



February 3, 2015

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

OR2015-02082

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# 552558 (TEA PIR# 23286).

The Texas Education Agency (the "agency") received two requests from different requestors for information related to a specified request for proposals, including all submitted proposals, as well as scoring evaluations and cost summaries for each proposal. You state you will release some information to the requestors. You state you do not have some of the requested information.¹ Although you take no position as to whether the submitted information is excepted from public disclosure under the Act, you state release of the submitted information may implicate the proprietary interests of Measurement Incorporated ("Measurement"); NCS Pearson, Inc. ("Pearson"); Vantage Learning; and The Riverside Publishing Company ("Riverside"). Accordingly, you state, and provide documentation showing, you notified these third parties of the requests for information and of their rights 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); *see also* Open Records Decision No. 542

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

(1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions to disclosure under the Act in certain circumstances). We have received comments from Riverside. We have reviewed the submitted information and 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 under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, we have not received comments from Measurement, Pearson, or Vantage Learning explaining why their information should not be released. Therefore, we have no basis to conclude these third parties have a protected proprietary interest in the submitted information. *See id.* § 552.110; 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 agency may not withhold any of the submitted information on the basis of any proprietary interests Measurement, Pearson, or Vantage Learning may have in the information.

Riverside argues portions of its information are not subject to the Act. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body:
 - (A) owns the information;
 - (B) has a right of access to the information; or
 - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988).

Riverside argues portions of its information do not consist of public information subject to the Act. In Open Records Decision No. 581 (1990), this office determined certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. ORD 581 at 5. However, the information at issue consists of portions of a response to the agency's request for proposals submitted by Riverside. Upon review, therefore, we find the information at issue has significance other than its use as a tool for the maintenance, manipulation, or protection of public information. Accordingly, we find the information at issue was collected, assembled, or maintained in connection with the transaction of the agency's official business. Thus, we find the information at issue is subject to the Act, and the agency must release it unless the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

Riverside claims portions of its information are excepted from disclosure under 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 id.* § 552.110. 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552. 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.² RESTATEMENT OF TORTS § 757 cmt. b. 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. *See* 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.

Riverside asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Riverside has established a *prima facie* case its customer information constitutes trade secret information. Accordingly, to the extent the customer information Riverside seeks to withhold is not publicly available on its web site, the agency must withhold Riverside’s customer information under section 552.110(a).³

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

³As our ruling is dispositive, we need not address Riverside’s remaining argument against disclosure of this information.

However, we find Riverside has failed to establish a *prima facie* case any portion of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 402, 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). We note pricing information pertaining to a particular proposal or 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.” *See* RESTATEMENT OF TORTS § 757 cmt. b; *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, the agency may not withhold any of Riverside’s remaining information under section 552.110(a) of the Government Code.

Riverside also claims portions of its remaining information constitute commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Upon review, we find Riverside has established its pricing information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, the agency must withhold Riverside’s pricing information, which we have marked, under section 552.110(b) of the Government Code. Further, upon review, we find Riverside has demonstrated portions of its remaining information, which we have marked, constitute commercial or financial information, the release of which would cause substantial competitive injury. Thus, the agency must also withhold the portions of Riverside’s remaining information we have marked under section 552.110(b) of the Government Code.

We note some of the remaining information is subject to copyright. A custodian of public records must comply with 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, to the extent the customer information Riverside seeks to withhold is not publicly available on its web site, the agency must withhold Riverside’s customer information under section 552.110(a) of the Government Code. The agency must also withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released; however, 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.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,



Alley Latham
Assistant Attorney General
Open Records Division

AKL/dls

Ref: ID# 552558

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

The Riverside Publishing Company
c/o Ms. Yvette Beeman
Senior VP & Associate General Counsel
Houghton Mifflin Harcourt Publishing Company
222 Berkeley Street
Boston, Massachusetts 02116
(w/o enclosures)

Mr. Patrick J. Carome
Wilmer, Cutler, Pickering, Hale and Dorr, L.L.P.
1875 Pennsylvania Avenue NW
Washington, D.C. 20006
(w/o enclosures)

Henry H. Scherich, Ph.D.
Measurement Incorporated
423 Morris Street
Durham, North Carolina 27701
(w/o enclosures)

Ms. Carole Sandefer
Account General Manager, State Services
NCS Pearson, Inc.
1950 Bulverde Road
San Antonio, Texas 78259
(w/o enclosures)