



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 5, 2015

Ms. Jill Sutherland
Purchasing Manager
Texas State Library and Archives Commission
P.O. Box 12927
Austin, Texas 78711-2927

OR2015-08716

Dear Ms. Sutherland:

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# 562241.

The Texas State Library and Archives Commission (the "commission") received a request for vendor proposals and evaluation and scoring documents regarding two specified requests for proposals. Although we understand you to take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Learning Express, L.L.C. ("Learning Express") and World Book, Inc. ("World Book") 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 Learning Express and World Book. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted any evaluation or scoring documents. To the extent the commission maintained any such information when it received the request for information, we assume you have released it. If the commission has not released any such

information, you must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if a governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

We understand World Book to argue some of its information is excepted from disclosure because it is marked "confidential" and was supplied to the commission with the expectation of confidentiality. However, information is not confidential under the Act simply because the party submitting the information 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, through an agreement or contract, overrule or repeal provisions of the Act. 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 Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the commission must release it, notwithstanding any expectations or agreement specifying otherwise.

Learning Express and World Book each raise section 552.110(b) of the Government Code for some of the submitted information. Section 552.110(b) protects "[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). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999).

World Book argues the release of its information would "impair the Texas government's ability to obtain necessary information in the future, as World Book and other potential contractors would be substantially less forthcoming with information for future [requests for proposals] if their proprietary information is disclosed." In advancing this argument, World Book appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also* *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). The *National Parks* test provides commercial or financial information is confidential if disclosure of the information is likely to impair a governmental body's ability to obtain necessary information in the future. 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former

section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration showing the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *See* ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only World Book's interests in withholding its information.

Learning Express and World Book each contend some of the submitted information is commercial or financial information, the release of which would cause substantial competitive harm. Upon review, we find each company has demonstrated the information it seeks to withhold constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the commission must withhold this information, which we have marked, under section 552.110(b) of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”¹ Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Upon review, we find the commission must withhold the insurance policy numbers within the submitted information under section 552.136 of the Government Code.

In summary, the commission must withhold the information we have marked under section 552.110(b) of the Government Code. The commission must withhold the insurance policy numbers within the submitted information under section 552.136 of the Government Code. The commission must release the remaining information.

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

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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

Sincerely,



Kristi L. Godden
Assistant Attorney General
Open Records Division

KLK/cz

Ref: ID# 562241

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Ilah M. Adkins
Counsel for World Book
Scott Fetzer
28800 Clemens Road
Westlake, Ohio 44145-1197
(w/o enclosures)

Ms. Cynthia P. Irani
Counsel for LearningExpress, LLC
Drinker Biddle & Reath, LLP
191 North Wacker Drive, Suite 3700
Chicago, Illinois 60606-1698
(w/o enclosures)