



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 12, 2016

Ms. Jessica Vu
Public Information Coordinator
Assistant General Counsel
Office of the Governor
P.O. Box 12428
Austin, Texas 78711

OR2016-27431

Dear Ms. Vu:

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# 639814 (OOG ID# 16-340).

The Office of the Governor (the "OOG") received a request for three specified studies. Although you take no position on the submitted information, you state release of this information may implicate the proprietary interests of Grotta Marketing Research, LLC, and Marketing Information Masters, Inc. ("MIMS"). Accordingly, you state you notified third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue 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 MIMS. We have considered the submitted arguments and reviewed the submitted information.

Initially, you indicate the OOG will withhold or release some of the requested information pursuant to Open Records Letter No. 2010-13143 (2010). *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 information is or is not excepted

from disclosure). However, that ruling was issued to the Texas Comptroller of Public Accounts (the “comptroller’s office”). Thus, the OOG may not rely on Open Records Letter No. 2010-13143 as a previous determination because that ruling was issued to the comptroller’s office, not the OOG. *See id.* Accordingly, the OOG must release that information or seek a ruling to withhold it. *See* Gov’t Code §§ 552.301, .302.

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining third party 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 OOG may not withhold the submitted information on the basis of any proprietary interest the remaining third party may have in the information.

Section 552.104(a) of the Government Code exempts 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. MIMS states it has competitors. In addition, MIMS states release of its information would give an advantage to a competitor or bidder. After review of the information at issue and consideration of the arguments, we find MIMS has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the OOG may withhold the submitted information pertaining to MIMS under section 552.104(a) of the Government Code.

We note some of the remaining information appears to be subject to copyright law. 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 OOG may withhold the submitted information pertaining to MIMS under section 552.104(a) of the Government Code. The OOG must release the remaining

information; however, any information protected by 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.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,



Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 639814

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)