



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 24, 2016

Ms. Ylise Janssen  
General Counsel  
Austin Independent School District  
1111 West Sixth Street  
Austin, Texas 78703

OR2016-04405

Dear Ms. Janssen:

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# 599648.

The Austin Independent School District (the "district") received two requests from different requestors for information related to RFP No. P16-012, Integrated Instructional Management System. Although you take no position as to whether the submitted information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Education Service Center Region 13, Eduphoria! Inc., Illuminate Education, Instructure, Inc., Itslearning, Inc., NCS Pearson, Inc. ("Pearson"), PCG Education, Progress Testing, Inc., SchoolCity, Inc., Schoology, Inc., and Xerox Corporation. Accordingly, you notified these third parties of the request for information and of each entity's right to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code §§ 552.304, .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 Act in certain circumstances). We have received comments from Pearson. We have considered the submitted arguments and reviewed the submitted information.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of

this letter, we have only received comments from Pearson explaining why the company's submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *See id.* § 552.110(a)-(b); 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 portion of the submitted information on the basis of any proprietary interests the remaining third parties may have in it.

Pearson asserts certain information pertaining to its employees is subject to common-law privacy. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses the doctrines of common-law privacy. Common-law privacy protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be established. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 600 at 9-10 (1992), 545 (1990), 523 (1989), 373 (1983). However, we note common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find Pearson has failed to demonstrate the information at issue is highly intimate or embarrassing and not of legitimate public concern. Accordingly, the district may not withhold the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

Pearson claims section 552.110 of the Government Code for some of its information. 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. *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).

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[.]”

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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).

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.

Pearson argues some of its information, including its customer and pricing information, consists 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 Pearson has demonstrated its customer information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, to the extent Pearson's customer information is not publicly available on Pearson's website, the district must withhold the customer information at issue under section 552.110(b) of the Government Code.<sup>2</sup> Further, we find Pearson has demonstrated release of the information we have marked would cause the company substantial competitive harm. Accordingly, the district must withhold the information we have marked under section 552.110(b) of the Government Code.<sup>3</sup> However, we find Pearson has failed to demonstrate the release of the remaining information at issue would result in substantial harm to its competitive position. *See* ORD 661. Consequently, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Further, we find Pearson has failed to demonstrate any of the remaining information at issue meets the definition of a trade secret, nor has Pearson demonstrated the necessary factors to establish a trade secret claim. *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). Therefore, the district may not withhold any of the remaining information pursuant to section 552.110(a) of the Government Code.

We note some of the remaining 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. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* 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.

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

<sup>3</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

In summary, to the extent Pearson's customer information is not publicly available on Pearson's website, the district must withhold the customer information at issue under section 552.110(b) of the Government Code. The district must withhold the information we have marked under section 552.110(b) of the Government Code. The district must release the remaining information, but any information protected by copyright may only be released 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,

  
Britni Ramirez  
Assistant Attorney General  
Open Records Division

BR/bhf

Ref: ID# 599648

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)

Progressive Testing  
Northwest 43<sup>rd</sup> st - 6-3  
4300 Northwest 3600  
Gainesville, Florida 32606  
(w/o enclosures)

Education Service Center Region 13  
5701 Springdale Road  
Austin, Texas 78748  
(w/o enclosures)

NCS Pearson  
5601 Green Valley Drive  
Bloomington, Minnesota 55437  
(w/o enclosures)

Itslearning, Inc.  
Suite 702  
One Gateway Center  
300 Washington Street  
Newton, Massachusetts 02458  
(w/o enclosures)

Xerox Corporation  
45 Glover Avenue  
P.O. Box 4505  
Norwalk, Connecticut 06856  
(w/o enclosures)

Instructure  
Suite 700  
6330 South 300 East  
Salt Lake City, Utah 84121  
(w/o enclosures)

PGG Education  
Suite 1110  
816 Congress Avenue  
Austin, Texas 78701  
(w/o enclosures)

Eduphoria!  
Suite 410  
1700 Alma Drive  
Plano, Texas 75075  
(w/o enclosures)

Schoology  
115 West 30<sup>th</sup> Street  
10<sup>th</sup> Floor  
New York, New York 10001  
(w/o enclosures)

SchoolCity  
Suite 2470  
2900 Lakeside Drive  
Santa Clara, California 95054  
(w/o enclosures)

Illuminate Education  
Suite 100  
6531 Irvine Center Drive  
Irvine, California 92618  
(w/o enclosures)