



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2012

Dr. Ruben Alejandro
Superintendent of Schools
Weslaco Independent School District
P.O. Box 266
Weslaco, Texas 78599-0266

OR2012-12251

Dear Dr. Alejandro:

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# 461243.

The Weslaco Independent School District (the "district") received a request for copies of all evaluation documents and bid responses submitted by vendors outside of Pearson for request for proposals number 12-03-39, Student Information System. We understand you have released or will release the requested information pertaining to four of the bidders. Although you take no position on the public availability of the remaining requested information, you state the remaining requested information may implicate the proprietary interests of third parties. Accordingly, you inform us you notified Prologic Technology Systems, Inc. ("Prologic") and Sungard K-12 Education ("Sungard") of the request and of their right to submit comments as to why the requested information should not be released to the requestor. *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances).* You have submitted comments from Prologic and Sungard. We have considered the submitted arguments and reviewed the submitted information.

Section 552.110 of the Government Code 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 (1990)*. 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)*.

Prologic and Sungard assert some of their submitted information is protected under section 552.110(a) of the Government Code. Upon review, we find Prologic has established a *prima facie* case that some of its customer information, which we have marked, constitutes trade secret information for purposes of section 552.110(a). Accordingly, the district must withhold the information we have marked under section 552.110(a). We note, however, that Prologic has made the remaining customer information it seeks to withhold publicly available on its website. Because Prologic has published this information, it has failed to demonstrate this information is a trade secret. Additionally, we note pricing information

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)*.

pertaining to a particular proposal or 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.” See Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Further, pricing information of a winning bidder, as Sungard is in this case, is generally not excepted under section 552.110. 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 Prologic and Sungard have failed to demonstrate any of the remaining information at issue meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the district may not withhold any of Prologic’s remaining information or any of Sungard’s submitted information under section 552.110(a) of the Government Code.

Prologic and Sungard contend some of their information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we find Prologic has established that its pricing information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Additionally, Sungard has established the customer information we have marked constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, the district must withhold the information we have marked under section 552.110(b) of the Government Code. We note, however, Sungard has made its remaining customer information publicly available on its website. As this information is publicly available, we find the release of this information would not cause Sungard substantial competitive harm. Further, upon review, we find Prologic and Sungard have not established any of their remaining submitted information constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. 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 information at issue 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 district must withhold the information we have marked under section 552.110 of the Government Code. The remaining submitted information must be

released; however, any information subject to 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,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

Ref: ID# 461243

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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