



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 6, 2015

Ms. Ramona Soto
Office of Legal Services
Fort Worth Independent School District
100 North University Drive, Suite SW 172
Fort Worth, Texas 76107

OR2015-20875

Dear Ms. Soto:

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# 582207.

The Fort Worth Independent School District (the "district") received a request for information pertaining to a specified request for proposals. 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 CompassLearning, Inc. ("Compass"); D2L, Ltd. ("D2L"); Edgenuity, Inc. ("Edgenuity"); Edmentum; K12 Virtual Schools, L.L.C. ("K12"); Nystrom Education/Social Studies School Service ("Nystrom"); Odysseyware; Pearson Education, Inc. ("Pearson"); and Texas ELearning, L.L.C. ("Texas ELearning"). Accordingly, you state, and provide documentation showing, you notified Compass, D2L, Edgenuity, Edmentum, K12, Nystrom, Odysseyware, Pearson, and Texas ELearning 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 have received comments from Compass, Edgenuity, and Odysseyware. 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 id. § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from D2L, Edmentum, K12, Nystrom, Pearson, or Texas ELearning explaining why the submitted information should not be released. Therefore, we have no basis to conclude D2L, Edmentum, K12, Nystrom, Pearson, or Texas ELearning has 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 district may not withhold the submitted information on the basis of any proprietary interest D2L, Edmentum, K12, Nystrom, Pearson, or Texas ELearning may have in the information.

Next, we note some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-17092 (2015). That ruling related to Odysseyware's information and determined, in relevant part, the district must withhold Odysseyware's customer information under section 552.110(a) of the Government Code, to the extent the customer information is not publicly available on Odysseyware's website; the district must withhold the marked insurance policy numbers in the remaining information under section 552.136 of the Government Code; and the district must release the remaining information in accordance with copyright law. Odysseyware has again submitted briefing to this office seeking to withhold the identical information it sought to withhold in the previous ruling on the basis of the same arguments previously made. We have no indication there has been any change in the law, facts, or circumstances with respect to the proposal submitted by Odysseyware. Accordingly, the district must rely on Open Records Letter No. 2015-17092 as a previous determination and withhold or release Odysseyware's information in accordance with that ruling. *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). As we are able to make this determination, we do not consider Odysseyware's arguments against release of its information.

Next, Compass and Edgenuity state portions of their information 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* 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 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 (1980), 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

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

result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (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).

Compass and Edgenuity assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Compass and Edgenuity have each established a *prima facie* case that portions of the submitted information, including the companies' customer information, constitute trade secret information. Accordingly, to the extent Compass's and Edgenuity's customer information is not publicly available on their websites, the district must withhold Compass's and Edgenuity's customer information, which we have marked, as well as the additional information we marked, under section 552.110(a) of the Government Code. However, we conclude Compass and Edgenuity have failed to establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find neither Compass nor Edgenuity has demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, the district may not withhold any of Compass's or Edgenuity's remaining information under section 552.110(a).

Compass and Edgenuity further argue portions of their information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Compass and Edgenuity have each demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the district must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Compass and Edgenuity have failed to demonstrate the release of any of their remaining information at issue would result in substantial harm to its competitive position. *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 Compass's or Edgenuity's remaining information under section 552.110(b).

The remaining documents include information that is subject to section 552.136 of the Government Code.² Section 552.136 of the Government Code provides, "Notwithstanding 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

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).

confidential.” 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. Accordingly, the district must withhold the insurance policy numbers within the remaining documents under section 552.136 of the Government Code.

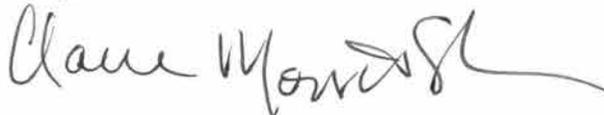
We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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 marked customer information is not publicly available on the companies’ websites, the district must withhold Compass’s and Edgenuity’s customer information under section 552.110(a) of the Government Code. The district must also withhold the information we marked under section 552.110(b) of the Government Code. The district must withhold the insurance policy numbers within the remaining documents under section 552.136 of the Government Code. The district must release the remaining information; however, any information that is 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/som

Ref: ID# 582207

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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D2L Ltd
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Baltimore, Maryland 21202
(w/o enclosures)

Edgenuity, Inc.
8860 East Chaparral, Suite 100
Scottsdale, Arizona 85250
(w/o enclosures)

Edmentum
5600 West 83rd Street
Bloomington, Minnesota 55437
(w/o enclosures)

K12 Virtual Schools, L.L.C.
2300 Corporate Park Drive
Herndon, Virginia 20171
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Nystrom Education/Social Studies School
Service
10200 Jefferson Boulevard
Culver City, California 90232
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Odysseyware
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Chandler, Arizona 85226
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Pearson Education, Inc.
One Lake Street
Upper Saddle River, New Jersey 07458
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