ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 15, 2009

Mr. Pat Peterson
Director, Legal Services
Round Rock ISD
1311 Round Rock Avenue
Round Rock, Texas 78681

OR2009-06655

Dear Mr. Peterson:

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# 343291.

The Round Rock Independent School District (the "district") received a request for Gallup's response to district request for proposals P09-045, Online Teacher and Principal Interview and Assessment.[1] Although the district takes no position on the release of the submitted information, you explain that it may contain proprietary information subject to exception under the Act. Accordingly, you have notified Gallup of this request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have reviewed the submitted information and considered arguments submitted by Gallup.

Initially, we must address the district's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Within fifteen days of receiving the request, the governmental body must submit to this office several items,

[1]As you have not submitted a copy of the request, we take our description of the request from your brief and the submitted documents.

including a copy of the written request for information. *See* Gov't Code § 552.301(e)(1)(B). As of the date of this ruling, we have not received a copy of the written request for information. Consequently, we find you have failed to comply with the requirements of section 552.301(e).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released. The governmental body can overcome this presumption only by demonstrating a compelling reason to withhold the information. *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); Open Records Decision No. 319 (1982). Because a third party's interests can provide a compelling reason to overcome the presumption of openness, *see* Open Records Decision No. 150 (1977), we will consider Gallup's arguments under sections 552.104 and 552.110 of the Government Code.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 104(a). Significantly, the purpose of this exception is to protect only the interests of a governmental body, and not those of a third party, with respect to competitive bidding situations. *See* Open Records Decision No. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). Because the district does not seek to withhold any information pursuant to section 552.104, the district may not withhold any of the submitted information under this section.

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 a single or ephemeral event 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 763, 776 (Tex. 1958). If the 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.[2] *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors 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).

Upon review of Gallup's arguments and the information at issue, we find that Gallup has made a *prima facie* case that one of its customer lists, which we have marked, is protected as trade secret information. Thus, the district must withhold this information under section 552.110(a). However, Gallup states that the other customer list at issue "includes Gallup's current clients that have agreed to serve as references." Lists of entities and individuals that have agreed to serve as references for a third party are not protected trade secrets; therefore, Gallup has not established a *prima facie* case that this list constitutes a protected trade secret. *See* Open Records Decision No. 319 at 3 (1982) (information relating

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[2]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 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).

to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Moreover, we conclude that Gallup has failed to establish a *prima facie* case that any of the remaining information at issue is a trade secret protected by section 552.110(a). *See* ORD 402.

Gallup also seeks to withhold portions of the submitted information under section 552.110(b) of the Government Code. After reviewing its arguments and the information at issue, we find that Gallup has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Furthermore, we note that Gallup was the winning bidder in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the 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); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the district may not withhold any of the remaining information at issue under section 552.110(b).

Finally, we note that some of the remaining information is 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. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See 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).

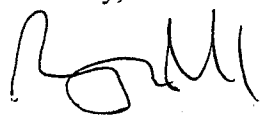
In summary, the district must withhold the information we have marked under section 552.110 of the Government Code and must release the remainder of the submitted information, but must comply with copyright law in so doing.

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 at (512) 475-2497.

Sincerely,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/cc

Ref: ID# 343291

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Ms. Rosanne Liesveld
1001 Gallup Drive
Omaha, Nebraska 68102
(w/o enclosures)