



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 19, 2022

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

OR2022-21039

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# 959937 (TEA PIR# 53402).

The Texas Education Agency (the "agency") received a request for information pertaining to a specified request for proposals. You state you will release some information to the requestor. Although you take no position regarding whether the submitted information is excepted from disclosure, you state release of the information at issue may implicate the proprietary interests of Mid-continent Research for Education and Learning International ("McREL"). Accordingly, you state, and provide documentation demonstrating, the agency notified McREL of the request for information and of its 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 submitted by McREL. We have considered the submitted arguments and reviewed the submitted information.

McREL raises section 552.104 of the Government Code for some of its 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." Gov't Code § 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 McREL's argument under section 552.104.

Section 2261.253 of the Government Code 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[.]

Id. § 2261.253(a)(1). Most of the submitted information is from a contract between the agency, a state agency, and McREL, a private vendor, for the purchase of goods or services. Further, the contract has neither expired nor been completed. Accordingly, we find this information is subject to section 2261.253.

McREL raises sections 552.110 and 552.1101 of the Government Code for portions of the submitted information. Section 552.0222 of the Government Code provides, in relevant part:

(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 note some of the information at issue was not properly redacted under subsection (e) of section 2261.253. Although McREL raises sections 552.110 and 552.1101 for this information, section 552.0222 expressly states these exceptions do not apply to a contract described by section 2261.253(a). Accordingly, we do not address McREL's arguments against disclosure of this information. However, we will address McREL's arguments for the information that was properly redacted.

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). McREL argues some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find McREL has demonstrated the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the agency must withhold the information we have marked under section 552.110(c) of the Government Code; however, to the extent the customer information is made available to the public by McREL, including but not limited to on its website or social media accounts, it may not be withheld under 552.110(c).¹

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 have marked under section 552.110(c) of the Government Code; however, to the extent the customer information is made available to the public by McREL, including but not limited to on its website or social media accounts, it may not be withheld under 552.110(c) 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,

Joseph Hoggatt
Assistant Attorney General
Open Records Division

JWH/be

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

Ref: ID# 959937

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)