



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 2, 2010

Ms. Ellen H. Spalding  
Feldman, Rogers, Morris & Grover, L.L.P.  
For Pasadena Independent School District  
5718 Westheimer Road, Suite 1200  
Houston, Texas 77057

OR2010-07962

Dear Ms. Spalding:

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# 381333.

The Pasadena Independent School District (the "district"), which you represent, received a request for all bid proposals, plus the contract and any other documentation regarding the winning bidder, pertaining to the district's website management. You state the district has provided some of the requested information to the requestor. Although you indicate the district takes no position with respect to the public availability of the submitted bid proposals and contract, you state their release may implicate the proprietary interests of Blackboard Inc. ("Blackboard"), Midwest Internet Consulting Group, Inc. d/b/a SchoolCenter ("SchoolCenter"), Centrifuge Solutions d/b/a SchoolFusion ("SchoolFusion"), and Intrafinity Inc. d/b/a SharpSchool ("SharpSchool"). Accordingly, you state, and provide documentation showing, the district notified these companies of the request and of each company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from Blackboard and SharpSchool. We have considered the submitted arguments and 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 SchoolCenter or SchoolFusion explaining why their submitted proposals and the submitted contract should not be released. Therefore, we have no basis to conclude SchoolCenter and SchoolFusion have protected proprietary interests in this 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. Consequently, the district may not withhold SchoolCenter's or SchoolFusion's submitted proposals or the submitted contract on the basis of any proprietary interests these companies may have in the information.

Blackboard asserts its proposal is confidential because it specifically labeled the proposal as proprietary and confidential prior to submitting the information to the district. Information is not confidential under the Act, however, simply because the party that submits the information anticipates or requests 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 does not satisfy requirements of statutory predecessor to section 552.110 of the Government Code). Consequently, unless Blackboard's proposal comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

SharpSchool claims portions of its submitted bid proposal are excepted under section 552.102(a) of the Government Code, which excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov't Code § 552.102(a). However, section 552.102(a) applies only to information in a personnel file of a government employee. *See id.* Therefore, SharpSchool has failed to demonstrate how section 552.102(a) applies to its bid proposal, and no portion of its proposal may be withheld on this basis.

SharpSchool asserts portions of its information are excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See Open Records Decision Nos. 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), 522 (1989) (discretionary exceptions in general). As the district does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to SharpSchool's information. *See ORD 592* (governmental body may waive section 552.104).

Blackboard and SharpSchool claim portions of their submitted proposals are excepted from disclosure under section 552.110 of the Government Code. This section 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.” 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 Open Records Decision No. 552 at 5* (1990). 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.<sup>1</sup> *Open Records Decision No. 402* (1983).

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<sup>1</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 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).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); 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).

Blackboard and SharpSchool generally claim portions of their submitted bid proposals constitute trade secrets under section 552.110(a). We find, however, Blackboard and SharpSchool have not demonstrated how the information they seek to withhold, including pricing and product specifications, meets the definition of a trade secret. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Consequently, the district may not withhold any part of Blackboard's or SharpSchool's bid proposals under section 552.110(a) of the Government Code.

Blackboard also indicates the release of its information could deter vendors such as Blackboard from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, Blackboard appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks*. *See also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of section 552.110(b) of the Government Code by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Blackboard's interests in its information.

Blackboard and SharpSchool also claim portions of their bid proposals constitute commercial information that, if released, would cause each company substantial competitive harm. After reviewing the submitted arguments and the information at issue, we find Blackboard and SharpSchool have established release of their respective pricing information would cause each company substantial competitive injury. Therefore, the district must withhold this information, which we have marked, under section 552.110(b). We find, however, Blackboard and SharpSchool have made only general conclusory assertions that release of

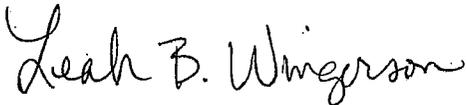
their remaining information at issue would cause them substantial competitive injury, and have provided no specific factual or evidentiary showing to support such assertions. *See generally* Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, bid specifications, and circumstances would change 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 district may not withhold any part of Blackboard's or SharpSchool's remaining information at issue under section 552.110(b) of the Government Code.

In summary, the district must withhold the pricing information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

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](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,



Leah B. Wingerson  
Assistant Attorney General  
Open Records Division

LBW/dls

Ref: ID# 381333

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Ms. Tess Frazier  
Vice President - Legal  
Blackboard Inc.  
6<sup>th</sup> Floor  
650 Massachusetts Avenue, NW  
Washington, DC 20001-3796  
(w/o enclosures)

Mr. Bradley Robins  
Manager of Business Development  
Intrafinity d/b/a SharpSchool  
201 Autumnview Road, Suite 200  
Williamsville, New York 14221  
(w/o enclosures)

Ms. Mary Mechler  
Midwest Internet Consulting Group, Inc. d/b/a SchoolCenter  
1075 Reed Station Road  
Carbondale, Illinois 62902  
(w/o enclosures)

Ms. Betsy Fonfara  
Centrifuge Solutions d/b/a SchoolFusion  
1600 Downing Street, Suite 700  
Denver, Colorado 80218  
(w/o enclosures)