



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 23, 2017

Mr. Will Cabler  
Counsel for Howard College  
The Fowler Law Firm, PC  
8310 North Capital of Texas Highway, Suite 150  
Austin, Texas 78731

OR2017-04025

Dear Mr. Cabler:

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# 646606 (reference ID HCOR121016).

Howard College (the "college"), which you represent, received a request for information pertaining to RFP # 16-001/ ERP System. 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 Ellucian, Jenzabar, and Unit4 Education Solutions, Inc. ("Unit4"). Accordingly, you state you notified Ellucian, Jenzabar, and Unit4 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 Ellucian, Jenzabar, and Unit4. We have reviewed the submitted information and the submitted arguments.

Ellucian claims the some of its information is protected under section 552.104 of the Government Code. 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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes

section 552.104 as an example of an exception that involves a third party's property interest, 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. Ellucian states it has competitors. In addition, Ellucian states that releasing the information at issue "would provide a direct competitor of insider knowledge of Ellucian's confidential bid information, and further allow the requestor to utilize Ellucian's confidential, proprietary competitively sensitive, and trade secret information to the benefit of its customers in order to underbid Ellucian in future bids." After review of the information at issue and consideration of the arguments, we find Ellucian has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the college may withhold the information Ellucian has marked under section 552.104(a).<sup>1</sup>

Section 552.110 of the Government Code 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. 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* Open Records Decision 552 at 5 (1990). 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>1</sup>As our ruling is dispositive, we do not address the remaining argument against disclosure.

the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>2</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 (party must establish *prima facie case* that information is trade secret). 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. *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* Open Records Decision No. 661 at 5 (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).

Jenzabar and Unit4 assert section 552.110(b) for portions of their information. Upon review, we find Jenzabar has demonstrated the information we have marked, and Jenzebar and Unit4 have demonstrated their customer information, constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the college must withhold under section 552.110(b) of the Government Code the information we have marked and the customer information of Jenzabar and Unit4; however, the college may not withhold those companies’ customer information to the extent such information is publicly available on their websites. We note Unit4 was a winning bidder in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has

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<sup>2</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).

interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). We further find Jenzebar and Unit4 have not demonstrated release of any of their remaining information would result in substantial harm to their competitive positions. Therefore, the college may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Jenzabar asserts portions of its remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Jenzabar has failed to establish a *prima facie* case that any portion of the remaining information, including any customer information published on its website, meets the definition of a trade secret. We further find Jenzabar has not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of Jenzabar's remaining information may be withheld under 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. 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.

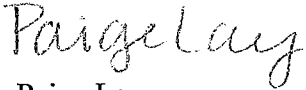
In summary, the college may withhold the information Ellucian has marked under section 552.104(a) of the Government Code. The college must withhold under section 552.110(b) of the Government Code the information we have marked and the customer information of Jenzebar and Unit4; however, the college may not withhold those companies' customer information to the extent such information is publicly available on their websites. The college must release the remaining information; however, 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,



Paige Lay  
Assistant Attorney General  
Open Records Division

PL/som

Ref: ID# 646606

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

3 Third Parties  
(w/o enclosures)