ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2010

Mr. Brian Nelson
General Counsel
Lone Star College System
5000 Research Forest Drive
The Woodlands, Texas 77381-4356

OR2010-00566

Dear Mr. Nelson:

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# 367093.

Lone Star College System (the "system") received two requests for proposals and evaluation forms related to Request For Proposal 09-080 for a lecture capture solution. You state you will release the evaluation forms to the requestors. Although you raise no exceptions to disclosure of the requested proposals, you state release of this information may implicate the proprietary interests of third parties. Thus, pursuant to section 552.305 of the Government Code, you have notified Clarix Technologies, Inc. ("Clarix"); Echo360; Panopto, Inc. ("Panopto"); TechSmith Corporation ("TechSmith"); and Tegrity, Inc. ("Tegrity") of the request and of their right to submit arguments to this office as to why the information should not be released. *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 certain circumstances). We have received comments from Clarix and Tegrity. We have considered the submitted comments and reviewed the submitted information.

We note that 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, Echo360, Panopto, and

TechSmith have not submitted any comments to this office explaining how release of the information at issue would affect their proprietary interests. Accordingly, none of the information pertaining to Echo360, Panopto, or TechSmith may be withheld on that basis. *See id.* § 552.110; 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). As the system makes no arguments regarding this information, it must be released to the requestors.

Next, we note Tegrity submitted arguments regarding information beyond that which the system submitted to this office for our review. This ruling does not address such information, and is limited to the information submitted as responsive to the request by the system. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Clarix and Tegrity claim portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.[1] *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information at issue 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) of the Government Code 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." 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. *See* ORD 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Clarix and Tegrity claim their client information and pricing information are trade secrets under section 552.110. We find Clarix and Tegrity have established some of their clients' identifying information, which we have marked, constitutes a trade secret which must be withheld under section 552.110(a). *See* Restatement of Torts § 757 cmt. b (1939) ("specialized list of customers" can be trade secret); Open Records Decision No. 255 (1980) (customer lists may be withheld under predecessor to section 552.110(a)). However, we note that both Clarix and Tegrity have made some of the customer information they seek to withhold publicly available on their websites. Because Clarix and Tegrity have published this information, they have failed to demonstrate that this information is a trade secret. We further conclude that Clarix and Tegrity have failed to establish a *prima facie* case that any of their pricing information is a trade secret protected by section 552.110(a). *See* ORD 402. Thus, the system may not withhold any pricing information under section 552.110(a).

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[1] 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Tegrity also claims that portions of its statement of specifications, its description of other services, its exceptions to the system's terms and conditions, and its sample master subscription agreement constitute trade secrets under section 552.110(a). Upon review, we find Tegrity has failed to demonstrate how any of its information at issue meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. *See* ORD Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Thus, the system may not withhold any of the remaining information at issue under section 552.110(a).

Clarix and Tegrity also seek to withhold portions of their information under section 552.110(b). Upon review, we determine that Clarix and Tegrity have established that their pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause Clarix or Tegrity substantial competitive injury. Therefore, the system must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find that Clarix and Tegrity have only made conclusory allegations that release of their remaining information would result in substantial damage to their competitive positions. *See* ORD 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 was entirely too speculative). Therefore, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the system must withhold the client information belonging to Clarix and Tegrity which we have marked under section 552.110(a) of the Government Code. The system must withhold the pricing information belonging to Clarix and Tegrity which we have marked under section 552.110(b) of the Government Code. The system must release the remaining information.

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,

Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/rl

Ref: ID# 367093

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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