



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 14, 2016

Mr. Ronn P. Garcia
Counsel for Region 17 Education Service Center
Underwood Law Firm, P.C.
P.O. Box 16197
Lubbock, Texas 79490

OR2016-25315

Dear Mr. Garcia:

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# 633921.

The Region 17 Education Service Center (the "center"), which you represent, received five requests from different requestors for information related to the current award catalog for the West Texas Food Service Cooperative.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of AdvancePierre Foods ("AdvancePierre"); Alpha Foods Company ("Alpha"); Basic American Foods ("Basic"); Bongard Creameries ("Bongard"); Brookwood Farms, Inc. ("Brookwood"); Cargill Meat Solutions ("Cargill"); Chef's Corner Foods ("Chef's"); Con Agra Foods Gilardi ("Con Agra"); Foster Farms ("Foster"); Goodman Foods Products d/b/a Don Lee Farms ("Goodman"); High Liner Foods (USA), Inc. ("High Liner"); Idahoan Foods, L.L.C. ("Idahoan"); Integrated Food Service ("Integrated"); J.R. Simplot ("Simplot"); Jennie-O

¹You state the center sought and received clarification of the information requested by the first requestor. See Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Turkey Store (“Jennie-O”); JM Smucker Company (“Smucker”); JTM Food Group (“JTM”); Labatt Food Service (“Labatt”); Lamb Weston (“Lamb”); Land O’Lakes, Inc. (“Land O’Lakes”); Lux Bakery (“Lux”); McCain Foods USA (“McCain”); M.C.I. Foods, Inc., d/b/a Los Cabos Mexican Foods (“M.C.I.”); Michael Foods, Inc. (“Michael”); Nardone Brothers Pizza (“Nardone”); National Food Group (“National”); Out of the Shell, L.L.C., d/b/a Ling’s (“Ling’s”); Pilgrim’s Pride Corp. (“Pilgrim’s”); Red Gold, L.L.C. (“Red Gold”); Rich Products Corp. (“Rich”); Schwan’s Food Service (“Schwan’s”); Tasty Brands (“Tasty”); Trident Seafoods (“Trident”); Tyson Foods, Inc. (“Tyson”); Uno Foods, Inc. (“Uno”); and Wawona Frozen Foods (“Wawona”). Accordingly, you state, and provide documentation showing, you notified AdvancePierre, Alpha, Basic, Bongard, Brookwood, Cargill, Chef’s, Con Agra, Foster, Goodman, High Liner, Idahoan, Integrated, Simplot, Jennie-O, Smucker, JTM, Labatt, Lamb, Land O’Lakes, Lux, McCain, M.C.I., Michael, Nardone, National, Ling’s, Pilgrim’s, Red Gold, Rich, Schwan’s, Tasty, Trident, Tyson, Uno, and Wawona 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 Michael. We have reviewed the submitted information and the submitted arguments.

Initially, 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from AdvancePierre, Alpha, Basic, Bongard, Brookwood, Cargill, Chef’s, Con Agra, Foster, Goodman, High Liner, Idahoan, Integrated, Simplot, Jennie-O, Smucker, JTM, Labatt, Lamb, Land O’Lakes, Lux, McCain, M.C.I., Nardone, National, Ling’s, Pilgrim’s, Red Gold, Rich, Schwan’s, Tasty, Trident, Tyson, Uno, or Wawona explaining why the submitted information should not be released. Therefore, we have no basis to conclude AdvancePierre, Alpha, Basic, Bongard, Brookwood, Cargill, Chef’s, Con Agra, Foster, Goodman, High Liner, Idahoan, Integrated, Simplot, Jennie-O, Smucker, JTM, Labatt, Lamb, Land O’Lakes, Lux, McCain, M.C.I., Nardone, National, Ling’s, Pilgrim’s, or Red Gold, Rich, Schwan’s, Tasty, Trident, Tyson, Uno, or Wawona has a protected proprietary interest 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 center may not withhold the submitted information on the basis of any proprietary interest AdvancePierre, Alpha, Basic, Bongard, Brookwood, Cargill, Chef’s, Con Agra, Foster, Goodman, High Liner, Idahoan, Integrated, Simplot, Jennie-O, Smucker, JTM, Labatt, Lamb, Land O’Lakes, Lux, McCain, M.C.I., Nardone, National, Ling’s, Pilgrim’s, Red Gold, Rich, Schwan’s, Tasty, Trident, Tyson, Uno, or Wawona may have in the information.

Next, we note Michael argues against the release of information that was not submitted by the center. This ruling does not address information that was not submitted by the center and is limited to the information the center has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

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). 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. Michael states it has competitors. In addition, Michael states release of its pricing information would give an advantage to its competitors. 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 at 841. After review of the information at issue and consideration of the arguments, we find Michael has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the center may withhold Michael’s pricing information under section 552.104(a) of the Government Code.² The center must release the remaining information.

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

²As our ruling is dispositive, we need not address Michael’s remaining argument against disclosure of the information at issue.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Claire Morris Sloan", with a long horizontal flourish extending to the right.

Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 633921

Enc. Submitted documents

c: 5 Requestors
(w/o enclosures)

36 Third Parties
(w/o enclosures)