



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 14, 2016

Mr. Luke A. Cochran
Counsel for the City of Brenham
Law Office of Cary L. Bovey, PLLC
2251 Double Creek Drive, Suite 204
Round Rock, Texas 78664

OR2016-20810

Dear Mr. Cochran:

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# 624599.

The City of Brenham (the "city"), which you represent, received a request for the bid amounts, proposals, and executed contracts related to a specified request for proposals. You claim portions of the submitted information are excepted from disclosure under sections 552.104, 552.130, and 552.136 of the Government Code.¹ You also state you notified Budget Disposal ("Budget"), Progressive Waste Solutions ("Progressive"), Republic Services, and Texas Disposal Systems, Inc. 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 considered the exceptions you claim and reviewed the submitted information. We have also considered comments from Budget and Progressive.

You inform us some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-12860 (2016). In that ruling, we determined the city may withhold the information at issue under section 552.104(a) of the Government Code. However, since that time we note Progressive was awarded the contract in response to the specified request for proposals and has executed a contract with the city. Therefore, we find circumstances have changed for the information previously withheld under section 552.104 of the Government Code.

¹Although you do not raise sections 552.130 and 552.136 of the Government Code in your brief, we understand you to raise these exceptions based on your markings.

Thus, the city may not rely on Open Records Letter No. 2016-12860 as a previous determination for the information previously withheld under section 552.104. *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). Accordingly, we will address the claimed exceptions for the submitted information.

Next, we note 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) of the Government Code 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, we have not received comments from the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of these parties have protected proprietary interests in the submitted information. *See 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You argue release of the submitted executed contract "could give the [r]equestor an advantage over its competitors." However, such an interest in protecting the information belongs to the third parties and not the city. Consequently, we find the city may not withhold any portion of the submitted information under section 552.104(a) of the Government Code on this basis. However, we note a private third party may also invoke this exception. *Boeing*, 466 S.W.3d at 839. Progressive states it has competitors. Additionally, Progressive argues release of its proposal "would severely undermine any competitive advantage Progressive might have[.]" After review of the information at issue and consideration of the arguments, we find Progressive has established the release of its information at issue would give advantage to a competitor or bidder. Thus, we conclude the city may withhold Progressive's proposal under section 552.104(a) of the Government Code.²

²As our ruling is dispositive, we need not address Progressive's remaining argument against disclosure of its information.

Section 552.110(b) of the Government Code 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.*; ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Budget contends portions of the remaining information are commercial or financial information, release of which would cause substantial competitive harm to Budget. Upon review of Budget’s arguments, we conclude Budget has established the release of the information we have marked would cause the company substantial competitive injury. Accordingly, the city must withhold the information we have marked under section 552.110(b), including Budget’s customer information to the extent it is not publicly available on Budget’s website. To the extent Budget’s customer information is publicly available on the company’s website, the city may not withhold such information under section 552.110(b). In addition, we find Budget has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982). We therefore conclude the city may not withhold the remaining information under section 552.110(b) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See* Gov’t Code § 552.130. Accordingly, the city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code.

Section 552.136(b) 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.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, we find the city must withhold the insurance policy numbers you have marked under section 552.136 of the Government Code.

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 city may withhold Progressive's proposal under section 552.104(a) of the Government Code. The city must withhold the information we have marked under section 552.110(b) of the Government Code, including Budget's customer information to the extent it is not publicly available on Budget's website. The city must withhold the motor vehicle record information you have marked under section 552.130 of the Government Code and the insurance policy numbers you have marked under section 552.136 of the Government Code. The city must release the remaining information 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 624599

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)