



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 21, 2010

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

OR2010-00967

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# 367731 (TEA PIR# 12085).

The Texas Education Agency (the "agency") received a request for e-mail correspondence in the possession of NEPC, LLC ("NEPC") or Courtland Partners, Ltd. ("Courtland Partners") that was sent to or from members of the State Board of Education during a specified time period and which references the Texas Permanent School Fund.<sup>1</sup> You state that the agency will release all of the responsive information in the possession of Courtland Partners.<sup>2</sup> You claim that some of the remaining requested information is not subject to the Act. You also claim that other requested information is subject to the Act, but is excepted from disclosure under section 552.143 of the Government Code. You further state the requested information may contain proprietary information. You inform us that you notified the interested third party, NEPC, of the agency's receipt of the request for information and of NEPC's right to submit arguments to this office as to why the requested 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 permitted governmental body to

---

<sup>1</sup>We note that the agency sought and received clarification of the request for information. *See Gov't Code § 552.222(b)* (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

<sup>2</sup>You state that Courtland Partners will forward the responsive information to the agency and that the information will be released to the requestor.

rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered your arguments, as well as the arguments submitted by NEPC.

We first address your contention that some of the information at issue is not subject to the Act. The Act is applicable to "public information." *See* Gov't Code § 552.021. Section 552.002 of the Act provides that "public information" consists of information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

*Id.* § 552.002(a). Thus, virtually all of the information that is in a governmental body's physical possession constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see also* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). Furthermore, the Act applies to information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for a governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2). Thus, information that is collected, assembled, or maintained by a third party may be subject to disclosure under the Act if a governmental body owns or has a right of access to the information. *See* Open Records Decision No. 462 (1987).

You state that the agency commenced contracts with Courtland Partners on July, 17, 2008, and NEPC on August 25, 2009. You inform us that the agency "does not have a right of access to information in the possession of Courtland Partners or NEPC prior to the commencement of the respective contracts." Based on your arguments that the agency does not have a right of access to this information, we determine that any information created before the commencement of the contracts at issue is not public information for purposes of section 552.002, and it need not be released in response to the request for information.

Next, you argue that the remaining responsive information in the possession of NEPC is public information subject to the Act. You argue that pursuant to the agency's agreement with NEPC, the agency has a right of access to the responsive e-mail correspondence between NEPC and the agency. You further assert that "[e]-mail correspondence regarding the execution of NEPC's contractual obligations constitutes official business of the [State Board of Education], [Texas Permanent School Fund], and [the agency]." Although NEPC argues that the responsive information is not public information for purposes of the Act, we conclude, on the basis of the agency's assertions, that the responsive information maintained by NEPC constitutes public information under section 552.002. *See* Gov't Code § 552.002(a)(2); *see also* *Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268, 271

(Tex. App.—Houston [14th Dist.] 2004, no pet.) (governmental body that was entitled to inspect books and records of contracting party had right of access to its payroll account records).

Having found the requested NEPC e-mails to be public information, we must address the agency's procedural obligations under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, the governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). As of the date of this letter, you have not submitted to this office a copy or representative sample of the requested information for our review. Thus, we find the agency failed to comply with the requirements of section 552.301.<sup>3</sup>

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—Amarillo 2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *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 of the Government Code); *see also* Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). You assert that some of the information at issue is excepted under section 552.143 of the Government Code, which is a mandatory exception to disclosure that may not be waived. In addition, NEPC argues that release of the responsive NEPC e-mails would cause NEPC substantial competitive harm. You have not, however, submitted any information for our review. Therefore, we have no basis for finding any information confidential. Thus, we have no choice but to order the agency to release the information at issue. If you believe the information at issue is confidential and may not

---

<sup>3</sup>Although NEPC has submitted to this office copies of e-mails it deems responsive to the request, this ruling does not address information that was not submitted by the agency. *See* Gov't Code § 552.301(e)(1)(b) (governmental body requesting decision from attorney general must submit copy of specific information requested).

lawfully be released, you must challenge this ruling in court pursuant to section 552.324 of the Government Code.

In summary, any information created before the commencement of the contracts with Courtland Partners and NEPC is not public information for purposes of section 552.002 of the Government Code, and it need not be released in response to the request for information. The remaining responsive information in the possession of NEPC must be released to the requestor.

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.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner  
Assistant Attorney General  
Open Records Division

CDSA/eeg

Ref: ID# 367731

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Steven C. Novick  
Courtland Partners, Ltd  
200 Public Square, Suite 2530  
Cleveland, Ohio 44114  
(w/o enclosures)

Mr. Rhett Humphreys  
NEPC, LLC  
5113 Piper Station Drive, Suite 205  
Charlotte, North Carolina 28277  
(w/o enclosures)

Ms. Jennifer L. Chunias  
Goodwin Procter LLP  
Exchange Place  
Boston, Massachusetts 02109  
(w/o enclosures)