



February 24, 2015

Ms. Katheryne Ellison
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2015-03580

Dear Ms. Ellison:

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# 554500 (TPIA Nos. G110714 and T121814).

The Houston Independent School District (the "district") received two requests for information pertaining to a specified request for information and a specified request for proposals.¹ You state the district does not possess information responsive to portions of the requests.² Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of CompassLearning ("Compass"); Edgenuity ("Edgenuity"); Edmentum ("Edmentum"); K12 Virtual Schools, L.L.C. ("K12"); and Pearson ("Pearson"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments on behalf of Compass, Edgenuity,

¹The district states, and provides documentation showing, it sent a cost estimate of charges pursuant to section 552.2615 of the Government Code and a demand for a deposit of such charges pursuant to section 552.263 of the Government Code. *See* Gov't Code §§ 552.2615, .263.

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

and Edmentum. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Compass and Edmentum seek to withhold information not submitted to this office by the district. By statute, this office may only rule on the public availability of 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 this information was not submitted by the district, this ruling does not address this information and is limited to the information submitted as responsive by the district.³

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from K12 or Pearson explaining why the submitted information should not be released. Therefore, we have no basis to conclude K12 or Pearson has protected proprietary interests 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 district may not withhold the submitted information on the basis of any proprietary interest K12 or Pearson may have in the information.

Edmentum generally raises section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other law. *See* Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). However, Edmentum has failed to direct our attention to any law, nor are we aware of any law, under which any of the submitted information is considered to be confidential for purposes of section 552.101. Therefore, none of Edmentum's information may be withheld under section 552.101 of the Government Code.

Edmentum asserts portions of its information are excepted from public disclosure under section 552.104 of the Government Code, which excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the district, not the proprietary interests of private parties such as Edmentum. *See* Open Records Decision

³Therefore, we need not address the arguments against disclosure of this information.

No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the district does not raise section 552.104 as an exception to disclosure. Therefore, the district may not withhold any of the information at issue under section 552.104 of the Government Code.

Compass, Edgenuity, and Edmentum argue some of their information is excepted from disclosure under section 552.110 of the Government Code. 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, 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret

⁴The 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).

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 section 552.110(a) is applicable 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. 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 (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).

We note some of the information Edgenuity seeks to withhold was previously released in Open Records Letter No. 2015-00947 (2015) because Edgenuity did not provide arguments objecting to the release of the information at issue in the file. Since the issuance of that ruling, Edgenuity has not disputed this office’s conclusion regarding the release of the information at issue. In this regard, we find Edgenuity has not taken any measures to protect the information at issue in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Edgenuity substantial harm. *See* Gov’t Code § 552.110; RESTATEMENT OF TORTS §757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the district may not withhold Edgenuity’s information that was previously released in Open Records Letter No. 2015-00947 under section 552.110 of the Government Code.

Upon review, we find Compass and Edgenuity have established some of the remaining information, including customer information, constitutes commercial or financial information, the release of which would cause the companies substantial competitive injury. Therefore, the district must withhold the information we marked and Compass’s and Edgenuity’s submitted customer information under section 552.110(b) of the Government Code; however, Compass’s and Edgenuity’s customer information may only be withheld to the extent it is not publicly available on the companies’s websites. However, we find Compass, Edgenuity, and Edmentum have failed to demonstrate that release of the remaining information at issue would cause them substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on

future contracts is too speculative). Accordingly, the district may not withhold any of the remaining information under section 552.110(b).

Upon review, we find Compass, Edgenuity, and Edmentum have failed to establish a *prima facie* case that any portion of the remaining information at issue meets the definition of a trade secret. We further find Compass, Edgenuity, and Edmentum have failed to demonstrate the necessary factors to establish a trade secret claim for the remaining information at issue information. *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 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Consequently, the district may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

Section 552.136 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.”⁵ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the district must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining 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 Compass’s and Edgenuity’s information we marked and Compass’s and Edgenuity’s submitted customer information under section 552.110(b) of the Government Code; however, Compass’s and Edgenuity’s customer information may only be withheld to the extent it is not publicly available on the companies’s websites. The district must withhold the insurance policy numbers in the remaining information under section 552.136 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.

⁵The 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).

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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/dls

Ref: ID# 554500

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Mr. Gregg Levin
Ms. Kate Kromar
K12 Virtual Schools, L.L.C.
2300 Corporate Park Drive
Herndon, Virginia 20171
(w/o enclosures)

Mr. Mark Moreno
Mr. Kevin Sweeney
Pearson
1001 Fleet Street, Fifth Floor
Baltimore, Maryland 21202
(w/o enclosures)

CompassLearning, Inc.
c/o Mr. Matt C. Wood
Baker Botts, L.L.P.
98 San Jacinto Boulevard, Suite 1500
Austin, Texas 78701-4078
(w/o enclosures)

Ms. Linnea Grooms
Director of Legal Affairs
Edgenuity Inc.
c/o Levett Rockwood, P.C.
P.O. Box 5116
Westport, Connecticut 06881-5116
(w/o enclosures)

Mr. Mitchell Wacker
Vice President of Sales Operations
Edmentum
8200 Tower
5600 West 83rd Street, Suite 300
Bloomington, Minnesota 55437
(w/o enclosures)