ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 26, 2014

Mr. Brian Nelson
General Counsel
Office of General Counsel
Lone Star College System
5000 Research Forest Drive
The Woodlands, Texas 77381

OR2014-10988

Dear Mr. Nelson:

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# 527879 (LSCS File Nos. PR14-0408-00088 and PR14-0505-00104).

The Lone Star College System (the "system") received two requests for the proposals submitted for request for proposals number 289. You state, although the system takes no position with respect to the requested information, its release may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, the system notified the third parties of the requests for information and of their right to submit arguments stating why their information should not be released.[1] *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by ELS.

[1]The third parties notified pursuant to section 552.305 are the following: Association of Community College Trustees; ChaseSource; Greenwood/Asher & Associates, Inc.; Gold Hill Associates; Isaacson, Miller; LATAVC Consulting Group, L.L.C.; R.H. Perry and Associates, Inc.; The ELS Group, L.L.C. ("ELS"); and Wheless Partners.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has received comments from only ELS explaining why its information should not be released to the requestor. Thus, we have no basis to conclude the release of the submitted information would implicate the interests of the remaining third parties, and none of the submitted information may be withheld on that basis. *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.

ELS submits arguments against disclosure of its information 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret to be as follows:

> [A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *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.[2] *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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.*; ORD 661 at 5-6.

ELS claims its pricing and methodology information constitutes trade secrets. Upon review, we find ELS has established a *prima facie* case its pricing information constitutes trade secret information. Accordingly, the system must withhold ELS's pricing information, which we have marked, under section 552.110(a) of the Government Code.[3] However, we find ELS has failed to demonstrate the remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the system may not withhold the remaining information on the basis of section 552.110(a).

ELS also contends its methodology information is commercial or financial information, release of which would cause substantial competitive harm to ELS. However, we find ELS has not made the specific factual or evidentiary showing required by section 552.110(b) of the Government Code that release of its remaining information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to

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[2]There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

(1) the extent to which the information is known outside of [the company's] business;
(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 to [its] competitors;
(5) the amount of effort or money expended by [the company] in developing the information; and
(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

[3]As our ruling is dispositive, we need not address ELS's remaining argument against disclosure of its pricing information.

organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the system may not withhold the remaining information under section 552.110(b).

In summary, the system must withhold the information we have marked under section 552.110(a) of the Government Code. The system must release the remaining information.

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,

Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/akg

Ref: ID# 527879

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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