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ATTORNEY GENERAL OF TEXAS

August 29, 2019

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

OR2019-24200

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# 783344 (PIR# 38563).

The Texas Education Agency (the "agency") received a request for the submitted proposals and scoring information pertaining to a specified request for proposals. You state the agency will release the scoring information to the requestor. Although you take no position regarding whether the submitted information is excepted from disclosure, you state release of the information at issue may implicate the proprietary interests of the following third parties: Attainment Company, Inc.; Education Service Center Region 11 ("ESC 11"); Family Counts & Consultants, LLC; Public Consulting Group; Rethink Ed, Inc. ("Rethink"); and Specialized Education of Texas, Inc. ("Specialized"). Accordingly, you state, and provide documentation demonstrating, the agency notified these interested 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 to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from ESC 11, Rethink, and Specialized. 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 any of the remaining third parties explaining why the information at issue should not be released. Thus, we have no basis to conclude the remaining third parties have a protected proprietary interest in the information at issue. *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. Therefore, the agency may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in it.

We understand Specialized asserts its information is confidential because it is marked confidential and proprietary. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

ESC 11 claims section 552.104 of the Government Code for its information at issue. 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. ESC 11 states it has competitors. Further, ESC 11 asserts release of its information at issue “would give [its] competitors an unfair marketplace advantage[.]” After review of the information at issue and consideration of the argument, we find ESC 11 has established the release of the information at issue would give advantage to a competitor or bidder.

Accordingly, the agency may withhold the information we marked under section 552.104(a) of the Government Code.<sup>1</sup>

Rethink and Specialized claim portions of their information are excepted from disclosure under section 552.110 of the Government Code. 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(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 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.<sup>2</sup> RESTATEMENT OF TORTS § 757 cmt. b. This

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<sup>1</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

<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;

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 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 § 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.

Rethink and Specialized assert section 552.110(b) of the Government Code for portions of their information at issue. Rethink asserts the information it indicated consists of proprietary commercial and financial information that, if released, would lead to it “losing business to its competitors in other bids . . . [and] result in significant economic harm to Rethink.” Specialized asserts the information it indicated is proprietary information that, if released, would “provid[e] an advantage to [its] competitors[,] thereby causing [it] substantial competitive harm[.]” Upon review, we find Rethink and Specialized have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury to the companies. Accordingly, the agency must withhold the pricing information pertaining to Rethink and Specialized and the information we indicated under section 552.110(b) of the Government Code. Additionally, to the extent the client reference information pertaining to Rethink and Specialized is not publicly available on the companies’ websites, the agency must withhold such information under section 552.110(b) of the Government Code. However, we find Rethink and Specialized have failed to demonstrate the release of any of their remaining information at issue would result in substantial harm to their competitive positions. 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

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(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).

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), 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). Therefore, the agency may not withhold any portion of the remaining information at issue under section 552.110(b).

Rethink and Specialized assert portions of their remaining information constitute trade secrets under section 552.110(a) of the Government Code. However, to the extent the client references for Rethink and Specialized are publicly available on their websites and not excepted from disclosure under section 552.110(b), the agency may not withhold such information under section 552.110(a). Additionally, upon review, we find Rethink and Specialized have failed to demonstrate the remaining information at issue meets the definition of a trade secret. Further, we find Rethink and Specialized have not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORDs 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), 319 at 2. Therefore, the agency may not withhold any portion of the remaining information at issue under section 552.110(a).

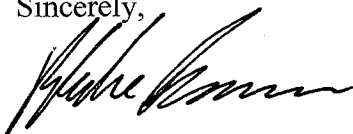
We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted 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 agency may withhold the information we marked under section 552.104(a) of the Government Code. The agency must withhold the pricing information pertaining to Rethink and Specialized and the information we indicated under section 552.110(b) of the Government Code. To the extent the client reference information pertaining to Rethink and Specialized is not publicly available on the companies' websites, the agency must withhold such information under section 552.110(b) of the Government Code. The agency 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Blake Brennan  
Assistant Attorney General  
Open Records Division

BBX/mo

Ref: ID# 783344

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: 6 Third Parties  
(w/o enclosures)