



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 9, 2016

Ms. Katheryne Ellison
Assistant General Counsel
Houston Independent School District
4400 West 18th Street
Houston, Texas 77092-8501

OR2016-27318

Dear Ms. Ellison:

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# 637029 (File No. Baird B091616).

The Houston Independent School District (the "district") received a request for the proposals and scoring information pertaining to Project 16-04-03. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Compass Learning Inc. ("Compass"); Edgenuity, Inc. ("Edgenuity"); Edmentum, Inc. ("Edmentum"); Glynlyon dba Odesseyware ("Odesseyware"); and Shmoop University, Inc. ("Shmoop") 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 Compass, Edgenuity, and Edmentum. 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 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 Odesseyware or Shmoop explaining why their information should not be released. Therefore, we have no basis to conclude Odesseyware or Shmoop 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 Odesseyware or Shmoop may have in it.

Edmentum argues some of its information is excepted from disclosure under the doctrine of common-law privacy. Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) 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 satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We note education, prior employment, and personal information are ordinarily not private information subject to common-law privacy. *See* Open Records Decision Nos. 554 (1990), 448 (1986). Upon review, we find Edmentum has failed to demonstrate how any of the information in its proposal is highly intimate or embarrassing and not of legitimate concern to the public. Thus, no portion of Edmentum’s information may be withheld under section 552.101 in conjunction with common-law privacy.

Edmentum also raises section 552.102(a) of the Government Code. Section 552.102(a) of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). We understand Edmentum to assert the privacy analysis under section 552.102(a) is the same as the common-law privacy test under section 552.101 of the Government Code, which is discussed above. In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court of appeals ruled the privacy test under section 552.102(a) is the same as the *Industrial Foundation* privacy test. However, the Texas Supreme Court has expressly disagreed with *Hubert’s* interpretation of section 552.102(a) and held the privacy standard under section 552.102(a) differs from the *Industrial Foundation* test under section 552.101. *See Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The supreme court also considered the applicability of section 552.102(a) and held it excepts from disclosure the dates of birth of state employees in the payroll database of the comptroller. *See id.* at 348. Upon review, we find none of the submitted information at issue

is subject to section 552.102(a); therefore, the district may not withhold any of the information at issue on that basis.

Section 552.104(a) of the Government Code 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. Compass, Edgenuity, and Edmentum state they have competitors. In addition, Compass states release of its information give its competitors insight into crucial elements of Compass’s products, services, product development, and business practices. Edgenuity states release of its information would give its competitors “invaluable insights into Edgenuity’s business strategies, giving the competitor an unfair competitive advantage.” Edmentum also states release of the information it has indicated would have a negative impact on Edmentum. After review of the information at issue and consideration of the arguments, we find Compass, Edgenuity, and Edmentum have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude district may withhold the information we have indicated under section 552.104(a).¹

Next, Edmentum claims some of its remaining information is excepted 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. 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

¹As our ruling on this information is dispositive, we need not address Edmentum’s remaining arguments against disclosure of this information.

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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 at 5-6 (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).

Edmentum asserts portions of its remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Edmentum has established a *prima facie* case that portions of its remaining information constitute trade secret information. Accordingly, to the extent Edmentum’s customer information is not publicly available on Edmentum’s website, the district must withhold Edmentum’s customer information under section 552.110(a). However, we conclude Edmentum has failed to

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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

establish a *prima facie* case that any portion of its remaining information meets the definition of a trade secret. We further find Edmentum 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 Edmentum's remaining information under section 552.110(a).

Edmentum claims section 552.110(b) of the Government Code for some of its remaining information. Upon review, we find Edmentum has demonstrated its pricing information constitutes commercial or financial information, the release of which would cause substantial competitive injury to Edmentum. Accordingly, the district must withhold Edmentum's pricing information under section 552.110(b). However, upon review, we find Edmentum has not demonstrated release of the remaining information at issue would cause the company substantial competitive harm. *See* Open Records Decision Nos. 661, 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), 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). Accordingly, none of the remaining information may be withheld under section 552.110(b).

We note portions of the remaining information are subject to section 552.136 of the Government Code.³ Section 552.136 states "[n]otwithstanding any other provision of this chapter, 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; *see also id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device for the purposes of section 552.136. Accordingly, we find the district must withhold the submitted insurance policy numbers under section 552.136 of the Government Code.

We note portions 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. 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.

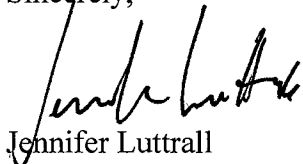
³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, the district may withhold the information we have indicated under section 552.104 of the Government Code. To the extent Edmentum's customer information is not publicly available on Edmentum's website, the district must withhold Edmentum's customer information under section 552.110(a) of the Government Code. The district must withhold Edmentum's pricing information under section 552.110(b) of the Government Code. The district must withhold the submitted insurance policy numbers under section 552.136 of the Government Code. The remaining information must be released, but any information subject to 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, 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 637029

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)