



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 11, 2013

Ms. Deborah Shibley
General Counsel
Central Texas College
P.O. Box 1800
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OR2013-00700

Dear Ms. Shibley:

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# 475860.

The Central Texas College District (the "district") received four requests for evaluation materials and copies of all proposals submitted in response to RFP 12-015. Although you take no position on whether the submitted information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Azorus, Inc. ("Azorus"); Educations Systems, Inc. ("ESI"); Ellucian, Inc. ("Ellucian"); Hobsons; Jenzabar, Inc. ("Jenzabar"); and TargetX. Accordingly, you have notified these third parties of the requests and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have reviewed the submitted information and considered the submitted arguments.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from Hobsons, Jenzabar, or TargetX. Thus, these companies have not demonstrated they have a protected proprietary interest in any of the submitted information. *See id.* § 552.110(a)-(b); 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. Accordingly, the district may not withhold the submitted information on the basis of any proprietary interests these companies may have in the information.

Azorus, ESI, and Ellucian claim section 552.110 of the Government Code, which 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, 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 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 *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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 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

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

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.*; *see also* ORD 661 at 5.

Azorus, ESI, and Ellucian all claim portions of their proposals are trade secrets that should be protected by section 552.110(a). Upon review, we find ESI and Ellucian have made a *prima facie* case that some of their respective client information constitutes trade secrets. We have marked the client information that the district must withhold from ESI’s and Ellucian’s proposals under section 552.110(a) of the Government Code. We note, however, ESI and Ellucian have published the identities of some of their customers on their respective websites. Additionally, Azorus has made all of its customer information available on its website. Thus, ESI, Ellucian, and Azorus have failed to demonstrate that the information they have published on their respective websites is a trade secret. Azorus, ESI, and Ellucian also assert that portions of their proposals that concern their methodologies and processes should be protected as trade secret information. Upon review, we agree that Azorus, ESI, and Ellucian have also made a *prima facie* case that the information we have marked in the remaining information reveals methodologies and processes that are trade secrets of the respective companies. Accordingly, the district must withhold the methodologies and processes we have marked under section 552.110(a) of the Government Code. However, we find Azorus, ESI, and Ellucian have failed to demonstrate that any portion of the remaining submitted information meets the definition of a trade secret. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 3 (information relating to organization and personnel, market studies, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, the district may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Azorus and ESI also seek to withhold some of their remaining information under section 552.110(b). Upon further review, we find certain pricing information related to Azorus and ESI constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the district must withhold Azorus’s and ESI’s pricing information we have marked under section 552.110(b) of the Government Code. However, Azorus and ESI have failed to demonstrate how any of the remaining information constitutes commercial or financial information, the disclosure of which would

cause the companies substantial competitive harm. Therefore the district may not withhold any of this information under section 552.110(b).

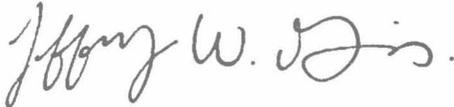
We note some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, the district must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released, but any information protected by copyright may only 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, toll free at (888) 672-6787.

Sincerely,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 475860

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

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