



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 19, 2019

Mr. Darin Darby
Counsel for the San Antonio Independent School District
Escamilla & Poneck, LLP
700 North Saint Mary's Street, Suite 850
San Antonio, Texas 78205

OR2019-36063

Dear Mr. Darby:

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# 799928.

The San Antonio Independent School District (the "district"), which you represent, received two requests from two different requestors for information pertaining to a specified request for proposals. 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 A.R.E Operations, LLC, d/b/a Sylvan Learning; Apex Learning ("Apex"); Carnegie Learning, Inc.; Dreambox Learning, Inc.; Ed Tech Soft, Inc.; Edmentum, Inc.; ExploreLearning, Inc.; Imagination Station, Inc., d/b/a Istation; IXL Learning, Inc. ("IXL"); Imagine Learning ("Imagine"); Mathspace, Inc.; McGraw-Hill School Education, LLC ("McGraw"); Mentoring Minds, L.P.; MIND Research Institute; Pearson K-12 Learning, LLC; Snappet, Inc.; and Texas Educational Solutions. Accordingly, you state, and provide documentation showing, the district notified these third parties of the request for information and of the 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 and considered comments from IXL, Imagine, and McGraw, and considered comments from Apex. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the request received from the second requestor is narrower than the request received from the first requestor. Thus, the district need not release information to the second requestor that is not responsive to his request for information.

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 the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining 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 district may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Imagine seeks to withhold information the district did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the district. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

IXL, Imagine, and McGraw raise section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 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. IXL and Imagine state they have competitors. In addition, IXL and Imagine state release of their information at issue would cause their companies competitive harm. After review of the information at issue and consideration of the arguments, we find IXL and Imagine have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information we have marked pertaining to IXL and Imagine under section 552.104(a).¹ However, we find McGraw has failed to demonstrate the applicability of section 552.104 to its information. Thus, the district may not withhold McGraw's information on that basis.

Apex states portions of its information are excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) protects "[c]ommercial

¹ As our ruling is dispositive, we need not address IXL's or Imagine's remaining arguments against disclosure of their information.

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.

Apex argues its pricing information consists of commercial information, the release of which would cause the company substantial competitive harm. Upon review, we find Apex has demonstrated its pricing information, which we marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Accordingly, the district must withhold the information we marked under section 552.110(b).

Section 552.136 of the Government Code provides, “Notwithstanding any other provision of [the Act], 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.”² Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the district must withhold the insurance policy numbers in the remaining information under section 552.136.

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 information 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 the copyrighted information, 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.

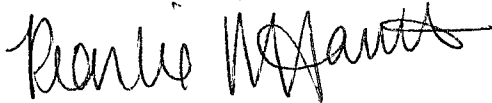
In summary, the district may withhold the information we have marked pertaining to IXL and Imagine under section 552.104(a) of the Government Code. The district must withhold Apex’s information we marked under section 552.110(b) of the Government Code. The district must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The district must release the remaining information; however, any information that is subject to copyright may be released only 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.

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,

A handwritten signature in black ink, appearing to read "Pearlie Gault", written in a cursive style.

Pearlie Gault
Attorney
Open Records Division

PG/eb

Ref: ID# 799928

Enc. Submitted documents

c: Requestor
(w/o enclosures)

17 Third Parties
(w/o enclosures)