KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 27, 2015

Ms. Ana Vieira Ayala
Senior Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701

OR2015-22547

Dear Ms. Ayala:

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# 582874 (OGC # 163356).

The University of Texas at Austin (the "university") received a request for contracts and requests for proposals related to the university's purchase of Civitas Leraning and any responses submitted to the university. You state you will release some information. You claim portions of the submitted information are excepted from disclosure under section 552.139 of the Government Code. You also claim release of the submitted information may implicate the proprietary interests of Canvas By Instructure ("Canvas"), Desire2Learn, Ltd ("Learn"), Deltak, edu, LLC ("Deltak"), Mattersight Corporation ("Mattersight"), RealizeIt Learning ("RealizeIt"), Panther Learning Systems, Inc. ("Panther"), Socratic Arts, Inc. ("Arts"), Destiny Solutions ("Solutions"), Vyopta, Jenzabar, Inc. ("Jenzabar"), Enterprise Hive, LLC ("Enterprise"), and Civitas Learning, Inc. ("Civitas"). The university states, and provides documentation showing, it notified the third parties of the university's receipt of the request for information and of their rights to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 Mattersight, RealizeIt, Enterprise, Jenzabar, Learn, and Vyopta.[1] We have considered the submitted arguments and reviewed the submitted information.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Canvas, Deltak, Panther, Arts, Solutions, and Civitas have not submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of these third parties. *See* 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, 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 university may not withhold the submitted information on the basis of any proprietary interests Canvas, Deltak, Panther, Arts, Solutions, and Civitas may have in it.

We also note Learn, Jenzabar, and Mattersight make arguments for withholding certain information that was not submitted by the university to this office for review. Because we do not have this information before us for review, this ruling does not address any such information, and is limited to the information submitted as responsive by the university. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

Next, we note Enterprise generally raises section 552.101 of the Government Code for portions of its information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. However, Enterprise has not pointed to any statutory confidentiality provision, nor are we aware of any, that would make any portion of the submitted information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the university may not withhold any portion of the submitted information under section 552.101 of the Government Code on behalf of Enterprise.

Section 552.139 of the Government Code provides, in part:

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[1]Mattersight argues section 552.305 of the Government Code applies to the submitted information. We note section 552.305 is not an exception to disclosure under the Act. *See* Gov't Code § 552.305.

> (a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.
>
> (b) The following information is confidential:
>
> > (1) a computer network vulnerability report; [and]
> >
> > (2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Gov't Code § 552.139(a), (b)(1)–(2). Section 2059.055 of the Government Code provides in part:

> (b) Network security information is confidential under this section if the information is:
>
> > (1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;
> >
> > (2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or
> >
> > (3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). The university asserts portions of the submitted information provide detailed information regarding the winning proposals' network vulnerabilities and capabilities that are now or will be in place. Further, the university states this information pertains to network security and, if released, would make the student data and billing information vulnerable to unauthorized access. Based on the university's representations and our review of the information, we conclude the university must withhold the information we have marked under section 552.139 of the Government Code. Additionally, Mattersight and Vyopta argue portions of the submitted information contain information relating to specified

technologies used by each company's network security and specific security measures taken to protect client data. However, we find the university, Mattersight, and Vyopta have not demonstrated the remaining information relates to computer network security, or to the design, operation, or defense of the computer network as contemplated in section 552.139(a). Moreover, we find the university, Mattersight, and Vyopta have failed to explain any of the remaining information consists of a computer network vulnerability report or assessment as contemplated by section 552.139(b). Accordingly, the university may not withhold the remaining information under section 552.139 of the Government Code.

RealizeIt, Learn, Mattersight, Enterprise, Vyopta, and Jenzabar each argue 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* ORD 552. 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 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) 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).

RealizeIt, Learn, Mattersight, Enterprise, Vyopta, and Jenzabar argue some of the information at issue constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Upon review, we find Learn, Mattersight, and Jenzabar have established their client information at issue constitutes commercial or financial information, the disclosure of which would cause substantial competitive injury. Thus, the university must withhold the client information we have marked under section 552.110 of the Government Code; however, to the extent the customer information at issue is publicly available on the companies' websites, the university may not withhold any such information. However, we find RealizeIt, Learn, Mattersight, Enterprise, Vyopta, and Jenzabar have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any portion of the remaining information at issue would cause the companies substantial competitive harm. *See* ORD 661, 509 at 5 (1988) (because

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[2]There 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;
> (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).

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) (résumés cannot be said to fall within any exception to the Act). Thus, the university may not withhold any portion of the remaining information at issue under section 552.110(b) of the Government Code.

RealizeIt, Learn, Mattersight, Enterprise, Vyopta, and Jenzabar argue some of the remaining information constitutes trade secrets and is excepted from disclosure under section 552.110(a) of the Government Code. Upon review, we find RealizeIt has demonstrated the information we marked constitutes a trade secret. Accordingly, the university must withhold this information under section 552.110(a). However, we find RealizeIt, Learn, Mattersight, Enterprise, Vyopta, and Jenzabar have failed to demonstrate any of the remaining information meets the definition of a trade secret. *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). Accordingly, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

We note, some of the submitted 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 university must withhold the information we have marked under section 552.139 of the Government Code. The university must generally withhold the information we have marked under section 552.110(b) of the Government Code; however, to the extent customer information of Learn, Jenzabar, and Mattersight we have marked is publicly available on the companies' websites, the university may not withhold any such information under section 552.110(b). The university must withhold the information we have marked under section 552.110(a). The remaining information must be released. However, in releasing the remaining information, 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,

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Open Records Division

CH/dls

Ref: ID# 582874

Enc. Submitted documents

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