



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 7, 2015

Mr. W. Montgomery Meitler
Senior Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2015-25564

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# 589588 (TEA PIR Nos, 25427 and 25615).

The Texas Education Agency (the "agency") received a request for all information submitted by Education Testing Service ("ETS") in response to RFP No. 701-15-002, and another request for all proposals, evaluation documents, and any contracts executed in response to RFP No. 701-15-002. You state you have released some information. Although you take no position with respect to the public availability of the remaining requested information, you state release of this information may implicate the proprietary interests of ETS; CTB/McGraw Hill, L.L.C.; Data Recognition Corporation; Measured Progress; and NCS Pearson, Inc. Accordingly, you state and provide documentation showing, you have notified these third parties of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have received comments from ETS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we 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 arguments from CTB/McGraw Hill, L.L.C.; Data Recognition Corporation; Measured Progress; and NCS Pearson, Inc. Thus, these third parties have not demonstrated they have a protected proprietary interest 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 agency may not withhold the submitted information on the basis of any proprietary interests these third parties may have in the information.

Next, we note the agency did not submit any presentation materials for our review. To the extent this information existed when the present request was received, we assume it has been released. If such information has not been released, then the agency must release it at this time. *See* Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

ETS argues portions of its information are excepted under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at 841. ETS states it has competitors. In addition, ETS states release of its information could allow its competitors to undercut ETS in its projected cost and time and allow the competitor to out-compete ETS in projects involving a similar scope of services. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive

information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d 831, 839. After review of the information at issue and consideration of the arguments, we find ETS has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the agency may withhold ETS's information, which we have indicated, under section 552.104(a) of the Government Code.¹

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 the copyright law and the risk of a copyright infringement suit.

In summary, the agency may withhold ETS's information, which we have indicated, under section 552.104 of the Government Code. The agency must release the remaining information; however, any information subject to 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,



Thana Hussaini
Assistant Attorney General
Open Records Division

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¹As our ruling is dispositive, we need not address ETS's remaining arguments for this information.

Ref: ID# 589588

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. George Powell
Executive Director
Educational Testing Service
10999 Interstate Highway 10 West,
Suite 400
San Antonio, Texas 78230
(w/o enclosures)

Ms. Anna M. Lobst
Market and Account Analyst
Pacific Metrics
1 Lower Ragsdale Drive
Building 1, Suite 150
Monterey, California 93940
(w/o enclosures)

Mr. Jake Parizek
State Solutions Manager
CTB/McGraw-Hill, LLC
20 Ryan Ranch Road
Monterey, California 93940
(w/o enclosures)

Ms. Susan S. Engeleiter
Chief Executive Officer and President
Data Recognition Corporation
13490 Bass Lake Road
Maple Grove, Minnesota 55311
(w/o enclosures)

Mr. John Parson
Chief Financial Officer
Measured Progress
50 Education Way
Dover, New Hampshire 03820
(w/o enclosures)