



ATTORNEY GENERAL OF TEXAS
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September 14, 2006

Ms. Ylise Janssen
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OR2006-10742

Dear Ms. Janssen:

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# 259309.

The Austin Independent School District (the "district") received a request for the bids submitted under RFP No. P05-042, Curriculum and Assessment Management System. You inform us that the district will release some of the requested information. You take no position with respect to the public availability of the rest of the requested information. You believe, however, that the information that you have submitted implicates the proprietary interests of third parties. You notified the interested parties of the request for information and of their right to submit arguments to this office as to why the information should not be released.¹ We also received correspondence from EDmin.com, Inc. ("EDmin.com"), EdSoft Software Corporation ("EdSoft"), Kaplan K12 Learning Services ("Kaplan"), and Pearson School Systems ("Pearson"). We have considered all of the submitted arguments and have reviewed the submitted information.²

We first note that an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 to submit its reasons, if any,

¹See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

²We note that Pearson's arguments encompass information that was not submitted to this office by the district. This decision does not address the public availability of that information. See Gov't Code § 552.301(e)(1)(D).

as to why information relating to that party should not be released.³ See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from EASI, Edusoft, IBM, Maximus, Office, PLATO, Renaissance, SchoolNet, TetraData, Trendec, Triand, TeachStream, Thomson, or Wordware. Thus, none of those parties has demonstrated that any of the submitted information is confidential or proprietary for the purposes of the Act. See *id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we address the claimed exceptions to disclosure. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. See Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Both EdSoft and Pearson raise section 552.101. However, neither EdSoft nor Pearson has directed our attention to any law under which any of their respective information is considered to be confidential for the purposes of section 552.101.⁴ Therefore, the district may not withhold any information under section 552.101 of the Government Code.

Kaplan raises section 552.102 of the Government Code. Section 552.102(a) excepts from public disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). This exception is applicable only to information that relates to public officials and employees. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to Gov't Code § 552.102). Because the submitted information relates to employees of private entities, the district may not withhold any information under section 552.102(a) of the Government Code.

EDmin.com raises section 552.104 of the Government Code. Section 552.104(a) excepts from public disclosure "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, not the proprietary interests of private parties such as EDmin.com. See Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus,

³You inform us that the other parties who received notice are EASI Educational Solutions, L.P. ("EASI"); Edusoft; IBM Business Consulting Services ("IBM"); Maximus, Inc. ("Maximus"); Office Communications Systems, Inc. ("Office"); PLATO Learning, Inc. ("PLATO"); Renaissance Learning, Inc. ("Renaissance"); SchoolNet, Inc.; TetraData Corporation; Trendec Corporation; Triand, Inc.; Video Journal of Education/TeachStream ("TeachStream"); Thomson Gale ("Thomson"); and Wordware Publishing, Inc. ("Wordware").

⁴We note that the federal copyright law does not make information confidential for purposes of section 552.101. See Open Records Decision No. 660 at 5 (1999) (Federal Copyright Act does not make information confidential, but rather gives copyright holder exclusive right to reproduce his work, subject to another person's right to make fair use of it.).

because the district does not claim this exception, the district may not withhold any information under section 552.104 of the Government Code.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to 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.” Gov’t Code § 552.110(a)-(b).

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 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 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” aspect of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.⁵ *See Open Records Decision No. 552 at 5 (1990)*. However,

⁵The 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)*.

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. *See* Open Records Decision No. 402 (1983).

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 information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

EDmin.com and Pearson contend that portions of their respective proposals are trade secrets under section 552.110(a). EDmin.com and Pearson also assert that parts of their proposals are exempted from disclosure under section 552.110(b). Kaplan argues that section 552.110(b) is applicable to parts of its proposal. EdSoft asserts that section 552.110 is applicable to its customer and financial information.⁶ Having considered all of the parties' arguments and reviewed their information, we conclude that the district must withhold some of Pearson's information under section 552.110(a). Additionally, the district must withhold Pearson's pricing information under section 552.110(b). We also conclude that the district must withhold some of EDmin.com's, Kaplan's, and EdSoft's information under section 552.110(b). We have marked the information relating to Pearson, EDmin.com, Kaplan, and EdSoft that must be withheld under section 552.110. We conclude that none of the parties has demonstrated that any of the remaining information at issue qualifies as a trade secret under section 552.110(a). Likewise, none of the parties has made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information at issue would cause substantial competitive harm. Therefore, the district may not withhold any of the remaining information under section 552.110. *See* Open Records Decision Nos. 552 at 5, 661 at 5-6; *see also* Open Records Decision No. 319 at 3 (1982) (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).

We note that section 552.136 of the Government Code is applicable to some of the remaining information at issue.⁷ This exception provides as follows:

- (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or

⁶We note that customer information published on a publicly-available internet website does not qualify as a trade secret or as commercial or financial information whose disclosure would result in substantial competitive harm.

⁷Unlike other exceptions to disclosure, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding 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. We have marked the information that the district must withhold under section 552.136.

We also note that some of the information to be released appears to be protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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 at 8-9 (1990).

In summary, the district must withhold the information that we have marked under sections 552.110 and 552.136 of the Government Code. The rest of the information must be released. Information that is protected by copyright must be released in accordance 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 10 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).

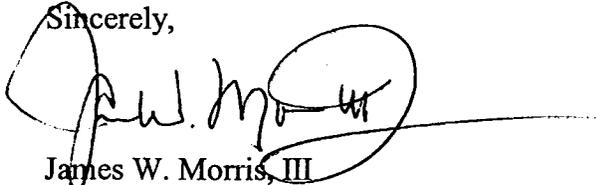
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *Texas 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 10 calendar days of the date of this ruling.

Sincerely,



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Open Records Division

JWM/sdk

Ref: ID# 259309

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