



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 23, 2011

Ms. Karla A. Schultz  
For Comal Independent School District  
Walsh, Anderson, Brown, Gallegos and Green, P.C.  
P.O. Box 2156  
Austin, Texas 78768

OR2011-08938

Dear Ms. Schultz:

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# 420071.

The Comal Independent School District (the "district"), which you represent, received a request for information related to testing of the requestor's daughter, including copies of specified standardized assessments. You state the district has released most of the requested information. Although the district takes no position with respect to the remaining requested information, you state the proprietary interests of third parties might be implicated. Accordingly, you state, and provide documentation demonstrating, you notified Riverside Publishing Company ("Riverside") and NCS Pearson, Inc. ("Pearson") of the request for information and of their right to submit arguments to this office as to why their 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 reviewed the submitted information and arguments submitted by Riverside and Pearson. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor argues he has a right of access to information concerning his child. We note the United States Department of Education Family Policy Compliance Office (the "DOE") has informed this office that the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, does not permit state and local educational authorities to disclose to this office, without parental consent, unredacted, personally identifiable information contained in education records for the purpose of our review in the open records ruling process under the Act.<sup>1</sup> Consequently, state and local educational authorities that receive a request for education records from a member of the public under the Act must not submit education records to this office in unredacted form, that is, in a form in which "personally identifiable information" is disclosed. *See* 34 C.F.R. § 99.3 (defining "personally identifiable information"). Because our office is prohibited from reviewing education records, we will not address the applicability of FERPA to the information at issue, other than to note parents have a right of access to their own child's education records. *See* 20 U.S.C. § 1232g(a)(1)(A). Similarly, section 26.004 of the Education Code, which the requestor asserts a right of access under, provides "[a] parent is entitled to access to all written records of a school district concerning the parent's child[.]" Educ. Code § 26.004. We note, FERPA does not entitle a parent to copy an education record to which the parent has a right of access, unless "circumstances effectively prevent the parent . . . from exercising the right to inspect and review the student's education records[.]" 34 C.F.R. § 99.10(d); *see* 20 U.S.C. § 1232g(a)(1)(A). Determinations under FERPA, and, in this instance, section 26.004 of the Education Code, must be made by the educational authority in possession of the records. Therefore, we will consider the submitted arguments to the extent the requestor does not have a right of access to the submitted information under FERPA or section 26.004 of the Education Code.

Section 552.110(a) of the Government Code protects "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision[.]" Gov't Code § 552.110(a). The Supreme Court of Texas 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

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<sup>1</sup>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>.

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 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 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.<sup>2</sup> *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude section 552.110(a) is applicable, however, 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. *See* Open Records Decision No. 402 (1983).

Pearson argues its submitted information constitutes trade secrets. Riverside also argues its test questions, answer keys, and data tables constitute trade secrets. Upon review, we find Pearson and Riverside have established a *prima facie* case that their test materials constitute trade secrets. Accordingly, the district must withhold the information we have marked under section 552.110(a) of the Government Code.<sup>3</sup>

You state the remaining 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

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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 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).

<sup>3</sup>As our ruling is dispositive, we need not address the third parties remaining arguments against disclosure of this information.

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 have marked under section 552.110(a) of the Government Code. The remaining information must be released; however, any information protected by copyright may be released only 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,



Tamara Wilcox  
Assistant Attorney General  
Open Records Division

TW/dls

Ref: ID# 420071

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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