



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 10, 2015

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

Mr. Miles LeBlanc
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2015-16483

Dear Mr. LeBlanc:

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# 574637 (Houston Independent School District Request No. W0151815).

The Houston Independent School District (the "district") received a request for the awarded proposal for the district's request for proposal 15-01-09. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Aspire HR ("Aspire"). Accordingly, you state, and provide documentation showing, you notified Aspire of the request for information and of the company's rights 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 have received comments from Aspire. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Aspire objects to disclosure of information the district has not submitted to this office for review. This ruling does not address information that was not submitted by the district and is limited to the information submitted as responsive by the district.¹ *See*

¹As we are able to make this determination, we need not address Aspire's arguments against disclosure of the information at issue.

Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Aspire argues portions of the submitted information are not subject to 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. *Id.* § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *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 *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must

²There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others 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 to [its] competitors;

accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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) of the Government Code 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.*; Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Aspire contends portions of the submitted information are commercial or financial information, release of which would cause substantial competitive harm to Aspire. Upon review, we find Aspire has demonstrated its customer information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the district must withhold Aspire’s customer information, to the extent the information is not publicly available on the company’s website, under section 552.110(b) of the Government Code. Additionally, we conclude Aspire has established the release of some of its pricing information related to a future bid would cause it substantial competitive injury. Accordingly, the district must withhold the pricing information we have marked under section 552.110(b) of the Government Code. However, we find Aspire has failed to demonstrate the release of any of the remaining information would cause the company substantial competitive harm. *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). Furthermore, we note the pricing information of a winning bidder, such as Aspire, is generally not excepted under section 552.110(b). This office considers the prices charged in government

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- (5) the amount of effort or money expended by [the company] in developing the information;
 - and
 - (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).

contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We, therefore, conclude the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Aspire also argues portions of remaining information constitute trade secrets under section 552.110(a). Upon review, we find Aspire has failed to establish a *prima facie* case any of the remaining information meets the definition of a trade secret and has not demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision Nos. 402 (1983) (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, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

Section 552.136 of the Government Code states “[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.”³ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of this exception. Thus, the district must withhold the insurance policy numbers we have marked 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, to the extent the client information at issue is not publicly available on the company's website, the district must withhold Aspire's client information under

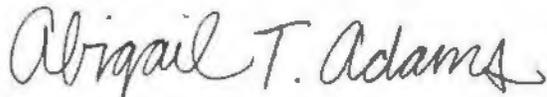
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.110(b) of the Government Code. The district must also withhold the pricing information we have marked under section 552.110(b) of the Government Code. The district must withhold the information we have marked under section 552.136 of the Government Code. The district must release the remaining information, but may only release any copyrighted information 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,



Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 574637

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. R. Heath Cheek
For Aspire HR
Bell Nunnally
3232 McKinney Avenue, Suite 1400
Dallas, Texas 75204
(w/o enclosures)

MAY 17 2016 *MR*

At 8:55 AM.
Velva L. Price, District Clerk

Cause No. D-1-GN-15-004004

ASPIRE HR, INC. f/k/a ERP
SOLUTIONS, INC.,
Plaintiff,

v.

OFFICE OF THE ATTORNEY
GENERAL OF THE STATE OF TEXAS
and HOUSTON INDEPENDENT
SCHOOL DISTRICT,
Defendants.

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IN THE DISTRICT COURT OF

201st JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

AGREED FINAL JUDGMENT

This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552, in which Aspire HR, Inc. (Aspire HR), sought to withhold certain information which is in the possession of the Houston Independent School District (Houston ISD) from public disclosure. All matters in controversy between Plaintiff, Aspire HR, and Defendants, Ken Paxton¹, Attorney General of Texas (Attorney General), and Houston ISD arising out of this lawsuit have been resolved by settlement, a copy of which is attached hereto as Exhibit "A", and the parties agree to the entry and filing of an Agreed Final Judgment.

Texas Government Code section 552.325(d) requires the Court to allow a requestor a reasonable period of time to intervene after notice is attempted by the Attorney General. The Attorney General represents to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the Attorney General sent a certified letter to the requestor, Ms. Janda Ward of EPI-USE America on April 25, 2016, informing her of the setting of this matter on the uncontested docket on this date. The

¹ Because the Attorney General was sued in his official capacity, Ken Paxton is now the correct defendant.



requestor was informed of the parties' agreement that Houston ISD will withhold the designated portions of the information at issue. The requestor was also informed of her right to intervene in the suit to contest the withholding of this information. A copy of the delivery verification is attached to this motion.

The requestor has not filed a notice of intervention.

After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED THAT:

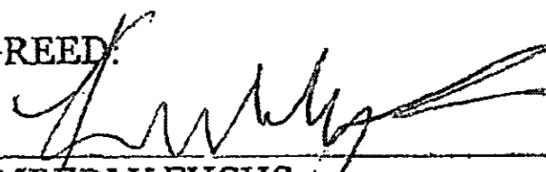
1. Aspire HR, the Attorney General, and Houston ISD have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue, specifically Aspire HR's competitive bidding information, are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, Houston ISD will release redacted copies of the documents at issue, with redactions consistent with the markings in "Exhibit C" of Aspire HR's March 31, 2016 letter to the Attorney General. The Attorney General will provide Houston ISD with a copy of the information with the agreed redactions highlighted;
2. All court cost and attorney fees are taxed against the parties incurring the same;
3. All relief not expressly granted is denied; and
4. This Agreed Final Judgment finally disposes of all claims that are the subject of this lawsuit between Aspire HR, the Attorney General, and Houston ISD and is a final judgment.

SIGNED the 17th day of May, 2016.


PRESIDING JUDGE

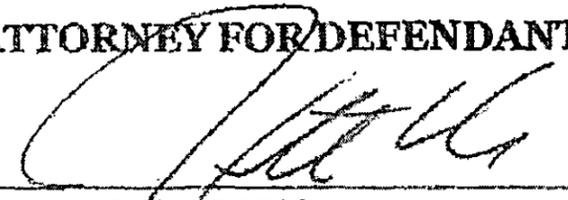
Amy Clark Meachum

AGREED:


KIMBERLY FUCHS

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Chief, Open Records Litigation
Administrative Law Division
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Facsimile: (713) 583-7698
Email: cgilbert@thompsonhorton.com

ATTORNEY FOR DEFENDANT HOUSTON INDEPENDENT SCHOOL DISTRICT

Agreed Final Judgment
Cause No. D-1-GN-15-004004

A

Cause No. D-1-GN-15-004004

ASPIRE HR, INC. f/k/a ERP
SOLUTIONS, INC.,
Plaintiff,

v.

OFFICE OF THE ATTORNEY
GENERAL OF THE STATE OF TEXAS
and HOUSTON INDEPENDENT
SCHOOL DISTRICT,
Defendants.

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IN THE DISTRICT COURT OF

201st JUDICIAL DISTRICT

TRAVIS COUNTY, TEXAS

SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is made by and between Aspire HR, Inc. (Aspire HR), Ken Paxton¹, Attorney General of Texas (the Attorney General), and the Houston Independent School District (Houston ISD). This Agreement is made on the terms set forth below.

Background

On May 18, 2015, Janda Ward made a request for information under the Public Information Act (PIA), Texas Government Code ch. 552. Some of the responsive information belonged to Aspire HR, so Houston ISD made Aspire HR aware of this request.

Houston ISD asked for an open records ruling from the Attorney General, pursuant to PIA section 552.301.

In Letter Ruling OR2015-16483, the Open Records Division of the Attorney General (ORD) required Houston ISD to release the information Aspire HR claims is

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proprietary. Aspire HR disputed the ruling and filed the above styled and captioned lawsuit to preserve its rights under the PIA.

Aspire HR submitted information and briefing to the Attorney General establishing that some of the information at issue is excepted from disclosure under Texas Government Code section 552.104. Houston ISD and the Attorney General have reviewed Aspire HR's request and agree to the settlement.

Texas Government Code section 552.325(c) allows the Attorney General to enter into settlement under which the information at issue in this lawsuit may be withheld. The parties wish to resolve this matter without further litigation.

Terms

For good and sufficient consideration, the receipt of which is acknowledged, the parties to this Agreement agree and stipulate that:

1. Aspire HR, the Attorney General, and Houston ISD have agreed that in accordance with the PIA and under the facts presented, portions of the information at issue, specifically Aspire HR's competitive bidding information, are excepted from disclosure pursuant to Texas Government Code section 552.104. Pursuant to Texas Government Code section 552.104, Houston ISD will release redacted copies of the documents at issue, with redactions consistent with the markings in "Exhibit C" of Aspire HR's March 31, 2016 letter to the Attorney General. The Attorney General will provide Houston ISD with a copy of the information with the agreed redactions highlighted;
2. Aspire HR, the Attorney General, and Houston ISD agree to the entry of an agreed final judgment, the form of which has been approved by each party's attorney.

The agreed final judgment will be presented to the court for approval, on the uncontested docket, with at least 15 days prior notice to the requestor.

3. The Attorney General agrees that he will also notify the requestor, as required by Tex. Gov't Code § 552.325(c), of the proposed settlement and of his right to intervene to contest Aspire HR's right to have Houston ISD withhold the information.

4. A final judgment entered in this lawsuit after a requestor intervenes prevails over this Agreement to the extent of any conflict.

5. Each party to this Agreement will bear their own costs, including attorney fees relating to this litigation.

6. The terms of this Agreement are contractual and not mere recitals, and the agreements contained herein and the mutual consideration transferred is to compromise disputed claims fully, and nothing in this Agreement shall be construed as an admission of fault or liability, all fault and liability being expressly denied by all parties to this Agreement.

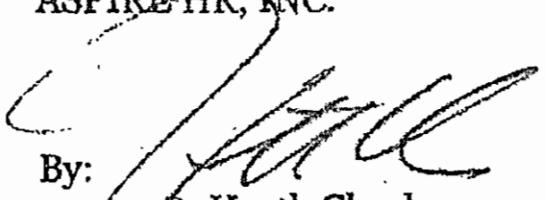
7. Aspire HR warrants that its undersigned representative is duly authorized to execute this Agreement on its behalf and that its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that Aspire HR has against the Attorney General and/or Houston ISD arising out of the matters described in this Agreement.

8. The Attorney General warrants that his undersigned representative is duly authorized to execute this Agreement on behalf of the Attorney General and his representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Attorney General has against Aspire HR and/or Houston ISD arising out of the matters described in this Agreement.

9. Houston ISD warrants that its undersigned representative is duly authorized to execute this Agreement on behalf of Houston ISD and its representative has read this Agreement and fully understands it to be a compromise and settlement and release of all claims that the Houston ISD has against Aspire HR and/or the Attorney General arising out of the matters described in this Agreement.

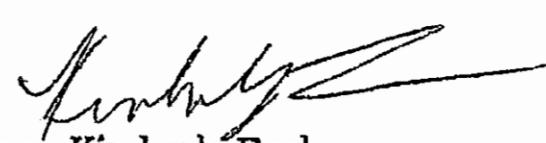
10. This Agreement shall become effective, and be deemed to have been executed, on the date on which the last of the undersigned parties sign this Agreement.

ASPIRE HR, INC.

By: 
name: R. Heath Cheek
firm: Bell Nunnally & Martin L.L.P.

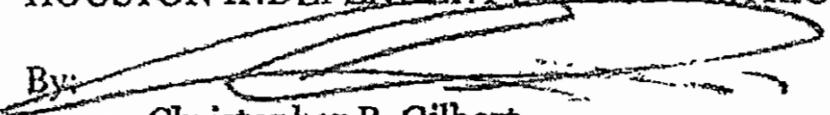
Date: 4/22/16

KEN PAXTON, ATTORNEY GENERAL
OF TEXAS

By: 
name: Kimberly Fuchs
title: Assistant Attorney General,
Administrative Law Division

Date: 4/22/16

HOUSTON INDEPENDENT SCHOOL DISTRICT

By: 
name: Christopher B. Gilbert
firm: Thompson & Horton LLP

Date: 4/22/16