



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 19, 2012

Mr. William Armstrong
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OR2012-05620

Dear Mr. Armstrong:

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# 451158.

The Alamo Community College District (the "district"), which you represent, received two requests from different requestors for the bid responses, evaluation documents, and final contract for RFP 11A-054. Although you raise no exceptions to disclosure of the submitted information, you believe release of the requested information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified Blackboard, Inc. ("Blackboard"); Desire2Learn; Epsilen, LLC ("Epsilen"); Gyrus; Instructure, Inc. ("Instructure"); Lamda Solutions ("Lamda"); Moodlerooms, Inc. ("Moodlerooms"); Schoology, Inc. ("Schoology"); Protocol 3D Consulting, Inc. ("Protocol"); Remote-Learner; The Bigword; and Pearson Learning Solutions ("Pearson") of the request and their right to submit arguments to this office. *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 Desire2Learn, Instructure, Lamda, and Moodlerooms. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code* § 552.305(d)(2)(B). As of the

date of this ruling, we have not received comments from Blackboard, Epsilen, Gyrus, Schoology, Protocol, Remote-Learner, The Bigword, or Pearson. Thus, we have no basis to conclude these entities have any protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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 district may not withhold any of the information at issue on the basis of any proprietary interests Blackboard, Epsilen, Gyrus, Schoology, Protocol, Remote-Learner, The Bigword, or Pearson may have in the information.

Desire2Learn claims portions of its submitted bid proposal are excepted under section 552.102 of the Government Code, which excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102. However, section 552.102 applies only to information in a personnel file of a government employee. *See id.* Therefore, we find section 552.102 is not applicable to Desire2Learn’s bid proposal, and no portion of its proposal may be withheld on this basis.

Desire2Learn also claims a portion of its bid proposal 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.” *Id.* § 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 the district does not argue section 552.104 is applicable in this instance, we conclude no portion of Desire2Learn’s bid proposal may be withheld under section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

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, 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 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 776 (Tex. 1958). 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.¹ This office must accept a claim that 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* Open Records Decision No. 552 at 5. However, we cannot conclude that section 552.110(a) is applicable 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. 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.

Lamda raises section 552.110(a) of the Government Code for portions of the submitted information. Upon review, we find that Lamda has not established a *prima facie* case that

¹The 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).

any of the submitted information constitutes a trade secret. Accordingly, the district may not withhold any of the submitted information under section 552.110(a) of the Government Code.

Desire2Learn, Instructure, Lamda, and Moodlerooms claim section 552.110(b) of the Government Code for portions of the submitted information.² Upon review, we find Lamda and Moodlerooms have established that the customer information we have marked constitutes commercial or financial information, the disclosure of which would cause them substantial competitive harm. We note, however, that Lamda and Moodlerooms have made some of their customer information, and Desire2Learn has made all of its customer information, publicly available on their websites. Because Lamda, Moodlerooms, and Desire2Learn have published this information, they have failed to demonstrate how release of this information would cause substantial competitive harm under section 552.110(b). In addition, the customer information Instructure seeks to withhold pertains to customers who appear in testimonials or are references for that company. Thus, we find Instructure has not established the information pertaining to these customers is excepted from disclosure under section 552.110. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to professional references). Upon review of the remaining information, we find Desire2Learn, Lamda, and Moodlerooms have established release of some of their respective remaining information constitutes commercial or financial information, the disclosure of which would cause them substantial competitive harm. Accordingly, the district must withhold the information we have marked under section 552.110(b) of the Government Code. Upon further review, we find Desire2Learn, Instructure, Lamda, and Moodlerooms have not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause these companies substantial competitive harm. We note Instructure was the winning bidder with respect to the contract at issue, and the pricing information of a winning bidder is generally not excepted under section 552.110(b). 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* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

We note some of 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

²We understand Instructure and Moodlerooms to raise section 552.110 (b) based on the substance of their arguments.

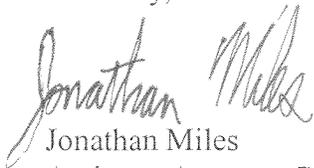
information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk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

In summary, the district must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released, but any copyrighted information 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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 451158

Enc. Submitted documents

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(w/o enclosures)

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