



February 23, 2015

Mr. Ross Laughead  
General Counsel  
District Office of Legal Services  
Alamo Colleges  
201 West Sheridan, Building C-8  
San Antonio, Texas 78204

OR2015-03471

Dear Mr. Laughead:

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# 554371.

The Alamo Community College District (the "district") received two requests from different requestors for the responses to CSP No. 14A-020. Although you take no position as to whether the submitted information is excepted from public disclosure under the Act, you state the release of the submitted information may implicate the proprietary interests of Brainfuse, Inc. ("Brainfuse"); Copley Retention Systems, Inc. ("Copley"); Eduwizards, Inc. ("Eduwizards"); Pearson Smarthinking, Inc. ("Pearson"); Tutor.com, Inc. ("Tutor"); Link-Systems International, Inc. ("NetTutor"); and Tutor Pace, Inc. ("Pace"). Accordingly, you state, and provide documentation showing, you notified these third parties of the requests 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) (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exceptions to disclosure under the Act in certain circumstances). We have received comments from Brainfuse, Pearson, and Tutor. We have reviewed the submitted information and the submitted arguments.<sup>1</sup>

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<sup>1</sup>Although Tutor raises section 552.139 for the submitted information, Tutor provides no arguments explaining how this exception is applicable. Therefore, we assume Tutor no longer asserts this exception.

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 Copley, Eduwizards, NetTutor, or Pace explaining why their information should not be released. Therefore, we have no basis to conclude these third parties have 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 submitted information on the basis of any proprietary interest Copley, Eduwizards, Link, or Pace may have in the information.

Brainfuse, Pearson, and Tutor claim portions of their information are 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.<sup>2</sup> *See Gov't Code* § 552.110. 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. 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

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<sup>2</sup>We understand Pearson to raise section 552.110 of the Government Code based on the substance of its arguments.

the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>3</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).

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.

Brainfuse, Pearson, and Tutor assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Brainfuse and Tutor have each established a *prima facie* case their customer information constitutes trade secret information. Accordingly, to the extent this information is not publicly available on these third parties’ web sites, the district must withhold these third parties’ customer information, which we have marked, under section 552.110(a). We further find Brainfuse has established a *prima facie* case portions of its remaining information, which we have marked, constitute trade secret information. Thus, the district must also withhold the portions of Brainfuse’s remaining information we have marked under section 552.110(a). However, we find Brainfuse, Pearson, and Tutor have failed to establish a *prima facie* case any portion of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for their remaining information. See ORD 402, 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily

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<sup>3</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).

excepted from disclosure under statutory predecessor to section 552.110). We note information pertaining to a particular proposal or 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." See RESTATEMENT OF TORTS § 757 cmt. b; *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, the district may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Brainfuse, Pearson, and Tutor also assert portions of their information constitute commercial or financial information, the disclosure of which would cause substantial competitive harm. Upon review, we find Pearson has established its pricing information constitutes commercial or financial information, the release of which would cause Pearson substantial competitive injury. Thus, the district must withhold Pearson's pricing information, which we have marked, under section 552.110(b) of the Government Code. Further, upon review, we find Tutor has demonstrated portions of its remaining information, including certain customer information, constitute commercial or financial information, the release of which would cause Tutor substantial competitive injury. Accordingly, to the extent this customer information is not publicly available on Tutor's website, the district must withhold the portions of Tutor's customer information we have marked under section 552.110(b). The district must also withhold the portions of Tutor's remaining information we have marked under section 552.110(b) of the Government Code. However, we find Brainfuse, Pearson, and Tutor have not demonstrated substantial competitive injury would result from the release of any of their remaining information. See Open Records Decisions Nos. 661, 319 at 3, 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Therefore, the district may not withhold any of the remaining information under section 552.110(b) 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."<sup>4</sup> 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 is protected by copyright. A custodian of public records must comply with copyright law and is not required to furnish copies of records that

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<sup>4</sup>The 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).

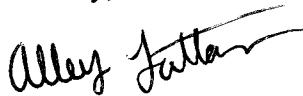
are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the 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 customer information Brainfuse and Tutor seek to withhold is not publicly available on their web sites, the district must withhold these third parties' customer information, which we have marked, under section 552.110(a) of the Government Code. Further, the district must withhold the portions of Brainfuse's remaining information we have marked under section 552.110(a) of the Government Code. The district also must withhold Pearson's pricing information, which we have marked, under section 552.110(b) of the Government Code. Further, the district must withhold the portions of Tutor's remaining information we have marked, including certain customer information to the extent it is not publicly available on Tutor's website, under section 552.110(b) of the Government Code. The district must also withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. The remaining information must be released; however, the district may only release the information subject to copyright 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](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,



Alley Latham  
Assistant Attorney General  
Open Records Division

AKL/dls

Ref: ID# 554371

Enc. Submitted documents

c: 2 Requestors  
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