



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 5, 2006

Mr. S. Anthony Safi  
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OR2006-03368

Dear Mr. Safi:

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# 245551.

The El Paso Independent School District (the "district"), which you represent, received a request for the following information: (1) all responses submitted in response to Request for Proposals ("RFP") No. 04-05; (2) communications between the district and any of the respondents to the RFP; (3) internal communications of the district, its staff, employees, or representatives related to the RFP; and (4) agendas, notes, minutes, or other reports relating to the evaluation of the responses to the RFP. You inform us that the district is providing some of the requested information to the requestor. However, you claim that the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also believe that the submitted information may be protected under section 552.110 of the Government Code because it implicates the proprietary interests of the following third parties: Century Consultants ("Century"); CrossPointe, LLC ("CrossPointe"); Empower Solutions ("Empower"); Information Design, Inc. ("Information"); MAXIMUS, Inc. ("MAXIMUS"); Microsoft Corporation ("Microsoft"); Pearson School Systems ("Pearson"); Prologic Technology Systems, Inc. ("Prologic"); Skyward; SunGard Bi-Tech Inc. ("SunGard Bi-Tech"); SunGard Pentamation, Inc. ("SunGard Pentamation"); and Tyler Technologies, Inc. ("Tyler"). Accordingly, you state, and provide documentation showing, that the district notified these companies of the request for information and of their right to submit arguments to this office as to why the information should not be released. *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 in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the district's procedural obligations under section 552.301 of the Government Code. This section prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) provides that the governmental body must ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(a), (b). Furthermore, pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld; (2) a copy of the written request for information; (3) a signed statement or sufficient evidence showing the date the governmental body received the written request; and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e).

You acknowledge that the district failed to comply with the procedural requirements of section 552.301.<sup>1</sup> Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third-party interests. *See* Open Records Decision No. 630 (1994).

You argue that "had the request initially been submitted to the Superintendent, the Chief Administrative Officer of the District, as its statutory officer for public information under Section 552.201 of the [Government] Code," the district would not have failed to meet its obligations under section 552.301. The Act's disclosure requirements are generally triggered by a governmental body's receipt of a written request for information. *See* Gov't Code § 552.301(a). However, in instances where a written request is submitted to a governmental body by facsimile transmission or through e-mail, the Act specifically provides that the request be "sent to the officer for public information, or the person designated by that officer[.]" *Id.* § 552.301(c). Thus, for written requests that are submitted to a governmental body via facsimile or e-mail, the Act's disclosure requirements are triggered only if the request is sent to the governmental body's "officer for public information," or by a person

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<sup>1</sup>The request for information is dated November 10, 2005, but the district did not request a decision from this office or provide the information required by section 552.301(e) until January 27, 2006.

designated by that officer to receive such requests. In this instance, the written request indicates it was received by the district via certified United States mail. Thus, the time periods under section 552.301 were triggered upon the district's receipt of this request, even though it was not sent to the district's public information officer or that officer's designee.

You claim that the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Sections 552.104 and 552.111 are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived by the governmental body. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver), 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver). You contend, however, that section 552.104 can provide a compelling reason to withhold information based on Open Records Decision No. 44 (1974). However, this decision did not conclude that section 552.104, or any statutory predecessor thereof, provided a compelling reason to withhold information. Rather, it determined a compelling reason existed to withhold information if the governmental body at issue had a statutory duty to conduct sealed bidding under the Education Code. *See* ORD 44 at 3. Thus, Open Records Decision No. 44 does not support your contention that a compelling reason exists to withhold information under section 552.104 of the Government Code.

You also argue that section 552.104 can provide a compelling reason to withhold information based on the Texas Court of Appeals memorandum opinion of *Reyna v. State*, No. 13-02-499-CR (Tex. App.—Corpus Christi Jan. 5, 2006, no pet.) (not designated for publication), 2006 WL 20772. We note, however, that this opinion is an unpublished memorandum opinion. *See* TEX. R. APP. P. 47.2(b). Opinions that are not designated for publication by the court of appeals have no precedential value. TEX. R. APP. P. 47.7. As such, *Reyna* does not provide any precedential authority for your assertion that section 552.104 provides a compelling reason to withhold information. We therefore conclude that, because the district failed to comply with the procedural requirements of section 552.301 and section 552.104 does not provide a compelling reason to withhold information from the public, the district may not withhold any of the submitted information under section 552.104. *See* ORD 592 at 8. Furthermore, because section 552.111 also does not provide a compelling reason to withhold information, none of the submitted information may be withheld on that basis either. *See* ORD 470 at 7.

However, the third-party proprietary interests at issue here can provide compelling reasons to withhold information from disclosure for purposes of section 552.302 of the Government Code. 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) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, the following third parties have not submitted comments explaining why their information should be withheld from disclosure: Century; CrossPointe; Empower; Information; MAXIMUS; Microsoft; Prologic; Skyward; SunGard Pentamation; and Tyler. Thus, these third parties have not demonstrated that any of their information is proprietary for purposes of the Act. *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 (1990). Accordingly, the district may not withhold any of the submitted information on the basis of any proprietary interest that these third parties may have in the information.

Pearson and SunGard Bi-Tech have submitted arguments to this office objecting to the release of portions of their information. First, Pearson argues that it has “marked each page of the information as ‘Confidential’ . . . for the District’s use[.]” However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. See Attorney General Opinion JM-672 (1987). Consequently, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Both Pearson and SunGard Bi-Tech claim exception to disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial 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.” See Gov’t Code § 552.110.

The Texas Supreme Court has adopted the definition of a “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 [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 a single or ephemeral event 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 763, 776 (Tex. 1958). If the governmental body takes no position on the application

of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> See Open Records Decision No. 552 at 5 (1990). The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). See Open Records Decision No. 402 at 3 (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.” 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 Open Records Decision No. 661 at 5-6 (1999).

Upon review of Pearson’s arguments and the information at issue, we find that Pearson has demonstrated that the pricing information it seeks to withhold is excepted from disclosure under section 552.110(b). We have marked this information, which the district must withhold. However, we find that Pearson has not established that any of the remaining information it seeks to withhold is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). See RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”); Open Records Decision Nos. 552 (1990), 661 (1999). Thus, none of Pearson’s remaining information may be withheld under section 552.110.

Upon review of SunGard Bi-Tech’s arguments and the information it seeks to withhold, we find that SunGard Bi-Tech has demonstrated that some of its customer and pricing information is protected under section 552.110(b). We have marked this information, which the district must withhold. However, we find SunGard Bi-Tech has not established that any of its remaining information is excepted from disclosure as either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause the companies substantial competitive harm under section 552.110(b). See

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<sup>2</sup>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 also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”); Open Records Decision Nos. 552 (1990), 661 (1999). As such, none of the remaining information SunGard Bi-Tech seeks to withhold may be withheld under section 552.110 of the Government Code.

However, both Pearson and SunGard Bi-Tech also claim that some of the information at issue is protected by copyright law. Some of Pearson’s and SunGard Bi-Tech’s remaining information, as well as some of the information pertaining to the other companies at issue, may be protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright law unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials that are protected by copyright law, 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. *See* Open Records Decision No. 550 (1990).

To conclude, the district must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining submitted information must be released to the requestor. However, in releasing any of the remaining submitted information that is protected by copyright, the district must comply with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552:301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll

free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within ten calendar days of the date of this ruling.

Sincerely,



Robert B. Rapfogel  
Assistant Attorney General  
Open Records Division

RBR/krl

Ref: ID# 245551

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