



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2009

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204-5491

OR2009-17065

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# 363088.

The Dallas Independent School District (the "district") received a request for all board updates and attachments from the district's superintendent for a specified time period. We understand that the district has released some of the requested information to the requestor. You claim that portions of the submitted information are excepted from disclosure under sections 552.107 and 552.110 of the Government Code and privileged under Rule 503 of the Texas Rules of Evidence.¹ You also state that release of this information may implicate the proprietary interests of The Princeton Review Inc. ("Princeton Review"), Academic Success Program, Education is Freedom, On-Target Supplies and Logistics Ltd. d/b/a ReadytoWork ("On-Target"), and Pathway to Success Education Services, (collectively, the "third parties"). Accordingly, you inform us, and provide documentation showing, that you notified the third

¹Although you raise section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence, we note that section 552.101 does not encompass discovery privileges. *See* Open Records Decision No. 676 at 1-3 (2002). We also note that although you raise the attorney-client privilege under Rule 503 of the Texas Rules of Evidence for all of the information you have marked under that privilege, we note section 552.107 is the proper exception to raise for your attorney-client privilege claim for some of the marked information in this instance. *See id.*

parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 received comments from representatives of Princeton Review and On-Target. We have considered the submitted arguments and have reviewed the submitted information.

Initially, we note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.² Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). Upon review, we note a portion of the submitted information appears to contain the names of district students. If FERPA does apply to any portion of the submitted information, any determination on appropriate redactions under FERPA must be made by the educational authority in possession of such records. Accordingly, we will not address the applicability of FERPA to any of the submitted information. We will, however, address the applicability of the claimed exceptions to the submitted information.

Next, we note that one of the submitted documents consists of a completed report by the district's Office of Professional Responsibility subject to section 552.022 of the Government, which provides in pertinent part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108.

Gov't Code § 552.022(a)(1). The district must release the completed report, which we have marked, under section 552.022(a)(1) of the Government Code unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly confidential under

²A copy of this letter may be found on the Office of the Attorney General's website: <http://www.oag.state.tx.us/open/20060725usdoe.pdf>.

other law. You raise the attorney-client privilege found in Rule 503 of the Texas Rules of Evidence for the information you have marked in the completed report. The Texas Supreme Court held that the Texas Rules of Evidence are 'other law' within the meaning of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); see also ORD 676. Accordingly, we will consider your assertion of this privilege under Rule 503 with respect to the information subject to section 552.022(a)(1).

Texas Rule of Evidence 503 enacts the attorney-client privilege. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You claim that the information you have marked in the completed report documents communications between the district's attorneys and the district's representatives. You also state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. You also state that this information was intended to be and has remained confidential. Based on your representations and our review, we conclude the information you have marked in the completed report may be withheld under Texas Rule of Evidence 503.

Next, you raise that attorney client privilege for some of the remaining information that is not subject to section 552.022. Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. ORD 676 at 6-7. First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege, unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim that the remaining information you have marked under the attorney-client privilege consist of communications between the district's attorneys and the district's representatives. You also state these communications were made for the purpose of facilitating the rendition of professional legal services to the district. You further state that this information was intended to be and has remained confidential. Based on your representations and our review, we conclude the remaining information you have marked under the attorney-client privilege may be withheld under section 552.107 of the Government Code.

Next, we note 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 decision, we have only received arguments from Princeton Review and On-Target explaining why their information should not be released. Therefore, we find that none of the remaining third parties have demonstrated that any of their submitted information is confidential or proprietary for purposes of the Act. *See id.* §§ 552.101, .110; Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999). Additionally, although the district also raises section 552.110 of the Government Code for the remaining third parties' information, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the district's argument under section 552.110 for the remaining information. Accordingly, none of the remaining information may be withheld on the basis of any proprietary interest the non-briefing third parties may have in it. *See* Gov't Code § 552.110; ORDs 661 at 5-6 (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 (party must establish *prima facie* case that information is trade secret).

Next, On-Target asserts that its information was marked confidential and submitted to the district as confidential. However, information is not made 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), cert. denied 430 U.S. 931 (1977); *see also* Open Records Decision Nos. 479 (1987) (information is not confidential under the Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Consequently, On-Target's information may not be withheld unless it falls within an exception to disclosure.

The district, Princeton Review, and On-Target all raise section 552.110 of the Government Code. As discussed above, section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we will only address Princeton Review's and On-Target's arguments under section 552.110. 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. See Gov't Code § 552.110(a), (b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also ORD 552. 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. See ORD 552 at 5. 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

³The 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).

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. *Id.* § 552.110(b); *see also* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

On-Target contends that its proposal consists of trade secrets excepted under section 552.110(a). Having considered On-Target’s arguments under section 552.110(a), we conclude that On-Target has failed to demonstrate that any portion of its information fits within the definition of a trade secret. On-Target has also not established any of the trade secret factors with respect to its information. Thus, none of On-Target’s information may be withheld under section 552.110(a) of the Government Code.

Both Princeton Review and On-Target contend that their information at issue is excepted under section 552.110(b). Upon review of the arguments and information at issue, find that Princeton Review has established that its pricing information, which we have marked, would cause Princeton Review substantial competitive injury. Accordingly, the district must withhold the information we have marked in Princeton Review’s information under section 552.110(b). However, we find that Princeton Review and On-Target have made only conclusory allegations that the release of the remaining information at issue would result in substantial damage to their competitive positions. Thus, Princeton Review and On-Target have not demonstrated that substantial competitive injury would result from the release of any of the remaining information. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

Finally, we note that some of the remaining information appears 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. 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, this ruling does not address the applicability of FERPA to any of the submitted information and any determination on appropriate redactions under FERPA must be made by the district. The district may withhold the information you have marked in the completed report under Rule 503 of the Texas Rules of Evidence. The district may withhold the remaining information you have marked under the attorney-client privilege under section 552.107 of the Government Code. The district must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released in accordance with copyright law.

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, toll free, at (888) 672-6787.

Sincerely,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 363088

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Michael Martinez
Academic Success Program
1700 Pacific Avenue, Suite 2415
Dallas, Texas 75201
(w/o enclosures)

Mr. Marcus Martin
Education is Freedom
2711 North Haskell Avenue
Suite 2070, LB 18
Dallas, Texas 75204
(w/o enclosures)

Mr. Scott Sessions
On-Target Supplies & Logistics
1133 South Madison Avenue
Dallas, Texas 75208
(w/o enclosures)

Ms. Patricia K. Schlegel
AVP and Assistant General Counsel
The Princeton Review
2315 Broadway
New York, New York 10024
(w/o enclosures)

Ms. Jerrelyn Gaines
Pathway to Success Education Services
2580 West Camp Wisdom Road
Suite 100-221
Grand Prairie, Texas 75052
(w/o enclosures)