



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 20, 2014

Mr. Brian Nelson
General Counsel
Lone Star College System
5000 Research Forest Drive
The Woodlands, Texas 77381-4356

OR2014-03152

Dear Mr. Nelson:

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# 514691 (LSCS File No. PR14-1118-00026).

The Lone Star College System (the "system") received a request for proposals and working documents containing comparative details on vendors' pricing and service features pertaining to request for proposals number 256, Student Loan Default Prevention Services. You state you have released some of the requested information to the requestor. 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 National Education Servicing ("NES"); Nebraska Student Loan Program, Inc. d/b/a Inceptia ("Inceptia"); and Student Outreach Solutions, Inc. ("SOS"). Accordingly, you state you notified NES, Inceptia, and SOS 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. *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 NES and Inceptia. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information pertaining to Inceptia was the subject of a previous request for information, in response to which this office issued Open Records Letter

No. 2013-21005 (2013). In that ruling, we concluded the system must withhold the information we marked under section 552.110(b) of the Government Code and must release the remaining information in accordance with copyright law. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Thus, the system must continue to rely on Open Records Letter No. 2013-21005 as a previous determination and withhold or release the identical information 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). As we are able to make this determination, we need not address Inceptia's submitted arguments against disclosure of this information.

We next note 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 information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from SOS. Thus, SOS has not demonstrated the company has protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the system may not withhold the submitted information on the basis of any proprietary interests SOS may have in the information.

We now address NES's arguments against disclosure of portions of its information.¹ Section 552.101 of the Government Code exempts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. NES raises section 552.101 in conjunction with Delaware Limited Liability Company laws. However, section 552.101 does not incorporate the confidentiality provisions of other states' statutes and regulations because those laws only govern the disclosure of information held by entities of those states. *But see* Open Records Decision No. 561 at 6-7 (1990) (noting that if agency of federal government shares its information with Texas governmental entity, Texas entity must withhold information that federal agency determined to be confidential under federal law). Accordingly, the system may not withhold any of the information at issue under section 552.101 in conjunction with Delaware state law.

¹NES also raises section 552.305 of the Government Code; however, this section 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 information. *See id.*

Section 552.101 of the Government Code also encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. We understand NES to assert that some of its submitted information is protected by common-law privacy. We note, however, common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co.*, 111 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy)). Accordingly, no portion of the submitted information pertaining to NES may be withheld under section 552.101 on the basis of common-law privacy.

NES also raises section 552.104 of the Government Code. This section excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the system does not seek to withhold any information pursuant to this exception, no portion of NES’s information may be withheld on this basis.

NES claims some of its information is excepted from disclosure under section 552.110(b) of the Government Code. This section excepts from disclosure “[c]ommercial 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.” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6.

NES contends some of its information constitutes commercial or financial information, the release of which would cause substantial competitive harm to the company. Upon review, we find the company’s pricing information, which we have marked, constitutes commercial or financial information. Further, we find NES has established that its customer information constitutes commercial or financial information for the purposes of section 552.110(b).

However, to the extent any of the customer information NES seeks to withhold has been published on the company's website, any such information is not confidential under section 552.110(b). Accordingly, the system must withhold NES's pricing information and customer information under section 552.110(b), provided the customer information has not been published on the company's website. However, upon further review, we find NES has not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Accordingly, none of NES's remaining information may be withheld under section 552.110(b) of the Government Code.

The system acknowledges that 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. *See* Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See id.*; *see also* 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 system must continue to rely on Open Records Letter No. 2013-21005 as a previous determination and withhold or release the identical information in accordance with that ruling. The system must withhold NES's pricing information under section 552.110(b) of the Government Code. The system must also withhold NES's customer information under section 552.110(b) of the Government Code, provided the customer information has not been published on the company's website. The system must release the remaining information, but 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 http://www.texasattorneygeneral.gov/open_orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/tch

Ref: ID# 514691

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Justine Gianandrea
Senior Vice President, Product Development
National Education Servicing, L.L.C.
200 West Monroe Street, Suite 700
Chicago, Illinois 60606-5075
(w/o enclosures)

Mr. Paul J. Peter
Counsel for Nebraska Student Loan Program d/b/a Inceptia
Law Offices of Keating, O'Gara, Nedved & Peter, P.C., L.L.O.
530 South 13th Street, Suite 100
Lincoln, Nebraska 68508-2795
(w/o enclosures)

Mr. Eric Johnson
President
Student Outreach Solutions
4501 North Superior Drive
Muncie, Indiana 47303
(w/o enclosures)