



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 6, 2022

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

OR2022-00548

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# 923942 (PIR# 50122).

The Texas Education Agency (the "agency") received a request for ten categories of information pertaining to three specified contracts. You state the agency will release some of the requested information. 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 Achieve3000; Amplify Education, Inc.; Asteria Learning, Inc. d/b/a ECS Learning Systems ("ECS"); BookNook, Inc. ("BookNook"); Carnegie Learning; Focus Care Inc. d/b/a FEV Tutor Inc.; Intervene K-12; iTutor; Lindamoodbell; SAGA Innovations d/b/a SAGA Education; The University of Texas at Austin; and Zearn. Accordingly, you state, and provide documentation showing, you notified the 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 comments from BookNook and ECS. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why info relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this

ruling, we have not received comments from any of the remaining third parties. Thus, we have no basis to conclude any of the remaining third parties have a protected proprietary interest 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 agency may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Next, ECS asserts its information should be withheld because the company expected confidentiality when the information was submitted to the agency. 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.

Next, we note a portion of the submitted information is subject to section 2261.253 of the Government Code. This section provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

Gov’t Code § 2261.253(a)(1). The contract at issue is between the agency, a state agency, and BookNook, a private vendor, for the purchase of goods or services. *See id.* §§ 2261.002(2) (“state agency” has meaning assigned by Gov’t Code § 2151.002), 2151.002(3) (“state agency” includes institution of higher education as defined by Educ. Code § 61.003). Further, the contract has neither expired nor been completed. Accordingly, we find the contract at issue is a contract described by section 2261.253. Although BookNook raises sections 552.110 and 552.1101 of the Government Code for portions of the contract, we note section 552.0222 of the Government Code provides, in relevant part, as follows:

(b) The exceptions to disclosure provided by Sections 552.110 and 552.1101 do not apply to the following types of contracting information:

(1) a contract described by Section 2261.253(a), excluding any information that was properly redacted under Subsection (e) of that section[.]

Id. § 552.0222(b)(1). We have no indication the information at issue was properly redacted under section 2261.253(e). Because section 552.0222 expressly states sections 552.110 and 552.1101 do not apply to a contract described by section 2261.253(a), we do not address BookNook's arguments under sections 552.110 and 552.1101 for the information in the contract.

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

(a) Except as provided by Section 552.0222, information 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). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.1101(a) does not apply. *See id.* § 552.0222(b). BookNook and ECS assert disclosure of some of their information would reveal an individual approach to work, organizational structure, staffing, internal operations, processes, and pricing and give advantage to a competitor. Upon review, we find BookNook and ECS have demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the agency must withhold the information we

marked under section 552.1101(a).¹ However, 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 552.1101(a). *See id.* § 552.0222(b) (listing certain types of information not excepted under section 552.1101). Additionally, we find BookNook has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is subject to section 552.1101(a). Therefore, the agency may not withhold any of the remaining information at issue under section 552.1101(a).

BookNook and ECS raise section 552.110 of the Government Code for some of their information. Section 552.110(b) 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). Section 552.110(c) 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). We note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Upon review, we find ECS has demonstrated some of its information at issue constitutes trade secrets. Accordingly, the agency must withhold the information we marked under section 552.110(b); however, to the extent the customer information is made available to the public by ECS, including but not limited to on its website or social media accounts, it may not be withheld under 552.110(b).² However, 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) or section 552.110(c). Additionally, we find BookNook has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret or constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the agency may not withhold the remaining information at issue under section 552.110(b) or section 552.110(c).

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

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

We note some of the remaining materials at issue 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 must withhold the information we marked under section 552.1101(a) of the Government Code. The agency must withhold the information we marked under section 552.110(b) of the Government Code; however, to the extent the customer information is made available to the public by ECS, including but not limited to on its website or social media accounts, it may not be withheld under 552.110(b) of the Government Code. The agency 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,

Emily Kunst
Assistant Attorney General
Open Records Division

EK/jm

Ref: ID# 923942

Enc. Submitted documents

c: Requestor
(w/o enclosures)

12 Third Parties
(w/o enclosures)