



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

April 12, 2010

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

OR2010-05090

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# 376870 (TEA PIR# 12619).

The Texas Education Agency (the "agency") received a request for information pertaining to RFP 701-08-050; specifically for a copy of the RFP, proposals submitted in response to the RFP, a copy of the award, and any additional contracts related to the RFP. You state the agency will release some of the requested information to the requestor. Although you take no position on the public availability of the submitted information, you indicate it may contain proprietary information. You state you have notified CTB/McGraw-Hill, LLC ("CTB"); Pacific Metrics Corporation ("Pacific"); Vantage Technologies Knowledge Assessment, LLC d/b/a Vantage Learning ("Vantage"); Internet Testing Systems; Measured Progress; The Princeton Review, Inc.; Sleek Corporation; and SynapticMash, LLC of the request and of each company's opportunity to submit comments to this office as to why the submitted 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 the applicability of exception to disclose under Act in certain circumstances). We have received comments from CTB, Pacific, and Vantage. 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 that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only CTB, Pacific, and Vantage have submitted comments to this office regarding how the release of their submitted information will affect their proprietary interests. Thus, we have no basis to conclude the release of any portion of the remaining third parties' submitted information would implicate their proprietary interests. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, the agency may not withhold any portion of the submitted information on the basis of any proprietary interest the third parties who did not submit comments to this office may have in the information.

CTB, Pacific, and Vantage assert portions of their submitted information are excepted under section 552.110 of the Government Code.¹ Section 552.110 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) excepts 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* ORD 552 at 2. Section 757 provides 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.

¹Although Vantage also raises sections 552.101 and 552.104 of the Government Code, it has provided no arguments explaining how these exceptions are applicable to the submitted information. Therefore, we assume Vantage no longer asserts these sections.

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 (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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5. 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). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3.

Section 552.110(b) of the Government Code exempts 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, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

CTB, Pacific, and Vantage argue portions of their proposals are protected trade secrets. Upon review, we find CTB has established a *prima facie* case that portions of its submitted information, which we have marked, constitute trade secrets. Accordingly, the agency must withhold the marked information pursuant to section 552.110(a) of the Government Code. However, we determine CTB has failed to demonstrate its remaining information at issue meets the definition of a trade secret. Furthermore, we find Pacific and Vantage have failed to establish any portion of the information they seek to withhold meets the definition of a trade secret, nor have these companies demonstrated the necessary factors to establish a trade secret claim for their information. Thus, the agency may not withhold any portion of the remaining information under section 552.110(a).

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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

CTB, Pacific, and Vantage also raise section 552.110(b) of the Government Code for portions of their proposals. Upon review, we find CTB and Vantage have established the release of their pricing information would cause them substantial competitive injury; therefore, the agency must withhold this information, which we have marked, under section 552.110(b). However, we find CTB, Pacific, and Vantage have failed to provide specific factual evidence demonstrating that release of CTB's and Vantage's remaining information at issue and any portion of Pacific's information would result in substantial competitive harm to the companies. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the agency may not withhold any of the remaining information pursuant to section 552.110(b).

We note the remaining information includes a bank account number. Section 552.136 of the Government Code provides that "[n]otwithstanding 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."³ Gov't Code § 552.136. This office has concluded bank account numbers constitute access device numbers for purposes of section 552.136. Accordingly, the agency must withhold the bank account number we have marked under section 552.136 of the Government Code.⁴

We also note portions of the remaining information appear to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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 have marked under sections 552.110 and 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

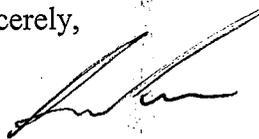
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a bank account number under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 376870

Enc. Submitted documents

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