



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 28, 2008

Ms. Marianna M. McGowan  
Abernathy Roeder Boyd & Joplin P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2008-04112

Dear Ms. McGowan:

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# 305857.

The McKinney Independent School District (the "district"), which you represent, received a request for information relating to a specified request for proposals, including "[c]ost and technical proposals submitted by [eSped.com, Inc.]" ("eSped") and "[a]ward evaluations/score sheets." You state that some of the requested information will be released. Although you take no position with respect to the public availability of the rest of the requested information, you believe that the remaining information implicates the proprietary interests of eSped. You notified eSped of this request for information and of its right to submit arguments to this office as to why the remaining information should not be released.<sup>1</sup> We received correspondence from an attorney for eSped. We have considered eSped's arguments and have reviewed the submitted information.

eSped claims exceptions to disclosure under sections 552.104 and 552.110 of the Government Code. eSped also asserts that the company is careful to note on information provided to outside parties such as the district that the information is confidential and proprietary. eSped also states that it relied on representations by the district regarding non-

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<sup>1</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

disclosure of the company's information. We note, however, that 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 overrule or repeal provisions of the Act through an agreement or contract. *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 did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the submitted information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Section 552.104 of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties such as eSped. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, because the district does not claim an exception to disclosure under section 552.104, the submitted information may not be withheld under section 552.104 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial 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(a)-(b).

The Texas Supreme Court has adopted the definition of a “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, *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 . . . [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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). If a governmental body takes no position on the application of the "trade secrets" aspect of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> *See* Open Records Decision No. 552 at 5 (1990). 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. *See* Open Records Decision No. 402 (1983).

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 information at issue. *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).

eSped contends that twelve specified sections of its proposal contain information that consists of trade secrets under section 552.110(a). eSped also argues that section 552.110(b) is applicable to the information in question. We note that some of the customer information for which eSped claims section 552.110 is published on the company's internet website. Given eSped's publication of that information, we are unable to conclude either that it constitutes a trade secret of the company under section 552.110(a) or that its release under

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<sup>2</sup>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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the Act would cause eSped substantial competitive harm. With the exception of that information, we conclude that eSped has presented a *prima facie* claim that its customer information, standard implementation services technical specifications, and system standard reports qualify as trade secrets under section 552.110(a). We have received no arguments that rebut eSped's claim as a matter of law. We therefore conclude that the district must withhold the trade secret information, which we have marked, under section 552.110(a). We find that eSped has not demonstrated that any of the remaining information in question falls within the scope of section 552.110(a). We also find that eSped has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause eSped substantial competitive harm. We therefore conclude that the district may not withhold any of the remaining information under section 552.110. *See* Open Records Decision Nos. 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 Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

In summary, the district must withhold the information that we have marked under section 552.110 of the Government Code. The rest of the submitted information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 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 challenge 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,



James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ma

Ref: ID# 305857

Enc: Submitted documents

c: Ms. Elizabeth D. Steponkus  
Fed Sources  
8400 Westpark Drive 4<sup>th</sup> Floor  
McLean, Virginia 22102  
(w/o enclosures)

eSped.com, Inc.  
c/o Mr. Robert H. Griffith  
Foley & Lardner LLP  
321 North Clark Street Suite 2800  
Chicago, Illinois 60610-4764  
(w/o enclosures)