



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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The ruling and judgment can be viewed in PDF  
format below.



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 14, 2011

Mr. Mark A. Booker  
Director of Purchasing  
Garland Independent School District  
P.O. Box 469026  
Garland, Texas 75046-9026

**The ruling you have requested has been amended as a result of litigation and has been attached to this document.**

OR2011-00750

Dear Mr. Booker:

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# 405991.

The Garland Independent School District (the "district") received a request for the proposals submitted by the two finalists selected for Request for Proposal # 37-10.<sup>1</sup> You state the district has released some responsive information to the requestor. Although you take no position as to the public availability of the submitted proposal, you state its release may implicate the proprietary interests of a third party whose information is at issue. Thus, pursuant to section 552.305 of the Government Code, you notified eSped.com, Inc. ("eSped") of the request and of the company's right to submit arguments to this office as to why its 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

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<sup>1</sup>The district sought and received clarification from the requestor regarding this request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general opinion is measured from the date request is clarified or narrowed).

permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under in certain circumstances). We have received comments submitted by eSped and reviewed the submitted information.

Initially, you acknowledge, and we agree, the district failed to request a ruling within the statutory time period prescribed by section 552.301(b) of the Government Code. *See* Gov't Code § 552.301(b). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential by law. Open Records Decision No. 150 (1977). Thus, because third party interests can provide a compelling reason to withhold information, we will consider whether any of the submitted information is excepted under the Act.

First, eSped raises 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* 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>2</sup> 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* Open Records Decision No. 661 at 5-6 (1999) (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).

eSped claims its proposal contains trade secrets subject to section 552.110(a). Specifically, eSped claims its proposal contains details about the company's implementation methods. Upon review of the submitted information, we have marked the portions of eSped's proposal that we agree are trade secrets. The district must withhold this information under section 552.110(a) of the Government Code. However, we find the remaining information eSped seeks to withhold consists of pricing information, personnel information, general statements as to the company's qualifications, and service terms tailored for this proposal. Such information is generally not protected under section 552.110, and eSped has not explained how this information meets the definition of a trade secret. *See Huffines*, 314 S.W.2d at 776; ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing not ordinarily excepted

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

from disclosure under statutory predecessor to section 552.110), 306 at 3. Thus, none of the remaining information in eSped's proposal may be withheld under section 552.110(a) of the Government Code.

eSped also raises section 552.110(b) for portions of its remaining information. Although eSped seeks, in part, to withhold the company's pricing information from its submitted proposal, eSped was awarded the contract related to the RFP at issue. Pricing information of a winning bidder is generally not excepted under section 552.110(b) because this office considers the prices charged in government contract awards to be a matter of strong public interest. *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). Upon review of its arguments, we find eSped has not provided the specific factual or evidentiary showing that release of any of its remaining information would cause the company substantial competitive injury. *See* Open Records Decision Nos. 661 at 5-6 (1999), 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). Therefore, because eSped failed to demonstrate the applicability of section 552.110(b), the district may not withhold any portion of eSped's proposal on that basis.

Next, eSped argues portions of its proposal fit the definition of trade secret found in section 1839(3) of title 18 of the United States Code, and indicates this information is therefore confidential under sections 1831 and 1832 of title 18 of the United States Code. *See* 18 U.S.C. §§ 1831, 1832, 1839(3). Section 1839(3) provides in relevant part:

(3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes . . . if-

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public[.]

*Id.* § 1839(3). Section 1831 provides criminal penalties for the unauthorized disclosure of trade secrets to foreign governments, instrumentalities, or agents. *Id.* § 1831. Section 1832 provides criminal penalties for the unauthorized appropriation of trade secrets related to

products produced for or placed in interstate or foreign commerce. *Id.* § 1832. We find eSped has not demonstrated the information at issue is a trade secret for purposes of section 1839(3). Accordingly, we need not determine whether release of the information at issue in this instance would be a violation of section 1831 or section 1832 of title 18 of the United States Code.

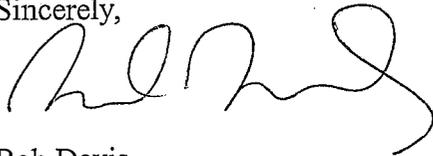
Finally, eSped states some of its information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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 district must withhold the information we marked under section 552.110(a) of the Government Code. The remaining submitted 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](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/dls

Ref: ID# 405991

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Robert H. Griffith  
Foley & Lardner, L.L.P.  
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(w/o enclosures)

JUN 05 2014

At 2:35pm M.  
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-11-000301

ESPED.COM, INC.,  
*Plaintiff,*

§ IN THE DISTRICT COURT

§

§

v.

§ 200th JUDICIAL DISTRICT

§

GREG ABBOTT, ATTORNEY GENERAL  
OF TEXAS,  
*Defendant.*

§

§ TRAVIS COUNTY, TEXAS

§

**AGREED FINAL JUDGMENT**

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff eSped.com, Inc. ("eSped") and Defendant Greg Abbott, Attorney General of Texas, appeared by and through their respective attorneys and announced to the Court that all matters of fact and things in controversy between them had been fully and finally resolved.

This is an action brought by eSped to challenge Letter Ruling OR2011-00750 (the "Ruling"). The Garland Independent School District ("GISD") received a request from SpectrumK12 School Solutions (the "Requestor") pursuant to the Public Information Act (the "PIA"), Tex. Gov't Code ch. 552, for, among other things, certain documents relating to a bid for services submitted by eSped to GISD that include commercial and financial information that eSped contends is confidential, proprietary, and trade secret ("eSped Information"). eSped asserted that the eSped Information was exempt from disclosure under the PIA. GISD requested a ruling from the Open Records Division of the Office of the Attorney General ("ORD"). ORD subsequently issued the Ruling, ordering the release of the eSped Information. GISD holds the information that has been ordered to be disclosed.

The parties represented to the Court that: (1) pursuant to Tex. Gov't Code § 552.327(2) the Attorney General has determined and represents to the Court that the Requestor has in writing voluntarily withdrawn its request for information, (2) in light of this withdrawal the lawsuit is now moot, and (3) pursuant to Tex. Gov't Code § 552.327(1) the parties agree to the dismissal of this cause.

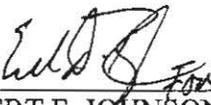
**IT IS THEREFORE ORDERED** that:

1. Because the request has been withdrawn, no eSped Information should be released in reliance on Letter Ruling OR2011-00750. Letter Ruling OR2011-00750 should not be cited for any purpose as a prior determination by the Office of the Attorney General under Tex. Gov't Code § 552.301(f).
2. Within 30 days of the Court signing this Final Judgment, the Office of the Attorney General shall notify GISD in writing of this Final Judgment and shall attach a copy of this Final Judgment to the written notice. In the notice, the Office of the Attorney General shall expressly instruct GISD that pursuant to Tex. Gov't Code § 552.301(g) it shall not rely upon Letter Ruling OR2011-00750 as a prior determination under Tex. Gov't Code § 552.301(f) nor shall it release any eSped Information in reliance on said Ruling, and if GISD receives any future requests for the same or similar eSped Information it must request a decision from the Office of the Attorney General, which shall review the request without reference to Letter Ruling OR2011-00750.
3. All costs of court are taxed against the parties incurring same.
4. This cause is hereby **DISMISSED** without prejudice.

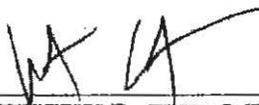
SIGNED on 6/5/2014, 2014.

15/ Judge NarcaSO  
JUDGE PRESIDING

AGREED:

  
For 03355250  
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