



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 27, 2015

Ms. Jeanne C. Collins  
General Counsel  
El Paso Independent School District  
P.O. Box 20100  
El Paso, Texas 79998-0100

OR2015-22510

Dear Ms. Collins:

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# 582937 (ORR# 2015.37).

The El Paso Independent School District (the "district") received a request for the score sheets and all proposals submitted for request for proposals number 15-052. The district states it will release some information. Although the district takes no position as to whether the submitted information is excepted under the Act, the district informs us release of this information may implicate the proprietary interests of Public Consulting Group ("PCG"); New Tech Network ("NTN"); Blackboard, Inc. ("Blackboard"); and Amplify Education, Inc. ("Amplify"). Accordingly, the district states, and provides documentation showing, it notified these third parties of the request for information and of their right 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 from NTN, Blackboard, and Amplify. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-16921 (2015). We have no indication the law, facts, and circumstances on which the prior ruling was based have changed with respect to the information of NTN and Amplify. Accordingly, the district must continue to rely on Open Records Letter No. 2015-16921 as a previous

determination and withhold or release the information of NTN and Amplify in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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). However, in Open Records Letter No. 2015-16921, the district notified Blackboard pursuant to section 552.305 when the district received the previous request for information, and Blackboard failed to submit comments objecting to the release of its information. Accordingly, in our previous ruling, we ruled the district must release Blackboard's information. Blackboard now claims some of this information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, the district may not withhold Blackboard's previously released information under section 552.104 of the Government Code. However, because information subject to section 552.110 is deemed confidential by law, we will address Blackboard's claim regarding its proposal under this exception.

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. Gov't Code § 552.305(d)(2)(B). Although the district provided this office with representations that PCG did not wish some of its information to be released, as of the date of this letter, we have not received any arguments from PCG claiming any exceptions to disclosure of the submitted information. Therefore, we have no basis to conclude PCG 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 any of the information at issue on the basis of any proprietary interest PCG may have in it.

Blackboard claims some of its information is 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* 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* ORD 552 at 2. 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.<sup>1</sup> 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).

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<sup>1</sup>The 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).

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 5-6.

As mentioned above, Blackboard’s information was subject to Open Records Letter No. 2015-16921. In the prior ruling, the district notified Blackboard of the request for information pursuant to section 552.305 of the Government Code. Blackboard did not object to the release of its information. Since the issuance of the previous ruling on August 17, 2015, Blackboard has not disputed this office’s conclusion regarding the release of the information. In this regard, we find Blackboard has not taken any measures to protect its information 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 Blackboard substantial harm. *See* Gov’t Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). Accordingly, we conclude the district may not withhold Blackboard’s information under section 552.110 of the Government Code.

In summary, the district must continue to rely on Open Records Letter No. 2015-16921 as a previous determination and withhold or release the information of NTN and Amplify in accordance with that ruling. The remaining information must be released.

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](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,



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Assistant Attorney General  
Open Records Division

RSH/dls

Ref: ID# 582937

Enc. Submitted documents

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