



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 6, 2009

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

OR2009-04477

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# 339055 (TEA PIR ID# 10666).

The Texas Education Agency (the "agency") received a request for certain proposals submitted in response to a specified Request for Qualifications issued by the agency. Although the agency takes no position as to the disclosure of the submitted proposals, you state that release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, that the agency notified the Center for Secondary School Redesign, Inc., the Institute for Research and Reform in Education, and Resurgent Technologies Institute d/b/a the R4 Group ("R4") of the request and of each company's opportunity to submit comments to this office as to why its requested 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 the applicability of exception to disclose under Act in certain circumstances). You also state, and provide documentation showing, that you have notified other governmental entities of the request and of each entity's opportunity to submit comments to this office as to why its information should not be released to the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered arguments submitted by R4 and reviewed the submitted proposals.

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 id.*

§ 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from R4. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of any of the other interested third parties. *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, 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 agency may not withhold any portion of the submitted information based on the other third parties' proprietary interests. Furthermore, as of the date of this letter, we have not received any arguments from the governmental entities you notified pursuant to section 552.304. Thus, none of the submitted proposals may be withheld on behalf of the notified governmental entities. *See* Gov't Code § 552.304.

We now address the submitted arguments. R4 raises section 552.110 of the Government Code for certain portions of its proposal. 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. *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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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.¹ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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) 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.* § 552.110(b); see also Open Records Decision No. 661 at 5-6 (1991) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

R4 has identified those portions of its proposal it asserts are trade secrets excepted under section 552.110(a). Having considered R4’s arguments, we conclude that R4 has established a *prima facie* case that some of the information in its proposal, which we have marked, constitutes trade secrets. Therefore, the agency must withhold the information we have marked pursuant to section 552.110(a) of the Government Code. However, R4 has failed to demonstrate that any of the remaining information it seeks to withhold meets the definition of a trade secret. See RESTATEMENT OF TORTS § 757 cmt. b. (definition of trade secret does not include information relating to single or ephemeral events in the conduct of the business). R4 also argues that the remaining information it marked, including pricing information,

¹The 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).

should be withheld under section 552.110(b) of the Government Code. R4 explains that the remaining information pertains to a Request for Qualifications that has not yet resulted in a contract or award. R4 states that release of its pricing information would allow a competitor to undercut R4's bid, thereby harming R4 competitively. Based on this representation, we have marked R4's pricing information that must be withheld under section 552.110(b). However, R4 has failed to demonstrate how release of the remaining information at issue would cause it substantial competitive harm. Accordingly, the agency must only withhold the information we have marked under section 552.110(b) of the Government Code.

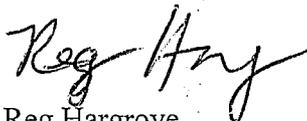
We note that some of the remaining information at issue appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990).

In summary, the agency must withhold the information we marked under section 552.110 of the Government Code. The remaining information must be released, but any copyrighted information must be released 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 339055

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Joseph DiMartino
President
Center for Secondary School redesign, Inc.
621 Wakefield Street
West Warwick, Rhode Island 02893
(w/o enclosures)

Dr. Linda Villarreal
ESC-2 Executive Director
Education Service Center, Region 2
209 North water Street
Corpus Christi, Texas 78401
(w/o enclosures)

Mr. Terry Smith
Executive Director
Education Service Center, Region 2
1314 Hines Avenue
San Antonio, Texas 78208
(w/o enclosures)

Ms. Laurie Levin
Executive Vice President
Institute for Research and Reform in Education
25 South Shore Drive
Toms River, New Jersey 08753
(w/o enclosures)

Mr. Jack Damron
Executive Director
Region One Education Service Center
1900 West Schunior Road
Edinburg, Texas 78541
(w/o enclosures)

Ms. Elizabeth Abernathy
Executive Director
Region VII Education Service Center
1909 North Longview Street
Kilgore, Texas 75662
(w/o enclosures)

Mr. RJ Boatman
General Manager
Resurgent Technologies Institute d/b/a The R4 Group
133 Friendswood Drive, Suite 120
Friendswood, Texas 77546
(w/o enclosures)

Mr. Richard P. Blount, CPA
Assistant Director for Business Affairs
The University of Texas at Austin, Charles A. Dana Center
2901 North Interstate 35, Suite 2.200
Austin, Texas 78722-2348
(w/o enclosures)