



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 3, 2019

Mr. B. Cole Brown
Counsel for the Pampa Independent School District
Underwood Law Firm, P.C.
500 South Taylor Street
Amarillo, Texas 79101-2446

OR2019-11866

Dear Mr. Brown:

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# 761887.

The Pampa Independent School District (the "district"), which you represent, received a request for purchasing records for a specified period of time.¹ Although the district takes no position as to whether the submitted information is excepted from disclosure under the Act, you state release of the information at issue may implicate the proprietary interests of numerous third parties. Accordingly, you state, and provide documentation demonstrating, you notified these third parties 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

¹We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from 806 Technologies, Inc. (“806”); Blue Star Bus Sales, Ltd. (“Blue Star”); DocuNav Solutions (“DocuNav”); EBSCO Subscription Services (“EBSCO”); Follett School Solutions (“Follett”); hand2mind, Inc. (“hand2mind”); Imagine Learning, Inc. (“Imagine”); Infection Controls, Inc. (“Infection”); Lakeshore Learning Materials (“Lakeshore”); MacGill Discount School Nurse Supplies (“MacGill”); Pocket Nurse Enterprises, Inc. (“Pocket Nurse”); PowerSchool Group, LLC (“PowerSchool”); Pro-Vision, Inc. (“Pro-Vision”); Vantage Learning USA, LLC (“Vantage”); and Varsity Brands, LLC (“Varsity”).² We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 806, Imagine, and Infection seek to withhold information not submitted to this office by the district. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the district, this ruling does not address this information and is limited to the information submitted as responsive by the district.

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third parties explaining why the information at issue should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in any portion of 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 portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in it.

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.

²We note EBSCO, MacGill, and Pro-Vision make no arguments against disclosure of their information and raise no exceptions to disclosure under the Act. Additionally, although Pocket Nurse raises section 552.101 of the Government Code, it provides no arguments explaining the applicability of this exception. Therefore, we assume Pocket Nurse no longer asserts this exception. *See* Gov’t Code § 552.305.

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. 806, Blue Star, Follett, hand2mind, Imagine, Infection, Lakeshore, Pocket Nurse, PowerSchool, Vantage, and Varsity raise section 552.104 for their information at issue and state they have competitors. In addition, 806, Blue Star, Follett, hand2mind, Imagine, Infection, Lakeshore, Pocket Nurse, PowerSchool, Vantage, and Varsity state the information at issue would give advantage to their competitors. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find 806, Blue Star, Follett, hand2mind, Imagine, Infection, Lakeshore, Pocket Nurse, PowerSchool, Vantage, and Varsity have established the release of the information they seek to withhold would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information we marked for 806, Blue Star, Follett, hand2mind, Imagine, Infection, Lakeshore, Pocket Nurse, PowerSchool, Vantage, and Varsity under section 552.104(a) of the Government Code.³

Section 552.110 of the Government Code protects (1) trade secrets obtained from a person 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, which holds a trade secret to be:

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

³As our ruling on this information is dispositive, we need not address the remaining arguments against disclosure of this information.

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.⁴ 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. 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. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular 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." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

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

⁴The 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).

§ 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 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

DocuNav claims some of its information is excepted from disclosure under section 552.110(a) of the Government Code. However, upon review, we find DocuNav has failed to demonstrate any of its information meets the definition of a trade secret. We further find DocuNav has not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 402. Therefore, the district may not withhold any of the remaining information under section 552.110(a) of the Government Code.

DocuNav claims some of its pricing information is excepted from disclosure under section 552.110(b) of the Government Code. We note DocuNav was a winning bidder with respect to the information at issue. 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* ORD 514; *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). Thus, DocuNav's pricing information may not be withheld under section 552.110(b). Upon review, we find DocuNav has not demonstrated the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 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). Therefore, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the district may withhold the information we marked for 806, Blue Star, Follett, hand2mind, Imagine, Infection, Lakeshore, Pocket Nurse, PowerSchool, Vantage, and Varsity under section 552.104(a) of the Government Code. The district must release the remaining information.

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,

A handwritten signature in black ink, appearing to read "D. Michelle Case". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/mo

Ref: ID# 761887

Enc. Submitted documents

c: Requestor
(w/o enclosures)

15 Third Parties
(w/o enclosures)