemed confidential by law, we will address Vantage's claims under these exceptions for its proposal. Furthermore, we note the agency did not notify any of the other third parties whose information is at issue here, CSI, Peoples, and Focus-Ed, pursuant to section 552.305 when it received the previous request for information ruled upon in Open Records Letter No. 2005-06129. Therefore, the facts and circumstances on which Open Records Letter No. 2005-06129 have changed with regard to the proposals of CSI, Peoples, and Focus-Ed, and, thus, that prior ruling is not a previous determination with regard to this information. *See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001)* (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

However, we must next address the agency's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b) of the Government Code, a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. Additionally, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written

request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Although the agency received the request for information on September 22, 2005, you did not request a decision from this office or provide the information required by section 552.301(e) until February 17, 2006. Thus, the agency failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third-party interests are at stake. Open Records Decision No. 150 at 2 (1977). Here, the third-party interests at issue can provide compelling reasons to withhold information. We will therefore address the submitted arguments for all of the information at issue.

We note, however, 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 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, this office has not received comments from CSI and Focus-Ed explaining how the release of each company's submitted information will affect its proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of CSI or Focus-Ed. *See, e.g.*, Open Records Decision Nos. 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, the agency may not withhold any of the submitted information on the basis of any proprietary interest that these companies may have in the information. However, Peoples and Vantage have submitted comments and we will address their arguments.

Vantage argues that portions of the submitted information are excepted from disclosure by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information protected by other statutes. *See* Gov't Code § 552.101. Vantage asserts that it has contractual obligations that prohibit it, and by extension the agency, from disclosing portions of the submitted information without proper consent. However, unless authorized by law to do so, a governmental body cannot, by

contract or otherwise, promise to maintain as confidential information that is subject to the Public Information Act. Attorney General Opinion H-258 at 3 (1974); *see* Attorney General Opinions JN-672 at 1-2 (1987), JM-37 at 2 (1983); Open Records Decision Nos. 585 at 2 (1991), 514 at 1 (1988), 55A at 2 (1975). Vantage cites no law that authorizes or obligates the agency to adhere to Vantage's contracts with other parties. Furthermore, information may not be withheld from the public under the Act merely because the person who provided the information to the governmental body anticipated or requested confidentiality in doing so. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 675-78 (Tex. 1976); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Accordingly, we find that none of the submitted information may be withheld under section 552.101 of the Government Code.

Both Peoples and Vantage argue that portions of their information are excepted from disclosure pursuant to 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 the release of which 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. 1958); *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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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. See 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. Gov’t Code § 552.110(b); see also *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having considered Peoples’s arguments and reviewed the information at issue, we find that Peoples has made a *prima facie* case that portions of its proposal meet the definition of a trade secret and has demonstrated the factors necessary to establish a trade secret claim. Moreover, we have received no arguments that would rebut their claim with regard to this information as a matter of law. We therefore conclude that the agency must withhold this information pursuant to section 552.110(a) of the Government Code. We also find that Peoples has demonstrated that release of other portions of its proposal would cause the company harm and must be withheld pursuant to section 552.110(b) of the Government Code. However, we conclude that Peoples has failed to make a *prima facie* case that the remaining information in its proposal constitutes trade secrets. Furthermore, we also conclude that Peoples has made only conclusory allegations that release of this remaining information would cause the company substantial competitive injury and has provided no

¹The 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).

specific factual or evidentiary showing to support their allegations with regard to this information. *See* Gov't Code § 552.110; *see also, e.g.*, 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), 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 is too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We have marked the information in Peoples's proposal that must be withheld under section 552.110.

Vantage also claims that its information is protected under section 552.110. As mentioned above, Vantage's information was subject to a previous request for information, in response to which this office issued Open Records Letter No. 2005-06129. In that ruling, we concluded that the agency must release the information pertaining to Vantage. We also note that Vantage failed to submit arguments to this office explaining why its information should be withheld from disclosure in response to the previous request. Further, we note that since the previous ruling was issued on July 12, 2005, Vantage has not disputed this office's conclusion regarding the release of its proposal, and we presume that, in accordance with that ruling, the agency has released Vantage's proposal in accordance with Open Records Letter No. 2005-06129. In this regard, we find that Vantage has not taken necessary measures to protect its proposal in order for this office to conclude that it now either qualifies as a trade secret or is commercial or financial information the release of which would cause Vantage substantial harm. *See* Gov't Code § 552.110, 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), 180 at 3 (1977). Accordingly, we conclude that the department may not withhold any information in Vantage's proposal under section 552.110 of the Government Code.

However, we note the submitted information includes insurance policy numbers. Section 552.136 of the Government Code provides that "[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 § 552.136.² Accordingly, the agency must withhold the policy numbers in the submitted information pursuant to section 552.136.

The submitted information also contains social security numbers. Section 552.147 of the Government Code provides that "[t]he social security number of a living person is excepted

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

from" required public disclosure under Act. Therefore, the agency must withhold the social security numbers contained in the submitted information under section 552.147.³

Finally, we note that portions of the submitted information appear to 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 submitted nonresponsive information need not be released. We have marked the information in Peoples's proposal that must be withheld under section 552.110 of the Government Code. The policy numbers in the information at issue must be withheld under section 552.136 of the Government Code. The social security numbers in the information at issue must be withheld under section 552.147 of the Government Code. The remaining submitted information must be released; however, in releasing information that is protected by copyright, the agency must comply with copyright law.

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, upon receiving this ruling, the governmental body

³Section 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.

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/krl

Ref: ID# 247139

Enc. Submitted documents

c: Ms. Norma Reyna
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Ms. Diane M. Miller
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(w/o enclosures)

APR 12 2007

At 1:46 P M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-06-001742

PEOPLES PUBLISHING GROUP, INC.,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
V.	§	TRAVIS COUNTY, TEXAS
	§	
ATTORNEY GENERAL OF TEXAS GREG	§	
ABBOTT,	§	
Defendant.	§	250 th JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Peoples Publishing Group, Inc. (Peoples), and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Norma Reyna, was sent reasonable notice of this setting and of the parties' agreement that the Texas Education Agency must withhold some of the information at issue; that the requestor was also informed of her right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of her intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The highlighted information in the Project Proposal Cover Sheet in the Proposal that Peoples submitted to the Attorney General, on August 8, 2006, is excepted from disclosure by Tex.

Gov't Code § 552.110(b).

2. The remaining information highlighted in the Proposal that Peoples submitted to the Attorney General, on August 8, 2006, is excepted from disclosure by Tex. Gov't Code § 552.110(a), except for the following information:

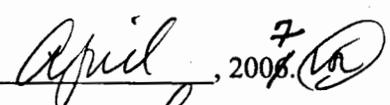
- (a) Cover letter, highlighted text on pages 1 & 3
- (b) Highlighted text in Sections 1.1, 3.7 & 5.3
- (c) Highlighted text in Attachment D, item (d) of all sections; highlighted text on page 88, below "Provide/Select justification"
- (d) Organization chart and pages 127-140
- (e) Attachment Q, Subscriber Agreement and Activation Form
- (f) Attachments T and U; and
- (g) Attachment V, 310-314 (except name and position on 310 & 312)

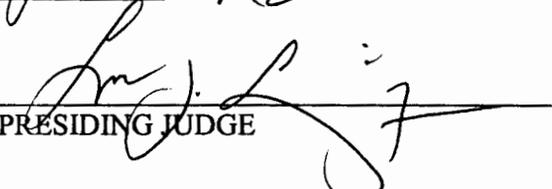
3. The Texas Education Agency shall withhold from the requestor the information described in Paragraphs 1 and 2 of this Agreed Judgment, except for the information listed in Paragraph 2(a) through (g) of this Agreed Judgment, and any other information the Attorney General ruled excepted from disclosure in OR2006-04198. The TEA shall make available to the requestor all other portions of the Proposal, including the information listed in Paragraph 2(a)-(g) of this Agreed Judgment.

4. All costs of court are taxed against the parties incurring the same;

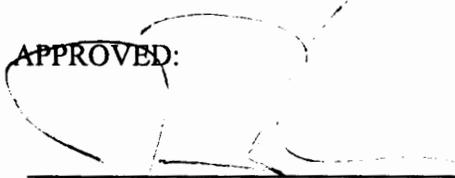
5. All relief not expressly granted is denied; and

6. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 12th day of April, 2006. 


PRESIDING JUDGE

APPROVED:



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