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ATTORNEY GENERAL OF TEXAS

August 23, 2016

Ms. Elisabeth D. Nelson
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OR2016-19040

Dear Ms. 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# 623592.

The Carrollton-Farmers Branch Independent School District (the "district"), which you represent, received a request for information pertaining to a specified request for proposals. The district does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the district states, and provides documentation showing, it notified the following third parties of the district's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released: Blackboard, Inc. ("Blackboard"); Dallas County School; eChalk, Inc. ("eChalk"); Instructure, Inc. ("Instructure"); and School Pointe, Inc. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 correspondence from Blackboard, eChalk, and Instructure objecting to the release of some

of the information at issue.¹ We have considered the submitted arguments and reviewed the submitted information.

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) 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, only Blackboard, eChalk, and Instructure have submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of any of the remaining third parties, and the district may not withhold any portion of it on that basis. *See* 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, 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.

Section 552.104(a) of the Government Code exempts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* Instructure states it has competitors and argues release of its proposal would cause it substantial competitive harm. Upon review, we find Instructure has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold Instructure's proposal under section 552.104(a) of the Government Code.

Section 552.110 of the Government Code 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. Section 552.110(a) of the Government Code exempts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 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 (1990). Section 757 provides a trade secret is

¹Although Blackboard and eChalk do not include a specific exception to disclosure in its arguments, we understand them to raise section 552.110 based on their arguments. In addition, although Instructure raises sections 552.110 and 552.139 of the Government Code, it has not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume Instructure no longer asserts these exceptions. *See* Gov't Code § 552.305.

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.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under that branch 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, substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (1999) (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

Upon review, we find eChalk has established the release of its customer information would cause it substantial competitive injury. Nevertheless, to the extent eChalk has published any of the customer information at issue on its website, this information is not confidential under

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

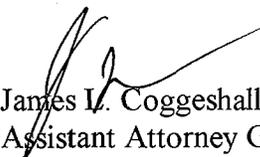
section 552.110. Accordingly, the district must withhold eChalk's customer information in the submitted documents under section 552.110(b), provided eChalk has not published the information on its website. In addition, we find Blackboard and eChalk have established the release of some of the remaining information, which we have marked, would cause them substantial competitive injury. Thus, the district must also withhold the information we have marked under section 552.110(b). However, we find Blackboard and eChalk have failed to establish release of any of the remaining information, including any customer information published on eChalk's website, would cause them substantial competitive injury. *See id.* § 552.110(b). We also conclude Blackboard and eChalk have not shown any of the remaining information, including any customer information published on eChalk's website, meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See id.* § 552.110(a); ORD 402 at 2-3. Therefore, the district may not withhold any of the remaining information under section 552.110.

To conclude, the district may withhold Instructure's proposal under section 552.104(a) of the Government Code. The district must withhold eChalk's customer information and the information we have marked under section 552.110(b) of the Government Code; however, the district may only withhold eChalk's customer information under section 552.110(b) if it has not published the information on its website. The district 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bhf

Ref: ID# 623592

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)