



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 23, 2020

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

OR2020-24019

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# 845384 (Ref. No. 43092).

The Texas Education Agency (the "TEA") received a request for information pertaining to RFP 701-15-002, Contracted Services for Student Assessment. 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 Educational Testing Service ("ETS"). Accordingly, the TEA states, and provides documentation showing, it notified ETS 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 comments from ETS. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the requested information was the subject of previous requests for rulings, as a result of which this office issued Open Records Letter Nos. 2020-15321 (2020) and 2015-25564 (2015). In Open Records Letter No. 2020-15321, we determined the TEA must withhold the information we marked under section 552.110(c) of the Government Code and must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law. In Open Records Letter No. 2015-25564, we determined the TEA may withhold ETS's information we indicated under section 552.104 of the Government Code and must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law. You state the law, facts, or circumstances on which Open Records Letter No. 2020-15321 was based have not changed. Thus, the TEA must continue to rely on Open Records Letter No. 2020-15321 as a previous determination and

withhold or release the information at issue in accordance with that ruling. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, with respect to Open Records Letter No. 2015-25564, as you acknowledge, the 86th Legislature recently amended section 552.104 of the Government Code. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 1. Therefore, the law on which Open Records Letter No. 2015-25564 was based has changed. *See* ORD 673. Thus, the TEA may not rely on Open Records Letter No. 2015-25564 as a previous determination and may not withhold any of the submitted information in accordance with that ruling. Therefore, we will consider the submitted arguments against disclosure of that information.

Next, we note ETS argues against the release of information that was not submitted by the TEA. This ruling does not address information that was not submitted by the TEA and is limited to the information the TEA has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Section 552.110(c) of the Government Code states:

(c) Except as provided by Section 552.0222, 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 is [excepted from required disclosure].

Id. § 552.110(c). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). ETS argues some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find ETS has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the TEA must withhold ETS's customer information and the information we marked under section 552.110(c) of the Government Code; however, ETS's customer information may only be withheld to the extent it is not publicly available on its company website.¹ We find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(c). Additionally, we find ETS has failed to provide specific factual evidence demonstrating any portion of the rest 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.

¹ As our ruling is dispositive for this information, we need not address ETS's remaining argument against its disclosure.

Section 552.110(b) of the Government Code states, “[e]xcept as provided by [s]ection 552.0222, 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). As noted above, section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). ETS argues some of its remaining information consists of trade secrets subject to section 552.110(b). Upon review, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(b). Additionally, we find ETS has failed to provide specific factual evidence demonstrating any portion of the rest 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.

We note some of the remaining information may be subject to copyright law. 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 TEA must continue to rely on Open Records Letter No. 2020-15321 as a previous determination and withhold or release the requested information in accordance with that ruling. The TEA must withhold ETS’s customer information and the information we marked under section 552.110(c) of the Government Code; however, ETS’s customer information may only be withheld to the extent it is not publicly available on its company website. The TEA must release the remaining information; however, any information protected by 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,

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/gw

Ref: ID# 845384

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third party
(w/o enclosures)