



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 17, 2020

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

OR2020-20587

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# 840165 (TEA PIR# 42662).

The Texas Education Agency (the "TEA") received a request for information pertaining to a specified grant application. You state the TEA will release some of the requested information. Although the TEA takes no position as to whether the submitted information is excepted under the Act, the TEA states release of the submitted information may implicate the proprietary interests of multiple third parties. Accordingly, you state, and provide documentation showing, the TEA notified the 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.¹ *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 Engage, ESC-20, Imagine, IXL, Kitamba, NWEA, and Zearn. We have reviewed the submitted information and considered the submitted arguments.

¹ The TEA notified: ABL Schools; Afton Partners; Better Lesson, Inc.; Carnegie Learning, Inc.; ClassLink, Inc.; Curriculum Associates; DreamBox Learning, Inc.; Education Elements, Inc.; Engage! Learning, Inc. d/b/a Engage2Learn.org ("Engage"); Education Service Center Region 20 ("ESC-20"); Imagine Learning ("Imagine"); Instruction Partners; IXL Learning ("IXL"); Kitamba, Inc. ("Kitamba"); New Classrooms Innovation Partners; NWEA; Renaissance Learning; ST. Math; TNTP, Inc.; Tegy Tools; Transcend; UTeach Professional Development; The University of Texas at Austin High School District; and Zearn, Inc. ("Zearn").

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 submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the TEA may not withhold the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Imagine and IXL raise section 552.104 of the Government Code for their information. Section 552.104 excepts from disclosure information "if a *governmental body* demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future." *Id.* § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov't Code § 552.104(a). Therefore, we do not address Imagine's or IXL's arguments under section 552.104 of the Government Code.

Engage, Imagine, IXL, and NWEA raise section 552.110 of the Government Code for some of the information at issue.² Section 552.110(c) of the Government Code excepts from disclosure "commercial 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[.]" *Id.* § 552.110(c). Engage, Imagine, IXL, and NWEA argue some of the information at issue consists of commercial or financial information subject to section 552.110(c). Upon review, we find Engage, Imagine, IXL, and NWEA have demonstrated some of the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, to the extent Imagine's and IXL's customer information is not publicly available on their companies' websites, the TEA must withhold Imagine's and IXL's customer information under section 552.110(c) of the Government Code.³ However, to the extent it is publicly available on their companies' websites, we find the TEA may not withhold the customer information under section 552.110(c) of the Government Code. Regardless, the TEA must withhold Engage's, Imagine's, IXL's, and NWEA's information

² We note the Eighty-sixth Legislature amended section 552.110 effective January 1, 2020. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Accordingly, we understand Imagine and IXL to raise subsections 552.110(b) and 552.110(c) for their information.

³ In this instance, as our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

we have marked under section 552.110(c) of the Government Code.⁴ However, we find Engage, Imagine, and IXL have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the TEA may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Engage, Imagine, and IXL argue some of the information at issue consists of trade secrets subject to section 552.110(b). Upon review, we find Engage, Imagine, and IXL have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the TEA may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Section 552.1101 of the Government Code provides, in relevant part:

- (a) . . . [I]nformation submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

- (1) reveal an individual approach to:
 - (A) work;
 - (B) organizational structure;
 - (C) staffing;
 - (D) internal operations;

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

Id. § 552.1101(a). Engage and Kitamba assert disclosure of some of their information would reveal an individual approach to work, internal operations, and processes and give advantage to a competitor. Additionally, Zearn asserts disclosure of some of its information would reveal an individual approach to work, organizational structure, staffing, internal operations, and processes and give advantage to a competitor. Upon review, we find Zearn has demonstrated the applicability of section 552.1101(a) to the information at issue. Accordingly, to the extent Zearn's customer information is not publicly available on its company's website, the TEA must withhold Zearn's customer information under section 552.1101 of the Government Code. However, to the extent it is publicly available on its company's website, we find the TEA may not withhold the customer information under section 552.1101 of the Government Code. Regardless, the TEA must withhold Zearn's information we have indicated under section 552.1101 of the Government Code. However, we find Engage and Kitamba have failed to provide the specific factual evidence necessary to withhold any of the information at issue under section 552.1101(a), and the TEA may not withhold it on that basis.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See id.* § 552.117(a)(1). However, we note section 552.117 applies only to information held by a governmental body in an employment context. Thus, information that is not held in an employment context may not be withheld under section 552.117(a)(1). ESC-20 seeks to withhold portions of its information under section 552.117(a)(1). The information ESC-20 seeks to withhold is contained in a grant application it submitted to the TEA and, thus, we find the TEA does not maintain the information at issue in an employment capacity. Therefore, we find ESC-20 has failed to demonstrate any of the information at issue is confidential under section 552.117. Accordingly, the TEA may not withhold any of the information at issue under section 552.117(a)(1) 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, to the extent Imagine's and IXL's customer information is not publicly available on their companies' websites, the TEA must withhold Imagine's and IXL's customer information under section 552.110(c) of the Government Code. The TEA must withhold Engage's, Imagine's, IXL's, and NWEA's information we have marked under section 552.110(c) of the Government Code. To the extent Zearn's customer information is not publicly available on its company's website, the TEA must withhold Zearn's customer information under section 552.1101 of the Government Code. The TEA must withhold Zearn's information we have indicated under section 552.1101 of the Government Code. The TEA 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.

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,

Alexandra C. Burks
Attorney
Open Records Division

ACB/be

Ref: ID# 840165

Enc. Submitted documents

c: Requestor
(w/o enclosures)

24 Third Parties
(w/o enclosures)