ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 26, 2012

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2012-18897

Dear Ms. McGowan:

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# 471820 (ORR #s 11504, 11519, 11601).

The Dallas Independent School District (the "district") received three requests for information pertaining to RFP # LH-203926 relating to a data collection and reporting assessment system.[1] The first requestor requested copies of the winning vendors' proposals, as well as documentation concerning evaluation of the submitted proposals and presentations. The second requestor requested all proposals submitted in response to the RFP, as well as evaluation documents and an explanation as to why the contract was awarded to the winning bidders and not the requestor's company. The third requestor requested all proposals submitted in response to the RFP, as well as evaluation and other documents

[1]We note the requests at issue were originally set up as two separate rulings by this office, with the ruling identification numbers 471820 and 472626. We have combined these two ruling numbers and will issue them as one ruling with the identification number 471820.

related to the contract award.[2] You inform us some information is being released to the first requestor and indicate some of the requested information has been released to the third requestor. We note that the Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, if information has been voluntarily released to any member of the public, that same information may not subsequently be withheld from the public, unless its public disclosure is expressly prohibited by law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Therefore, any information that the district has released to the first and third requestors must also be released to the second requestor, to the extent that such information is responsive to the second request.

You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. Further, you state release of the submitted information may implicate the proprietary interests of various third parties.[3] Accordingly, you state, and provide documentation showing, you have notified the third parties of the request for information and of each company's 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). As of the date of this ruling, we have received comments from CTB, Pearson, Scholastic, and Wireless Generation. However, we have not received correspondence from any of the remaining third parties. We note that 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). Thus, the remaining third parties have not demonstrated that they have a protected proprietary interest in any of 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 the submitted information on the basis of any proprietary interests ALEKS Corporation, Britannica Digital Learning, Global Scholar, Inc., or Riverside

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[2]The first request was received by the district on September 6, 2012, the second request was received on September 11, 2012, and the third request was received on October 3, 2012. For purposes of this ruling, the requestor whose request was received on September 6 will be referred to as the "first requestor," the requestor whose request was received on September 11 will be referred to as the "second requestor," and the requestor whose request was received on October 3 will be referred to as the "third requestor."

[3]The companies notified of the request are ALEKS Corporation; Britannica Digital Learning; CTB McGraw-Hill LLC ("CTB"); Global Scholar, Inc.; NCS Pearson, Inc. ("Pearson"); Riverside Publishing; Scholastic, Inc. ("Scholastic"); and Wireless Generation.

Publishing may have in the information. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Pearson asserts some of its information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the district, not the proprietary interests of private parties such as Pearson. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the district does not raise section 552.104 as an exception to disclosure. Therefore, the district may not withhold any of Pearson's information under section 552.104 of the Government Code.

Although the district argues the submitted information is excepted under section 552.110 of the Government Code, that exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the district's arguments under section 552.110. We will, however, address the arguments of Pearson, Scholastic, and CTB under this exception. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Gov't Code § 552.110(a), (b). Scholastic and CTB raise both the trade secret and commercial-financial branches of section 552.110 for portions of their information, while Pearson argues portions of its information are excepted as commercial financial information. Wireless Generation asserts that its proposal in its entirety is subject to copyright law. CTB also raises section 552.122 as well as copyright for a portion of its information.

Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret 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. 1958); *see also* Open Records Decision No. 552 at 2. Section 757 provides 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.[4] RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a private person's claim for exception as valid under section 552.110 if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown 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) 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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Scholastic and CTB contend portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Scholastic has demonstrated its client information, which we have marked, constitutes trade secrets of the company. This information must be withheld under section 552.110(a). We find neither Scholastic nor CTB has established a *prima facie* case that any of the companies' remaining information is a trade secret protected by section 552.110(a). *See* ORDs 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

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[4]The following are the six factors that the Restatement gives 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).

(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 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. Thus, the district may not withhold any of Scholastic's or CTB's remaining information under section 552.110(a) of the Government Code.

Pearson, Scholastic, and CTB also contend portions of their information are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find Scholastic has failed to make the specific factual or evidentiary showing required by section 552.110(b) that release of any of their information would cause the company substantial competitive harm. *See* ORD 319 at 3 (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Additionally, 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, such as Scholastic in this instance, 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). Therefore, the district may not withhold any of Scholastic's information under section 552.110(b) of the Government Code.

We find Pearson has demonstrated how release of the information it seeks to withhold concerning its customers would cause the company substantial competitive harm. Thus, the district must withhold this information, which we have marked, under section 552.110(b). In addition, we find that CTB has established its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the district must withhold the pricing information of CTB that we have marked under section 552.110(b). We find, however, that Pearson and CTB have failed to make the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information at issue would cause the companies substantial competitive harm. Accordingly, the district may not withhold any of Pearson's or CTB's remaining information under section 552.110(b) of the Government Code.

CTB also argues that a portion of its information is excepted from disclosure under section 552.122 of the Government Code. Section 552.122 of the Government Code excepts from required public disclosure "a test item developed by a . . . governmental body[.]" Gov't Code § 552.122(b). Section 552.122 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to

protect the interests of third parties. *See* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As the district did not submit any arguments in support of withholding any information pursuant to section 552.122, the district may not withhold any portion of the submitted information pursuant to section 552.122 of the Government Code. *See* Open Records Decision No. 665 at 2 n. 5 (2000) (discretionary exceptions generally).

Next, we note some of the remaining information is subject to section 552.136 of the Government Code.[5] Section 552.136 states 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, we find the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

Finally, we note that a portion of the information, including information submitted by Wireless Generation and CTB, 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 sections 552.110 and 552.136 of the Government Code. The remaining information must be released to the respective requestors, 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

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[5]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/som

Ref: ID# 471820

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

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