ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 12, 2013

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2013-13996

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# 495996 (TEA PIR# 19793).

The Texas Education Agency (the "agency") received a request for all documents related to any requests for proposals for student information systems or modules and their add-ons or accessories or any other software solution to the management of student information or databases. You inform us a portion of the requested information will be released. Although you take no position on the public availability of the submitted information, you state the release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified Infinite Campus, Inc. ("Infinite"); JR3 Education Associates, L.P. ("JR3"); NCS Pearson, Inc. ("Pearson"); Prologic Technology Systems, Inc. ("Prologic"); Skyward, Inc. ("Skyward"); SunGard Public Sector K-12 ("SunGard"); and Texas Computer Cooperative ("TCC") of the request and of their right to submit comments to this office as to why the submitted 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). We have received comments from Infinite, Pearson, and TCC. We have considered the

submitted arguments and reviewed the submitted information, a portion of which you indicate constitutes a representative sample.[1]

Initially, we note some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-11639 (2013), 2011-18408 (2011), 2011-17250 (2011), and 2011-13355 (2011). In Open Records Letter No. 2013-11639 we determined the information at issue in that ruling must be released. In Open Records Letter No. 2011-18408, we determined the agency may withhold the information we marked under section 552.104 of the Government Code, must withhold the information we marked under section 552.110(b) of the Government Code, and must release the remaining information at issue, but any information subject to copyright may only be released in accordance with copyright law. In Open Records Letter No. 2011-17250, we determined the agency may withhold the information we marked under section 552.104 of the Government Code, must withhold the information we marked under section 552.110(b) of the Government Code, and must release the remaining information at issue, but any information subject to copyright may only be released in accordance with copyright law. In Open Records Letter No. 2011-13355, we determined the agency must withhold certain information under section 552.110(a) of the Government Code and must release the remaining information at issue. We understand there has not been any change in the law, facts, or circumstances on which Open Records Letter Nos. 2013-11639, 2011-18408, and 2011-13355 were based. Accordingly, we conclude the agency must rely on Open Records Letter Nos. 2013-11639, 2011-18408, and 2011-13355 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Additionally, with the exception of the information pertaining to Pearson that we ordered released, we understand there has not been any change in the law, facts, or circumstances on which Open Records Letter No. 2011-17250 was based. Accordingly, we conclude, with the exception of the information pertaining to Pearson that we ordered released, the agency must also rely on Open Records Letter No. 2011-17250 as a previous determination and withhold or release the identical information in accordance with that ruling. *See id.*

We note Pearson submitted arguments in response to the request at issue in Open Records Letter No. 2011-17250. In that ruling we found the agency must withhold some of Pearson's information at issue under section 552.110(b) of the Government Code, but Pearson failed to demonstrate the applicability of section 552.110 of the Government Code to any of its remaining information at issue. Accordingly, we determined in our previous ruling the agency must release, among other things, portions of Exhibits F and G of Pearson's proposal.

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[1]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the agency may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. In this instance, Pearson has submitted further arguments against release of information that was not withheld in Open Records Letter No. 2011-17250. Pearson claims these portions of its proposal are excepted under sections 552.101 and 552.110 of the Government Code, which make information confidential under the Act. Therefore, because circumstances have changed with respect to Pearson's information that was not withheld in Open Records Letter No. 2011-17250, the agency may not rely upon the prior ruling as a previous determination for this information, and we will address Pearson's arguments against release of this information. We will also consider the remaining arguments for the submitted information that was not at issue in the previous rulings.

Next, we note 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from JR3, Prologic, Sungard, or Skyward on why their information at issue should not be released. Therefore, we have no basis to conclude JR3, Prologic, Sungard, or Skyward have protected proprietary interests in their information at issue. *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 remaining information on the basis of any proprietary interest JR3, Prologic, Sungard, or Skyward may have in it.

Pearson raises section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Pearson has not directed our attention to any law, nor are we aware of any law, under which any of the remaining information is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Accordingly, none of the remaining information may be withheld under section 552.101 of the Government Code.

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.[2] 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) of the Government Code protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause

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[2]The 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).

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.

As mentioned above, Exhibits F and G of Pearson's proposal were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-17250. In that prior ruling, we found the agency must withhold some of Pearson's information at issue under section 552.110(b) of the Government, but held Pearson failed to demonstrate the applicability of section 552.110(b) to any of its remaining information at issue. We also concluded Pearson failed to demonstrate any of the remaining information at issue meets the definition of a trade secret and did not demonstrate the necessary factors to establish a trade secret claim for this information. Since the issuance of the previous ruling on November 22, 2011, Pearson has not disputed this office's conclusion regarding the release of portions of Exhibits F and G of its proposal, and we presume the agency has released this information in accordance with that ruling. In this regard, we find Pearson has not taken any measures to protect the information at issue in order for this office to conclude any portion of those documents now either qualifies as a trade secret or contains commercial or financial information, the release of which would cause Pearson substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the agency may not withhold any of Pearson's information that we previously ordered released in Open Records Letter No. 2011-17250, under section 552.110 of the Government Code.

Infinite and Pearson contend some of their remaining information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we find Infinite and Pearson have established some of their remaining information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Accordingly, the agency must withhold the information we have marked under section 552.110(b) of the Government Code.[3] However, upon review, we find Infinite and Pearson have not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. *See* ORD 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the agency may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Pearson also asserts some of its remaining information contains trade secrets. Upon review, we find Pearson has failed to demonstrate any of their remaining information meets the

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[3]As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

definition of a trade secret, nor has the company demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the agency may not withhold any of Pearson's remaining information under section 552.110(a) of the Government Code.

We note some of the remaining 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 agency must rely on Open Records Letter Nos. 2013-11639 , 2011-18408, and 2011-13355 as previous determinations and withhold or release the identical information in accordance with those rulings. With the exception of the information pertaining to Pearson that we ordered released, the agency must also rely on Open Records Letter No. 2011-17250 as a previous determination and withhold or release the identical information in accordance with that ruling. The agency must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released; however, any information subject to copyright may be released only 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to 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# 495996

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Eric Creighton
Infinite Campus, Inc.
4321 109th Avenue, North East
Blaine, Minnesota 55449
(w/o enclosures)

Mr. Bob Barnard
Skyward, Inc.
5233 Coye Drive
Stevens Point, Wisconsin 54481
(w/o enclosures)

Mr. Robert H. Clemons
JR3 Education Associates, LP
1200 Mary Avenue
Waco, Texas 76701
(w/o enclosures)

Mr. Rusty Player
Prologic Technology Systems, Inc.
9600 North MoPac Expressway, Suite 300
Austin, Texas 78759
(w/o enclosures)

Mr. Robert A. Mignanelli
Assistant General Counsel
Pearson
Mail Stop #31
3075 West Ray Road, Suite 200
Chandler, Arizona 85226
(w/o enclosures)

Mr. Mike Lovejoy
SunGard Public Sector K-12
1000 Business Center Drive
Lake Mary, Florida 32746
(w/o enclosures)

Texas Computer Cooperative
c/o Mr. David P. Backus
Underwood Attorneys at Law
P.O. Box 16197
Lubbock, Texas 79490
(w/o enclosures)