



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 17, 2014

Ms. Leticia D. McGowan
School Attorney
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204

OR2014-20855

Dear Ms. McGowan:

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# 543197 (DISD ORR# 13312).

The Dallas Independent School District (the "district") received a request for evaluation information concerning RFP# OA-204175 and the proposals other than the requestor's that were submitted in response to the RFP. You state the district will release some information. Although you take no position with respect to the public availability of the remaining requested information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified 2Revolutions, L.L.C. ("2Revolutions"); Education Elements, Inc. ("Elements"); Ignite Learning Partners, Inc. ("Ignite"); Mastery Design Collaborative, Inc. ("Mastery"); Marzano Research Laboratory ("Marzano"); Pearson; Relevant Knowledge ("Relevant"); The Alvo Institute ("Alvo"); and WestEd of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments from WestEd, Marzano, and on behalf of Alvo. We have reviewed the submitted information and considered the arguments.

Initially, we note the district seeks to withdraw its request for a ruling because it asserts the underlying request for information was withdrawn by operation of law due to the requestor's failure to timely respond to a cost estimate. Upon review of a copy of the cost estimate, we find it does not comply with the requirements of section 552.2615(a) of the Government Code because it does not notify the requestor whether there is a less costly way to view the information. *See Gov't Code § 552.2615(a)*. Accordingly, we conclude the request for information was not withdrawn by operation of law. *See id.* § 552.2615(b).

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from 2Revolutions, Elements, Ignite, Mastery, Pearson, or Relevant. Thus, none of these third parties has demonstrated it has 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 2Revolutions, Elements, Ignite, Mastery, Pearson, or Relevant may have in the information.

Alvo seeks to withhold information not submitted to this office by the district. By statute, this office may rule on the public availability of only the information submitted by the governmental body requesting the ruling. *See Gov't Code § 552.301(e)(1)(D)* (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because some of the information Alvo seeks to withhold was not submitted by the district, this ruling does not address that information and is limited to only the information submitted as responsive by the district.

Alvo also argues its information should be protected because it responded to the RFP with the understanding that its submission was “for the exclusive review of the [district].” Information is not confidential under the Act simply because the party that submits the information to a governmental body 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 overrule or repeal provisions of the Act through an agreement or contract. *See Attorney General Opinion JM-672* (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Alvo also asserts section 552.104 of the Government Code, which excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). Section 552.104 protects the purchasing interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Accordingly, we will not consider Alvo’s claim under this exception. As the district does not raise section 552.104 as an exception to disclosure, it may not withhold any of the submitted information on that basis.

Alvo, Marzano, and WestEd all assert 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

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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2

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. *See id.*; *see also* ORD 661.

Alvo and Marzano seek to withhold all or part of their information as trade secrets under section 552.110(a). Upon review, we find Alvo has made a *prima facie* case that the customer information we marked constitutes a trade secret. To the extent the customer information we marked in Alvo’s proposal is not published on a publicly available website, the district must withhold this information under section 552.110(a) of the Government Code. As for the remaining information, we conclude neither Alvo nor Marzano has demonstrated this information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim. Accordingly, the district may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Alvo, Marzano, and WestEd seek to withhold all or portions of their information under section 552.110(b) of the Government Code. Upon review, we find the pricing information we marked in Alvo’s, Marzano’s, and WestEd’s proposals consists of commercial or financial information, which if released would cause substantial competitive harm. Accordingly, the district must withhold this information under section 552.110(b) of the Government Code. However, neither Alvo, Marzano, nor WestEd has demonstrated any of the remaining information constitutes commercial or financial information, the disclosure of which would cause substantial competitive harm. Accordingly, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], 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.”²

(1982), 255 at 2 (1980).

²The 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).

Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the district must withhold the insurance policy numbers we marked in WestEd's proposal under section 552.136 of the Government Code.

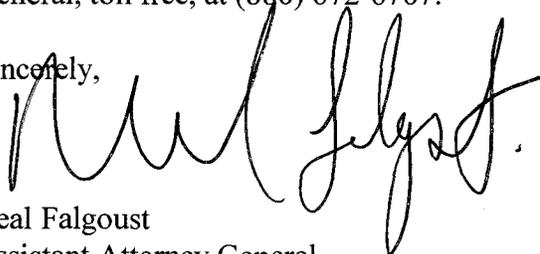
We note some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, a governmental body must allow inspection of 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, to the extent the customer information we marked in Alvo's proposal is not published on a publicly available website, the district must withhold this information under section 552.110(a) of the Government Code. The district also must withhold the pricing information we marked in Alvo's, Marzano's, and WestEd's proposals under section 552.110(b) of the Government Code and the insurance policy numbers we marked in WestEd's proposal under section 552.136 of the Government Code. The district must release the remaining information; however, any information protected by copyright must be released only 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Neal Falgoust
Assistant Attorney General
Open Records Division

NF/bhf

Ref: ID# 543197

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