



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 4, 2010

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701

OR2010-01742

Dear Mr. Meitler:

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# 369438 (TEA PIR# 12204).

The Texas Education Agency (the "TEA") received a request for the vendor proposals submitted by National Evaluation Systems ("NES") and Harcourt Assessment, Inc. ("Harcourt") in response to request for proposals ("RFP") number 705-06-001, pertaining to the development and administration of educator assessments. Although you take no position as to the public availability of the submitted proposals, you state their release may implicate the proprietary interests of NES and Harcourt. Thus, pursuant to section 552.305 of the Government Code, you notified NES and Harcourt of the request and of the companies' right to submit arguments to this office as to why their information should not be released. 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 in certain circumstances). We received comments submitted by NES. We have reviewed the submitted information.

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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Harcourt explaining why any portion of its submitted information should not be released.

Therefore, we have no basis to conclude Harcourt has any protected proprietary interest in its submitted information. *See id.* § 552.110; 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), 542 at 3 (1990). Consequently, the TEA may not withhold any portion of Harcourt's proposal on the basis of any proprietary interest Harcourt may have in that information.

NES asserts some of the information in its proposal is excepted from disclosure under 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: (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." *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 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). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors

have been demonstrated to establish a trade secret claim.¹ 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* ORD 661 at 5-6 (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).

NES states a portion of its bid proposal contains details of its test scoring process. NES additionally represents a portion of its proposal reveals NES's competitive strategy regarding measurement and psychometric issues, which is only provided to prospective clients. Having reviewed the information at issue and the submitted arguments, we find NES has made a *prima facie* case that these two portions of its proposal are protected as trade secrets. Accordingly, the TEA must withhold the marked information under section 552.110(a). However, NES states portions of its remaining information specifically address the work tasks defined in the RFP at issue, or relate to personnel and staffing details. Section 552.110 is generally not applicable to this type of information. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, and qualifications and experience). Additionally, with respect to all of its remaining information, NES only states the information is a trade secret and makes conclusory statements regarding the applicability of the factors necessary to establish a trade secret claim; NES does not provide any facts or arguments demonstrating the information meets the definition of a trade secret or the applicability of the factors. *See* ORD 402. Accordingly, we find NES has failed to show how its remaining information meets the definition of a trade secret and it therefore may not be withheld as such.

Turning to section 552.110(b), we find NES has established release of the pricing information in its Cost Proposal would cause it substantial competitive injury. Therefore,

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 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

the TEA must withhold the information we have marked under section 552.110(b). However, NES has provided no specific factual or evidentiary showing release of its remaining information at issue would cause the company substantial competitive injury. *See* Open Records Decision Nos. 661 at 5-6, 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. Therefore, the TEA may not withhold the remaining information NES seeks to withhold under section 552.110(b).

Finally, we note the remaining information contains documents 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 materials that are subject to copyright protection 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 TEA must withhold the information we marked that reveals details of NES's test scoring process and competitive strategy under section 552.110(a), and well as the pricing information we marked under section 552.110(b). The remaining information must be released, but any copyrighted 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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 369438

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

Mr. Jeffery S. Galt
President and Chief Executive Officer
Harcourt Assessment, Inc.
19500 Bulverde Road
San Antonio, Texas 78259
(w/o enclosures)

Mr. Williams Phillips Gorth, Ph.D.
President
National Evaluation Systems, Inc.
300 Venture Way
Hadley, Massachusetts 01035
(w/o enclosures)