ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 9, 2010

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2010-17006

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# 399475 (TEA PIR Nos. 13813, 13848).

The Texas Education Agency (the "agency") received two requests from different requestors for proposals submitted for the College Readiness Initiative for Middle School Students, RFQ 701-10-044.[1] The first requestor seeks the proposals submitted by The Princeton Review, Inc. ("Princeton Review") and Education Service Center, Region 20 ("Region 20") and the second requestor seeks all of the submitted proposals. You state the agency will provide some of the requested information to the second requestor in accordance with Open Records Letter No. 2010-13002 (2010).[2] You state you have redacted student-identifying information from the submitted documents pursuant to the Family Education Rights and

[1]We note the first requestor amended her initial request to exclude the proposal from Laying the Foundation, Inc.

[2]*See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Privacy Act ("FERPA"), section 1232g of title 20 of the United States Code.[3] Although the agency takes no position with respect to the public availability of the submitted information, you state its release may implicate the proprietary interests of third parties. Accordingly, you state you notified Region 20; Laying the Foundation, Inc. ("Laying the Foundation"); Princeton Review; and The College Board ("College Board") of the requests for information and of their 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) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Laying the Foundation, Princeton Review, and College Board. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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) of the Government Code to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received any arguments from Region 20. Thus, we have no basis to conclude that any portion of the submitted information constitutes the proprietary information of Region 20. *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. Accordingly, the agency may not withhold any of the submitted information based on any proprietary interests Region 20 may have in it.

Next, we note that Princeton Review seeks to withhold certain information that the agency has not submitted to this office for our review. Because some of the information that Princeton Review seeks to withhold was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted by the agency. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Thus, we will only address Princeton Review's arguments against disclosure of the information that was actually submitted to this office for our review.

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[3]The United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office FERPA does not permit state and local educational authorities to disclose to this office, without parental or student consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act. The DOE has determined FERPA determinations must be made by the educational authority in possession of the education records. A 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.

College Board argues that its organizational chart and the resumes of its key employees are confidential under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" *Id.* § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor). Section 552.102 only applies to information in a personnel file of an employee of a governmental body. The information College Board seeks to withhold is not contained in the personnel file of a governmental employee. Thus, we determine that section 552.102 does not apply to any of College Board's information, and it may not be withheld on that basis.

College Board claims section 552.104 of the Government Code for portions of its information. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). We note that this exception protects the competitive interests of governmental bodies, not the proprietary interests of a private party such as College Board. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the agency did not claim an exception to disclosure under section 552.104. Therefore, the agency may not withhold any of the submitted information under section 552.104 of the Government Code.

College Board, Laying the Foundation, and Princeton Review each claim portions of their 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* 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.[4] Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code 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 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. *Id.*; *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).

College Board, Laying the Foundation, and Princeton Review claim portions of their proposals are confidential under section 552.110(a) of the Government Code. Upon review, we find that College Board and Princeton Review have established a *prima facie* case that their customer information, which we have marked, constitutes trade secrets. We also find that Princeton Review has demonstrated that additional portions of its proposal constitute protected trade secrets. Therefore, the agency must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, College Board,

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[4]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).

Laying the Foundation, and Princeton Review have failed to demonstrate that any of the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

College Board, Laying the Foundation, and Princeton Review claim portions of their respective proposals are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find that Princeton Review has established that the information we have marked in the submitted information constitutes commercial or financial information, the release of which would cause it substantial competitive harm. We also find Laying the Foundation has established that release of its customer information would cause the company substantial competitive injury. Therefore, the agency must withhold this information, which we have marked, under section 552.110(b). However, we find College Board, Laying the Foundation, and Princeton Review have made only conclusory allegations that the release of the remaining submitted information they seek to withhold would result in substantial damage to their competitive position. Thus, College Board, Laying the Foundation, and Princeton Review have not demonstrated that substantial competitive injury would result from the release of any of their remaining information. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because 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 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Further, we note that College Board, Laying the Foundation, and Princeton Review were selected as approved vendors 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, none of the remaining information at issue may be withheld under section 552.110(b).

We note some of the remaining information may 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the

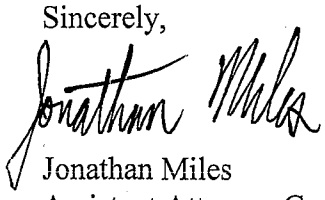
information. *Id.; see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the agency must withhold the information we have marked under subsections 552.110(a) and 552.110(b) of the Government Code. The remaining information must be released, but any information protected by copyright 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/eeg

Ref: ID# 399475

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Ms. B. Ann Wright
Vice President, Southwestern Regional Office
The College Board Southwestern Regional Office
4330 Gaines Ranch Loop, Suite 200
Austin, Texas 78735
(w/o enclosures)

Mr. Terry W. Smith
Executive Director
Education Service Center, Region 20
1314 Hines Avenue
San Antonio, Texas 78208
(w/o enclosures)

Ms. Gillian Grissom
Grant Manager
Laying the Foundation, Inc.
8350 North Central Expressway, Suite 300
Dallas, Texas 75206
(w/o enclosures)

Mr. Joe Guerra
AVP, College Readiness Initiatives
The Princeton Review, Inc.
2025 Guadalupe, Suite 148
Austin, Texas 78705
(w/o enclosures)