ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 13, 2011

Mr. Brett Norbraten
Open Records Attorney
Texas Department of Aging and Disability Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2011-14920

Dear Mr. Norbraten:

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# 432918 (2011SOLEG0167).

The Texas Department of Aging and Disability Services (the "department") received a request for (1) a copy of the contracts, including all schedules and attachments, under which Pearson VUE ("Pearson") and any other contractor manages the Nurse Aide, Medication Aide, and any other databases or information systems for the department; and (2) all documentation and deliverables provided to the department by Pearson. You claim a portion of the submitted information is excepted from disclosure under section 552.122 of the Government Code.[1] You also inform us release of the submitted information may implicate the proprietary interests of Pearson. Accordingly, you notified Pearson of the request for information and of its 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 an attorney who represents

[1]Although you raised section 552.139 of the Government Code as an exception to disclosure in your initial brief to this office, you did not submit to this office written comments stating the reasons why this section would except the submitted information; we therefore assume you no longer assert this exception. *See* Gov't Code §§ 552.301, .302.

Pearson. We have considered the submitted arguments and reviewed the submitted information.

Pearson contends that portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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).

The Texas Supreme Court has adopted the definition of a trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).[2] This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we will accept a private person's claim for exception as valid under that branch

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[2]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: (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).

if that person establishes a *prima facie* case for the exception and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5-6. However, we cannot conclude that section 552.110(a) applies unless it has been shown that 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).

Section 552.110(b) of the Government Code excepts from disclosure "[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. *See id.*; *see also* Open Records Decision No. 661 (1999).

Pearson states that it provides electronic testing and knowledge measurement services. Pearson informs us this is a highly specialized and fiercely competitive field involving a limited number of companies competing for a finite number of contracts. Further, Pearson asserts release of the information at issue would cause it substantial competitive harm because this information would provide a competitive edge to Pearson's competitors that could be the difference between winning a contract. Based on Pearson's representations and our review, we conclude Pearson has demonstrated that release of most of the information it seeks to protect would result in substantial competitive harm to it for purposes of section 552.110(b). Accordingly, we have marked the information that must be withheld under section 552.110(b).[3] However, we find that Pearson has made only conclusory allegations that release of the remaining information at issue would result in substantial competitive harm and has not provided a specific factual or evidentiary showing to support these allegations. *See* Open Records Decision No. 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 was entirely too speculative). Thus, none of the remaining information may be withheld under section 552.110(b).

Furthermore, upon review, we find that Pearson has not shown that any of the remaining information meets the definition of a trade secret, nor has Pearson demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Thus, none of the remaining information may be withheld under section 552.110(a). *See* ORD 402.

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[3]As our ruling for this information is dispositive, we need not address Pearson's remaining arguments against disclosure.

You raise section 552.122(b) of the Government Code for a portion of the remaining information. This section excepts from public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). In Open Records Decision No. 626 (1994), this office determined that the term "test item" in section 552.122 includes "any standard means by which an individual's or group's knowledge or ability in a particular area is evaluated," but does not encompass evaluations of an employee's overall job performance or suitability. *Id.* at 6. The question of whether specific information falls within the scope of section 552.122(b) must be determined on a case-by-case basis. *Id.* Traditionally, this office has applied section 552.122 where release of "test items" might compromise the effectiveness of future examinations. *Id.* at 4-5; *see also* Open Records Decision No. 118 (1976). Section 552.122 also protects the answers to test questions when the answers might reveal the questions themselves. *See* Attorney General Opinion JM-640 at 3 (1987); Open Records Decision No. 626 at 8 (1994). You state some of the remaining information at issue is material and work product from the contractor who maintains both the Nurse Aide Registry and the licensing and aptitude tests given to prospective nurses aides in the state. You explain disclosure of the internal test development material would compromise future exams. Upon review, we agree that portions of the remaining information evaluate an individual's knowledge or ability in a particular area and, thus, qualify as test items under section 552.122(b). We also find that release of the scoring criteria for these test items would tend to reveal the test items themselves. Therefore, the department may withhold the information we have marked under section 552.122(b). However, we conclude the remaining information does not qualify as test items under section 552.122(b). Thus, none of the remaining information may be withheld under section 552.122(b).

Finally, we note that some of the submitted 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 department must withhold the information we marked under section 552.110(b) of the Government Code. The department may withhold the information we marked under section 552.122(b) of the Government Code. The department must release the remaining submitted information, but any information protected by copyright may only 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,

Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/agn

Ref: ID# 432918

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Jenessa M. Glenn
Moltz Morton O'Toole, L.L.P.
106 East 6th Street, Suite 700
Austin, Texas 78701

Ms. Melody Suchowicki
Pearson VUE
3 Bala Plaza West, Suite 300
Bala Cynywd, Pennsylvania 19004