



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 16, 2015

Ms. Walquiria T. Sanchez, J.D.
Legal Services Coordinator RRISD
Round Rock Independent School District
1311 Round Rock Avenue
Round Rock, Texas 78681

OR2015-03797A

Dear Ms. Sanchez:

This office issued Open Records Letter No. 2015-03797 (2015) on February 26, 2015. We have examined this ruling and determined that we will correct the previously issued ruling.¹ *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on February 26, 2015. Your request was assigned ID# 564273.

The Round Rock Independent School District (the "district") received a request for all proposals submitted in response to request for proposals numbers 14-087, 14-103, and 14-104. Although you take no position as to whether the submitted information is excepted under the Act, release of the submitted information may implicate the proprietary interests of Achieve3000, Inc. ("Achieve3000"); Apex Learning ("Apex"); Ascend Education ("Ascend"); Austin Sylvan, L.L.C. ("Sylvan"); Carnegie Learning, Inc. ("Carnegie"); Compass Learning, Inc. ("Compass"); Edgenuity; Educate Online Learning, L.L.C. ("EOL"); Educational Technology Learning ("ETL"); EPS Literacy and Intervention ("EPS"); GF Educators, Inc. ("GFE"); Greenwood Publishing d/b/a Heinemann ("Heinemann"); Hotmath,

¹We decline to reconsider the portion of the ruling pertaining to Edgenuity, Inc. ("Edgenuity").

Inc. (“Hotmath”); Imagination Station, Inc. (“Istation”); itsLearning, Inc. (“itsLearning”); Mentoring Minds, L.P. (“Mentoring”); MIND Research Institute (“MIND”); NCS Pearson, Inc. (“Pearson”); Renaissance Learning, Inc. (“Renaissance”); Scholastic, Inc. (“Scholastic”); Spanish Learning Center d/b/a SLC Reading & Math (“SLC”); Texas Educational Solutions (“TES”); Vantage Learning USA, L.L.C. (“Vantage”); and Voyager Sopris Learning, Inc. (“Voyager”). Accordingly, you state, and provide documentation showing, you notified Apex, Sylvan, Edgenuity, and Vantage of the request for information and of the right of each to submit arguments 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) (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 assume the district also notified the remaining third parties of the request for information. We have received comments from Apex, Edgenuity, and Istation. We have reviewed the submitted information and the submitted arguments.²

Initially, we note Edgenuity’s response to request for proposals number 14-087 was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-00393 (2015). Upon review, we find the law, facts, and circumstances on which the previous ruling was based have changed. Accordingly, the district may not rely on Open Records Letter No. 2015-00393 as a previous determination. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). Therefore, we will consider Edgenuity’s arguments against disclosure of its information. We will also consider the public availability of the remaining submitted information.

Next, 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 Achieve3000, Ascend, Carnegie, Compass, EOL, EPS, ETL, GFE, Heinemann, Hotmath, itsLearning, Mentoring, MIND, Pearson, Renaissance, Scholastic, SLC, Sylvan, TES, Vantage, or Voyager explaining why any of the submitted information should not be released. Therefore, we have no basis to conclude any of these third parties has a protected proprietary interest in this 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

²We note the submitted information includes the requestor’s proposal. As we do not assume the requestor seeks access to the requestor’s own proposal, we do not address the public availability of that information.

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 Achieve3000, Ascend, Carnegie, Compass, EOL, EPS, ETL, GFE, Heinemann, Hotmath, itsLearning, Mentoring, MIND, Pearson, Renaissance, Scholastic, SLC, Sylvan, TES, Vantage, or Voyager may have in the information.

Next, we note Apex and Edgenuity each argues against the release of information that was not submitted by the district. This ruling does not address information that was not submitted by the district and is limited to the information the district has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

We next turn to the submitted arguments against release of the submitted information. Apex, Edgenuity, and Istation each states portions of its information at issue are 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 id.* § 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.³ 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* Open Records Decision No. 552 at 5 (1990). 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). 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; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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.

We note some of the information Edgenuity seeks to withhold was previously released in Open Records Letter No. 2015-00393 because Edgenuity failed to demonstrate the information was excepted from public disclosure. Furthermore, some of the remaining information now Edgenuity seeks to withhold was previously released in Open Records Letter Nos. 2015-00393 and 2015-00947 (2015) because Edgenuity did not provide arguments objecting to the release of the information at issue in those rulings. 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 at issue now either qualifies as a trade secret or contains 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*

³The 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).

ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the district may not now withhold under section 552.110 of the Government Code any of Edgenuity's information that was previously released in Open Records Letter No. 2015-00393 or Open Records Letter No. 2015-00947.

Apex and Istation each claims portions of its proposal, and Edgenuity claims portions of its proposal that have not previously been released, constitute commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Upon review, we find Apex, Edgenuity, and Istation have each established some of the information at issue, including Apex's, Edgenuity's, and Istation's customer and client reference information and Apex's pricing information, constitutes commercial or financial information, the release of which would cause the companies substantial competitive injury. Therefore, the district must withhold the information at issue, which we have marked and noted, under section 552.110(b) of the Government Code; however, Apex's, Edgenuity's, and Istation's customer and client information may only be withheld to the extent such information is not published on the companies' websites.⁴ However, having considered Apex's and Istation's arguments under section 552.110(b) for the remaining information at issue, we find neither Apex nor Istation has demonstrated substantial competitive injury would result from the release of such information. *See* Open Record Decision Nos. 661, 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), 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Therefore, the district may not withhold any of Apex's or Istation's remaining information at issue under section 552.110(b) of the Government Code.

Apex also claims some of its remaining information constitutes trade secrets and is protected under section 552.110(a) of the Government Code. Upon review, we find Apex has not demonstrated any of the remaining information meets the definition of a trade secret, nor has Apex demonstrated the necessary factors to establish a trade secret claim for such information. *See* ORD 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). Consequently, none of Apex's remaining information at issue may be withheld under section 552.110(a) of the Government Code.

We note some of the materials at issue 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

⁴As our ruling is dispositive for Edgenuity's information at issue, we need not address Edgenuity's remaining argument against disclosure of the information at issue.

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 marked and noted within Apex's, Edgenuity's, and Istation's proposals under section 552.110(b) of the Government Code; however, Apex's, Edgenuity's, and Istation's customer and client information may only be withheld to the extent such information is not published on the companies' websites. The district must release the remaining information; however, any information subject to copyright may 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/cbz

Ref: ID# 564273

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. George McGuirk
Chief Operating Officer
Achieve3000, Inc.
1985 Cedar Bridge Avenue, Suite 3
Lakewood, New Jersey 08701
(w/o enclosures)

Ms. Marjorie Bailey
Managing Partner
Ascend Education
302 Albany Avenue
Shreveport, Louisiana 71105
(w/o enclosures)

Mr. Dennis Ciccone
CEO
Carnegie Learning, Inc.
437 Grant Street
Pittsburgh, Pennsylvania 15219
(w/o enclosures)

Mr. J. Whitney Scudder
Counsel for Edgenuity, Inc.
Verrill Dana, LLP
P.O. Box 5116
Westport, Connecticut 06881
(w/o enclosures)

Mr. Ed Tweedie
Owner
Education Technology Learning
532 Silicon Drive, Suite 101
Southlake, Texas 76092
(w/o enclosures)

Mr. Lars Gaarde
Proposal Manager
Apex Learning
1215 Fourth Avenue
Seattle, Washington 98161
(w/o enclosures)

Ms. Crystal Cotti
Executive Director
Austin Sylvan, L.L.C.
11066 Pecan Park Boulevard, Suite 207
Cedar Park, Texas 78613
(w/o enclosures)

Mr. Raul Trevino
Account Executive
Compass Learning, Inc.
203 Colorado Street
Austin, Texas 78701
(w/o enclosures)

Ms. Margo Amrein
Controller
Educate Online Learning, L.L.C.
1001 Fleet Street, 8th Floor
Baltimore, Maryland 21202
(w/o enclosures)

Mr. Mike Bates
Vice-President
EPS Literacy and Intervention
P.O. Box 9031
Cambridge, Massachusetts 02139-9031
(w/o enclosures)

Mr. Robert Chase
Vice President of Operations
Greenwood Publishing
d/b/a Heinemann
361 Hanover Street
Portsmouth, New Hampshire 03801
(w/o enclosures)

Mr. David W. Lincoln
Regional Representative
Hotmath, Inc.
18 Sunset Drive
Kensington, California 94707
(w/o enclosures)

Mr. Travis Willard
CEO
itsLearning, Inc.
36 Cordage Park Circle, Suite 302
Plymouth, Massachusetts 02360
(w/o enclosures)

Mr. Matthew Peterson
Chief Operating Officer
MIND Research Institute
111 Academy, Suite 100
Irvine, California 92617
(w/o enclosures)

Ms. Amy Pownall
Account Executive
Scholastic Inc.
557 Broadway
New York, New York 10012-3999
(w/o enclosures)

Ms. Gayle Fuller
Chief Executive Director
GF Educators, Inc.
c/o Ms. JoyLynn Occhiuzzi
Officer for Public Information
Round Rock Independent School District
1311 Round Rock Avenue
Round Rock, Texas 78681
(w/o enclosures)

Mr. G. Michael Gruber
Mr. William S. Richmond
Gruber Hurst Johansen Hail Shank
Counsel for Imagination Station, Inc.
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202-2711
(w/o enclosures)

Ms. Theresa D. Avirett
Chief Operations Officer
Mentoring Minds, L.P.
P.O. Box 8843
Tyler, Texas 75711
(w/o enclosures)

Ms. Jennifer Fisher
Account General Manager
NCS Pearson, Inc.
3075 West Ray Road, Suite 200
Chandler, Arizona 85226
(w/o enclosures)

Mr. Al Valdes
Chief Operating Officer
Spanish Learning Center
d/b/a SLC Reading & Math
2923 South Arch
Chicago, Illinois 60608
(w/o enclosures)

Ms. Karen Chase
Executive Administrator
Texas Educational Solutions
305 Rolling Green Drive
Austin, Texas 78734
(w/o enclosures)

Ms. Amy Otis
Director of Bids and Contracts
Voyater Sopris Learning, Inc.
17855 Dallas Parkway, Suite 400
Dallas, Texas 75287
(w/o enclosures)

Mr. Andrew J. Singleton, AIIB
Vantage Learning USA, L.L.C.
Director of Sales
800 Township Line Road, Suite 300
Yardley, Pennsylvania 19067
(w/o enclosures)

Ms. Debra C. Schoenick
Vice President of Strategic Support
Renaissance Learning, Inc.
P.O. Box 8036
Wisconsin Rapids, Wisconsin 54495-8036
(w/o enclosures)