



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 14, 2016

Ms. Jodie T. Kennemer
General Counsel
Pasadena Independent School District
1515 Cherrybrook Lane
Pasadena, Texas 77502

OR2016-01147

Dear Ms. Kennemer:

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# 594541.

The Pasadena Independent School District (the "district") received a request for information related to request for proposals number 14-037. You state the district has released some of the requested information. 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 Esped.com, Inc. ("Esped"); SuccessEd, L.L.C. ("SuccessEd"); OnCourse Systems for Education, L.L.C. ("OnCourse"); Public Consulting Group ("PCG"); and Computer Automation Systems, Inc. ("CASI"). Accordingly, you state, and provide documentation showing, you notified Esped, SuccessEd, OnCourse, PCG, and CASI of the request for information and of their right 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 SuccessEd and PCG. 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Esped, OnCourse, or CASI explaining why the submitted information should not be released. Therefore, we have no basis to conclude Esped, OnCourse, or CASI 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 Esped, OnCourse, or CASI may have in the information.

SuccessEd argues some of its information is protected by section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. SuccessEd states it has competitors. In addition, SuccessEd states it “frequently competes for contracts with Texas school districts by responding to [requests for proposals] similar to that issued by the district. SuccessEd argues it “typically incorporates into its proposals much of the same information that it submitted to [the district].” Thus, SuccessEd claims the disclosure of its information would give SuccessEd’s competitors a preview of the proposals that SuccessEd is likely to submit to other school districts in response to future requests for proposals, which would give SuccessEd’s competitors an advantage in the ability to craft their own proposals to mirror or be more favorable than SuccessEd’s. After review of the information at issue and consideration of the arguments, we find SuccessEd has established the release of its information would give advantage to a competitor or bidder. Thus, we conclude the district may withhold SuccessEd’s information under section 552.104(a) of the Government Code.¹

Next, PCG states portions of its information are excepted from disclosure under section 552.110(a) of the Government Code. 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

¹As our ruling is dispositive for this information, we need not address SuccessEd’s remaining argument against its disclosure.

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.² 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).

PCG asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude PCG has established a *prima facie* case that portions of its information, which we have marked, constitute trade secret information. Accordingly, the district must withhold the information we marked under section 552.110(a). However, we conclude PCG has failed to establish a *prima facie* case that its remaining information at issue meets the definition of a trade secret. We further find PCG has not 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 PCG's remaining information at issue under section 552.110(a).

The remaining documents also include information that is subject to section 552.136 of the Government Code.³ Section 552.136 of the Government Code provides, "Notwithstanding

²The 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).

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).

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.” 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, the district may withhold SuccessEd’s information under section 552.104(a) of the Government Code. The district must withhold the information we marked under section 552.110(a) 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# 594541

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Esped.com, Inc.
6 Riverside Drive
Andover, Massachusetts 01810
(w/o enclosures)

Mr. James W. Bridges, III
President and CEO
SuccessEd, L.L.C.
2100 McKinney Avenue, Suite 1501
Dallas, Texas 75201
(w/o enclosures)

OnCourse Systems for Education, L.L.C.
214 North Jackson Street
Media, Pennsylvania 19063
(w/o enclosures)

Mr. Brian Riley
Public Consulting Group
816 Congress Avenue, Suite 1110
Austin, Texas 78701
(w/o enclosures)

Computer Automation Systems, Inc.
P.O. Box 590
Mountain Home, Arkansas 72654
(w/o enclosures)