



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 24, 2017

Mr. W. Montgomery Meitler  
Senior Counsel  
Office of Legal Services  
Texas Education Agency  
1701 North Congress Avenue  
Austin, Texas 78701-1494

OR2017-08608

Dear Mr. Meitler:

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# 654601 (TEA PIR 28818).

The Texas Education Agency (the "agency") received a request for information pertaining to applications to the agency. You indicate you will redact e-mail addresses pursuant to section 552.137 of the Government Code and Open Records Decision No. 684 (2009).<sup>1</sup> Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of Region 20 Education Service Center ("ESC"); Texas ACP-San Antonio; A Career in Education; ACT-San Antonio ("ACT"); TNTP Academy-Fort Worth ("TNTP"); YES Prep Public Schools; and Relay GSE-Houston ("Relay GSE"). Accordingly, you state, and provide documentation demonstrating, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records

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<sup>1</sup>Open Records Decision No. 684 serves as a previous determination to all governmental bodies authorizing them to withhold certain categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision. *See* ORD 684.

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 ESC, ACT, TNTP, and Relay GSE. We have reviewed the submitted information.

Initially, we note some of the responsive information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2007-02313 (2007) and 2011-08641 (2011). In Open Records Letter No. 2007-02313, we ruled the agency must withhold the marked information under section 552.110(a) of the Government Code, but must release the remaining information. In Open Records Letter No. 2011-08641, we ruled the agency must withhold the marked information under section 552.110(a) of the Government Code, but must release the remaining information. There is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, we conclude the agency must continue to rely on Open Records Letter Nos. 2007-02313 and 2011-0424, 20178641 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure).

Next, 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) of the Government Code 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 Texas ACP-San Antonio, A Career in Education, or YES Prep Public Schools explaining why the submitted 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 agency may not withhold the submitted information on the basis of any proprietary interest these third parties may have in the information.

ESC, Relay GSE, and TNTP claim their information is excepted from disclosure 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). 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. ESC, Relay GSE, and TNTP state they have competitors. ESC states release of its information at issue would give advantage to a competitor by allowing competitors to use “ESC’s product as their own or as a template for creating competing curriculum without incurring the substantial development costs necessary to create such a product.” Relay GSE states release of the information it indicated would allow competitors “to replicate Relay [GSE’s] unique teaching models and strategies, jeopardizing [Relay GSE’s advantage] in the marketplace.” TNTP states release of its information at issue, which includes “a detailed explanation of [its] teaching methods, models, timeline, and other information that explain[s] [TNTP’s] successful methods of teacher preparation” would give advantage to a competitor or bidder. After review of the information at issue and consideration of the arguments, we find ESC, Relay GSE, and TNTP have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the agency may withhold ESC’s information at issue, the information Relay GSE indicates, and TNTP’s information at issue under section 552.104(a) of the Government Code.

ACT asserts portions of its information are excepted from disclosure under section 552.110(a) of the Government Code, which protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov’t Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.); *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>2</sup> 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 exception is made and no argument is submitted that rebuts the claim as a matter of law. See ORD 552 at 5-6. 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).

Upon review, we find ACT has established the information we have marked constitutes trade secret information for the purposes of section 552.110(a). Accordingly, the agency must withhold the information we marked under section 552.110(a) of the Government Code.

We note some of the remaining information appears to 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 agency must continue to rely on Open Records Letter Nos. 2007-02313 and 2011-08641 as previous determinations and withhold or release the identical information in accordance with those rulings. The agency may withhold ESC's information at issue, the information Relay GSE indicates, and TNTP's information at issue under section 552.104(a). The agency must withhold the information we marked under section 552.110(a) of the Government Code. The remaining information must 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.

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<sup>2</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others 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).

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,



April Philley  
Assistant Attorney General  
Open Records Division

AP/sb

Ref: ID# 654601

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

7 Third Parties  
(w/o enclosures)