ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 22, 2011

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

OR2011-10499

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# 424680 (TEA PIR No. 15309).

The Texas Education Agency (the "TEA") received a request for "copies in their entirety of all contract(s), agreements, etc[.] the State of Texas, or their representatives have with Pearson (PIR 15243) since January 1, 2007." You state you will release some responsive information. You state TEA does not maintain responsive information related to contracts and agreements between Pearson and other governmental bodies of the State of Texas.[1] Although you take no position as to whether the remaining requested information is excepted under the Act, you state its release may implicate the proprietary interests of A+Rise/Pearson Teacher Education & Development ("A+Rise"), NCS Pearson, Inc., d/b/a National Transcript Center ("NCS"), and Pearson. Accordingly, you notified A+Rise, NCS, and Pearson of the request 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 submitted by NCS. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter

[1]We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

Nos. 2009-08727 (2009), 2010-13398 (2010), 2010-14758 (2010), and 2011-06566 (2011). In Open Records Letter Nos. 2009-08727, 2010-14758, and 2011-06566, this office determined TEA must release the information at issue. In Open Records Letter No. 2010-13398, this office determined TEA must withhold portions of the requested information under sections 552.101, 552.107, 552.110, 552.117, and 552.136 of the Government Code, and release the remaining information. As we have no indication the law, facts, or circumstances on which the prior rulings were based have changed, TEA must continue to rely on Open Records Letter Nos. 2009-08727, 2010-13398, 2010-14758, and 2011-06566 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings. *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). However, we will consider arguments for the information not subject to the previous determinations.

Next, we note 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 A+Rise or Pearson explaining why their submitted information should not be released. Thus, we have no basis to conclude that A+Rise or Pearson have protected proprietary interests in the information at issue and none of their respective information may be withheld on that basis. *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.

NCS claims its information is excepted under section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 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 a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As TEA does not argue section 552.104 is applicable in this instance, we conclude none of NCS's information may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

NCS also raises section 552.110 of the Government Code for portions of its submitted information. Section 552.110 protects (1) trade secrets and (2) commercial or financial

information, the disclosure of which 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 trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. Section 757 provides that a trade secret is:

> 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 . . . . 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 Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret, as well as the Restatement's list of six trade secret factors.[2] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted 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

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[2]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).

have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) 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 to disclosure 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. *Id.*; *see also* ORD 661 at 5-6 (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).

NCS states some of its information consists of trade secrets under section 552.110(a) of the Government Code. Upon review, we determine NCS has failed to demonstrate any portion of its information meets the definition of a trade secret, nor has NCS demonstrated the necessary factors to establish a trade secret claim for its information. *See* Open Records Decision Nos. 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (1982) (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). We further note 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; *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3 (1982). Accordingly, TEA may not withhold any of the submitted information under section 552.110(a) of the Government Code.

NCS also contends some of its information is excepted under section 552.110(b) of the Government Code. We note the information at issue relates to RFO 701-10-006, in which NCS was the winning bidder. 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* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (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, we find NCS has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its submitted information would cause the company substantial competitive harm. *See* Open Records Decision Nos. 661 (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), 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). We, therefore, conclude TEA may not withhold any of the submitted information under section 552.110(b) of the Government Code.

We note a portion of the submitted information appears to 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. As no further arguments against disclosure have been made, the submitted information must be released, but any information that is protected by copyright may only be released in accordance with copyright law.[3]

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,

Jennifer Burnett
Assistant Attorney General
Open Records Division

JB/dls

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[3]Although NCS "requests an evidentiary hearing to further demonstrate that [NCS's] confidential property is covered by applicable exceptions to publicdisclosure," we find that such a request is outside the scope of the Act.

Ref: ID# 424680

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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