



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2006

Mr. Michael Gabarino
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2006-11361

Dear Mr. Garbarino:

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# 260576.

The Texas Education Agency (the "agency") received two requests for information pertaining to RFQ# 701-06-002. You state that you have released some information to the requestors, but claim that some of the submitted information is excepted from disclosure under section 552.137 of the Government Code. Although you take no position regarding the public availability of the remaining submitted information, you state that release of the remaining submitted information may implicate third party proprietary interests. Thus, pursuant to section 552.305 of the Government Code, you have notified the following entities of the request and each entity's right to submit arguments to this office: Compass Learning ("Compass"), Plato Learning, Inc. ("Plato"), Riverdeep, Inc. ("Riverdeep"), Scholastic, Inc. ("Scholastic"), Scientific Learning Corporation ("Scientific"), Texas A&M Research Foundation ("A&M"), Tom Snyder Productions ("Tom Snyder"), and Voyager Expanded Learning ("Voyager"). *See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits*

governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have reviewed the submitted information and considered the submitted arguments.

Initially, we note that the cost proposals submitted for RFQ# 701-06-002 were the subject of a previous request for information to the agency, in response to which this office issued Open Records Letter No. 2006-05351 (2006). *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You indicate that the pertinent facts and circumstances have not changed since the issuance of Open Records Letter No. 2006-05351. Consequently, we determine that the agency must continue to follow our ruling in Open Records Letter No. 2006-05351 with respect to the information at issue in that ruling.¹

Next, we note, and you acknowledge, that the agency failed to comply with the time periods prescribed by section 552.301 of the Government Code in seeking an open records decision from this office. *See* Gov't Code § 552.301(a), (b), (e). Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest is demonstrated when some other source of law makes the information at issue confidential or third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). In this instance, because third-party interests are at issue, and because section 552.137 of the Government Code can provide a compelling reason, we will address the submitted arguments for the remaining submitted information.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Compass, Plato, Riverdeep, Scholastic, Scientific, A&M, Tom Snyder, and Voyager have not submitted to this office any reasons explaining why any of the remaining submitted information should not be released. We thus have no basis for concluding that the release of any portion of the remaining submitted information pertaining to these entities would harm their proprietary interests.

¹As our ruling on this issue results in the withholding of all the information for which Scientific raises arguments, we need not address Scientific's arguments against disclosure.

See, e.g., id. § 552.110; 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). Accordingly, we conclude that the agency may not withhold any portion of the remaining submitted information on the basis of any proprietary interest Compass, Plato, Riverdeep, Scholastic, Scientific, A&M, Tom Snyder, and Voyager may have in the information.

Section 552.137 of the Government Code exempts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail addresses you have marked in a portion of the submitted information relating to the agency’s reviewers of RFQ# 701-06-002 are not of a type specifically excluded by section 552.137(c). Therefore, the agency must withhold these marked e-mail addresses in accordance with section 552.137 unless the agency receives consent for their release.

Finally, we note that some of the remaining information includes notice of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of materials that are subject to copyright protection unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990). Accordingly, in releasing the remaining information the agency must release copyrighted information only in accordance with copyright law.

In summary, the agency must continue to follow our ruling in Open Records Letter No. 2006-05351 with respect to the information at issue in that ruling. The agency must withhold the marked e-mail addresses in accordance with section 552.137 of the Government Code unless the agency receives consent for their release. The remaining submitted information must be released; however, in releasing information that is protected by copyright, the agency must comply with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 260576

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