



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 30, 2011

Mr. W. Montgomery Meitler
Assistant Counsel
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701

OR2011-12502

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# 428454 (TEA PIR# 15584).

The Texas Education Agency (the "agency") received a request for the proposals submitted in response to Request For Proposals No. 701-10-026A, College Preparation Assessments, information pertaining to the Texas College Preparation Program, and information pertaining to students who took the ACT and SAT tests. You state the agency will release some of the requested information. Although you take no position as to whether the submitted information is excepted under the Act, you state that release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified ACT, Inc. ("ACT") and the College Board 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 the College Board. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note, and you acknowledge, the requested information was the subject of a previous request, as a result of which this office issued Open Records Letter No. 2010-09362 (2010). In that ruling, we determined the agency must withhold certain portions of Cambridge Educational Services's ("Cambridge") information under section 552.110 of the Government Code but must release the remainder of the information at issue, including ACT's proposal, in accordance with copyright law. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based with regard to ACT's and Cambridge's proposals, we conclude the agency must rely on Open Records Letter No. 2010-09362 as a previous determination and withhold or release ACT's and Cambridge's proposals in accordance with Open Records Letter No. 2010-09362. *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). Furthermore, in Open Records Letter No. 2010-09362, the agency notified the College Board pursuant to section 552.305 when the agency received the previous request for information, and the College Board failed to submit any arguments that its information was excepted under the Act. Accordingly, in our previous ruling, we ruled that the agency must release the College Board's information. However, the College Board now claims that its submitted proposal is excepted from disclosure under section 552.110 of the Government Code. Because the proprietary interests of a third party are at stake, we will consider the College Board's claims under this exception.

The College Board claims portions of its information are excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial 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." *See* Gov't Code § 552.110(a)-(b).

As mentioned above, the College Board's information was subject to a previous request for information, in response to which this office issued Open Records Letter No. 2010-09362. In that prior ruling, the agency notified the College Board pursuant to section 552.305, and the College Board failed to submit any arguments that its information was excepted from disclosure under the Act. Since the issuance of the previous ruling on June 25, 2010, the College Board has not disputed this office's conclusion regarding the release of its submitted proposal, and the agency has informed us that, in accordance with that ruling, the agency has released the College Board's proposal. In this regard, we find the College Board has not taken the necessary measures to protect the requested proposal in order for this office to conclude that any portion of that document now either qualifies as a trade secret or contains commercial or financial information, the release of which would cause the College Board substantial harm. *See* Gov't Code § 552.110, RESTATEMENT OF TORTS § 757 cmt. b (1939);

see also 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), 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). Accordingly, we conclude that the agency may not withhold any information in the College Board's proposal under section 552.110 of the Government Code.

We note that some of the materials at issue 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 must rely on Open Records Letter No. 2010-09362 as a previous determination and withhold or release ACT's and Cambridge's proposals in accordance with that ruling. The agency must release the College Board's information, but 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.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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

Ref: ID# 428454

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Paul Weeks
Assistant Vice President
ACT, Inc.
P.O. Box 168
Iowa City, Iowa 52243-0168
(w/o enclosures)

Ms. Latifa Stephens
Associate General Counsel
The College Board
45 Columbus Avenue
New York, New York 10023-6992
(w/o enclosures)