



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 27, 2017

Ms. Julie Allen
Assistant General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR2017-04226

Dear Ms. Allen:

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# 647203 (TABC Ref. No. 1479305892).

The Texas Alcoholic Beverage Commission (the "commission") received a request for records relating to a proposed enforcement badge.¹ You state you will release some of the requested information. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.104, and 552.137 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Smith & Warren ("S&W"); Celebrate Excellence ("Celebrate"); Symbol Arts ("Symbol"); G and C Printing ("G&C"); and Miller Uniforms ("Miller"). Accordingly, you state you notified the third parties 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

¹The commission states it sought and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the 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 public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

to raise and explain applicability of exception in the Act in certain circumstances). You have provided us with comments from S&W and Celebrate. We have received comments from Miller. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Symbol or G&C explaining why the submitted information should not be released. Further, although you inform us S&W and Celebrate object to the release of their information, these third parties have not raised any exceptions to disclosure under the Act or provided any arguments against disclosure. Therefore, we have no basis to conclude Symbol, G&C, S&W, or Celebrate 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 commission may not withhold the submitted information on the basis of any proprietary interest these third parties 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). 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, 841 (Tex. 2015). The commission states the information it has marked in Exhibit C pertains to a procurement where the proposals have been completed, but the commission has not yet selected a winning vendor, completed negotiations, or executed a final contract with a vendor. The commission argues release of the information at issue in Exhibit C before the execution of the final contract will interfere with the commission's bargaining position and diminish its ability to negotiate the most competitive contract. After review of the information at issue and consideration of the arguments, we find the commission has established the release of the information at issue would give

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

advantage to a competitor or bidder. Thus, we conclude the commission may withhold the information it marked under section 552.104 of the Government Code.³

Additionally, a private third party may invoke section 552.104(a). *See id.* Miller raises section 552.104 for its information in Exhibit B. Miller states it has competitors. In addition, Miller states release its information would give advantage to a competitor or bidder. After review of the information at issue and consideration of the arguments, we find Miller has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may withhold Miller's information in Exhibit B under section 552.104(a).⁴

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See Gov't Code 552.137(a)-(c)*. We note section 552.137 does not apply to an e-mail address "provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent[.]" *See id.* § 552.137(c)(2). We note the e-mail addresses you seek to withhold are subject to section 552.137(c)(2). Therefore, the commission may not withhold the e-mail addresses at issue under section 552.137 of the Government Code. *See id.* § 552.137(a).

You contend remaining information in Exhibit B is or may be protected by copyright law under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. Section 552.101 encompasses information protected by other statutes. We understand you to claim the submitted information is confidential under the Federal Copyright Act, title 17 of the United States Code. However, copyright law does not make information confidential for purposes of section 552.101. Open Records Decision No. 660 at 5 (1999) (Federal Copyright Act does not make information confidential, but rather gives copyright holder exclusive right to reproduce his work, subject to another person's right to make fair use of it). Thus, the commission may not withhold any of the submitted information under section 552.101 of the Government Code in conjunction with copyright law. A custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). However, 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

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

⁴As our ruling is dispositive, we need not address Miller's remaining argument against disclosure of the information at issue.

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 commission may withhold the information it marked in Exhibit C and Miller's information in Exhibit B under section 552.104 of the Government Code. The commission must release the remaining information; however, any information that is subject to copyright may be released only 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/eb

Ref: ID# 647203

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)