



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 15, 2012

Mr. W. Montgomery Meitler
Assistant Counsel
Texas Education Agency
1701 North Congress Ave.
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OR2012-18473

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# 471183 (TEA PIR # 18186).

The Texas Education Agency (the "agency") received three requests for information pertaining to request for proposals 701-12-026. You state the agency will release some of the requested information. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Achievement Solutions, LLC ("Achievement"), Fast Path Learning, LLC ("Fast Path"), IStation, Pearson Digital Learning ("Pearson"), Texas Instruments Incorporated ("TI"), and Think Through Learning, Inc. ("TTL"). Accordingly, you state you notified these third parties of the requests for information and of their rights to submit arguments to this office as to why their 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 IStation, Pearson, and TI. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note IStation seeks to withhold information that was not submitted by the agency. This ruling does not address information that was not submitted by the agency and

is limited to the information the agency has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Next, we note that 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) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Achievement, Fast Path, or TTL explaining why their requested information should not be released. Therefore, we have no basis to conclude that Achievement, Fast Path, or TTL has protected proprietary interests in the requested information. *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. Accordingly, the agency may not withhold any portion of the submitted information based upon the any interest these parties may have in the information.

IStation, Pearson, and TI assert portions of their information are excepted from disclosure under section 552.110 of the Government Code. 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 2. 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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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* ORD 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 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we find that IStation, Pearson, and TI have established a *prima facie* case that some of their information, which we have marked, constitutes trade secrets. Therefore, the agency must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. We note, however, that IStation, Pearson, and TI have made the remaining customer information they seek to withhold publicly available on their websites. Because IStation, Pearson, and TI have published this information, they have failed to demonstrate this information constitutes trade secrets. Additionally, we note pricing information 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

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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 IStation 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 IStation, Pearson, and TI have failed to demonstrate how any portion of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. Therefore, the agency may not withhold any of IStation’s, Pearson’s, or TI’s remaining information pursuant to section 552.110(a) of the Government Code.

We find Pearson and TI have established that release of some of their remaining information, which we have marked, would cause the companies substantial competitive injury. Therefore, the agency must withhold the marked information under section 552.110(b) of the Government Code. However, we find IStation, Pearson, and TI have only made conclusory allegations that release of their remaining information at issue would result in 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, as previously noted, IStation was a 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). *See* ORD 514. *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344–45. Accordingly, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

Pearson asserts portions of its information may be excepted from disclosure under section 552.101 of the Government Code on the basis of federal copyright law. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, copyright law does not make information confidential for purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). 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. Accordingly, the agency may not withhold any of the information at issue under section 552.101 in conjunction with copyright law, but any information that is protected by copyright may only be released in accordance with copyright law.

Pearson also raises section 552.102 of the Government Code for portions of its information. Section 552.102(a) 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(a). However, section 552.102 applies only to information in the personnel file of a government employee. *See id.* Therefore, we find section 552.102 is not applicable to Pearson’s information, and the agency may not withhold any of the remaining information on that basis.

Finally, Pearson raises section 552.136 of the Government Code for its “demo” information. Section 552.136 provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value, or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument, and includes an account number. *Id.* § 552.136(a). Although Pearson asserts its demo passwords and user names constitute access devices, we find Pearson has failed to demonstrate how this information consists of access device numbers used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Accordingly, the agency may not withhold the information at issue under section 552.136 of the Government Code.

In summary, the agency must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released, but any information that is 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,



Cynthia G. Tynan
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Open Records Division

CGT/ag

Ref: ID# 471183

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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