



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 18, 2020

Ms. Katheryne Ellison
Associate General Counsel
Houston Independent School District
4400 West 18th Street, Box 99
Houston, Texas 77092-8501

OR2020-31736

Dear Ms. Ellison:

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# 858520 (File No. Rafique KTRK093020).

The Houston Independent School District (the "district") received a request for e-mails between specified district employees and external contractors containing specified keywords during a defined period of time.¹ Although you take no position as to whether the submitted information is excepted from disclosure under the Act, you state release of the submitted information may implicate the proprietary interests of Blackboard, Inc. ("Blackboard"). Accordingly, you state, and provide documentation demonstrating, you notified Blackboard 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 Blackboard.² We have considered the submitted arguments and reviewed the submitted information.

¹ You state the district sought and received clarifications of the information requested. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.2d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

² Blackboard raises section 552.305 of the Government Code. We note section 552.305 is not an exception to public disclosure under the Act. *See* Gov't Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *Id.* In addition, although Blackboard raises section 552.101 of the Government Code, it makes no arguments

Initially, we note Blackboard argues against the release of information the district has not submitted to this office for our review. This ruling does not address information that was not submitted 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). Thus, this ruling is limited to the information the district has submitted for our review.³ *See id.*

Next, Blackboard argues some of the information at issue is confidential pursuant to the contract between Blackboard and the district. We note information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *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. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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, the district must release it, notwithstanding any expectation or agreement specifying otherwise.

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.” Gov't Code § 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). Blackboard argues portions of its information consist of trade secrets subject to section 552.110(b). Upon review, we find Blackboard has demonstrated some of its information at issue constitutes trade secrets. Accordingly, the district must withhold the information we marked under section 552.110(b) of the Government Code.⁴ However,

to support this exception. Therefore, we assume Blackboard has withdrawn its claim that this section applies to the submitted information. *See id.* §§ 552.301, .302.

³ As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

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

upon review, we find Blackboard failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the district 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, as follows:

(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;

(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). Blackboard generally asserts disclosure of some of the remaining information at issue would give advantage to a competitor. Upon review, we find Blackboard has failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a) of the Government Code, and the district may not withhold it on that basis.

Blackboard seeks to withhold certain information under section 552.102(a) of the Government Code. Although Blackboard raises section 552.102(a), this section only applies to information in the personnel files of governmental employees, as opposed to private employees. *See id.* § 552.102(a). As such, section 552.102(a) is not applicable in this instance. Consequently, the district may not withhold any portion of the remaining information under section 552.102(a) 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 copyright law and the risk of a copyright infringement suit.

In summary, the district must withhold the information we marked under section 552.110(b) of the Government Code. The district must release the remaining information; however, any information protected by 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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/rm

Ref: ID# 858520

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)