



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 16, 2017

Ms. Carah-Beth Bass
Counsel for Ector County
Allison, Bass & Magee, LLP
402 West 12th Street
Austin, Texas 78701

OR2017-05490

Dear Ms. Bass:

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# 649103.

Ector County (the "county"), which you represent, received a request for purchasing records during a specified time period.¹ You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of named third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights 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 Alere, Inc. ("Alere"), Bob Barker Company, Inc. ("BBC"), Environmental Systems Research Institute, Inc. ("Esri"), Jones Brothers Dirt & Paving Contractors, Inc. ("Jones Brothers"), W.W. Grainger, Inc. ("Grainger"), ProQuest, LLC ("ProQuest"), and Sanofi Pasteur, Inc. ("Sanofi

¹You state the county sought and received clarification of the request for information. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Pasteur”). We have considered the submitted arguments and reviewed the submitted information.

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 the remaining notified third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude these third parties have protected proprietary interests in the information at issue. *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 county may not withhold the submitted information on the basis of any proprietary interest these third parties may have in the information.

Next, we note ProQuest and Esri object to disclosure of information the county has not submitted to this office for review. This ruling does not address information that was not submitted by the county and is limited to the information the county 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). Thus, we do not consider ProQuest’s and Esri’s arguments against disclosure.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 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 state release of the submitted information may give an advantage to competitors of the third parties who submitted the requested invoices. However, while you argue release of the submitted information would harm these third parties by giving an advantage to their competitors, such an interest in protecting the information belongs to the third parties and not the county. Thus, the county may not withhold the submitted information under section 552.104.

However, Alere, BBC, Grainger, Jones Brothers, and Sanofi Pasteur seek to withhold some information under section 552.104(a) of the Government Code. A private third party may invoke this exception. *Boeing*, 466 S.W.3d at 831. 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 only to 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 831, 839. Alere, BBC, Grainger, Jones Brothers, and Sanofi Pasteur assert they have competitors and release of their information at issue would give their competitors an advantage. After review of the information at issue and consideration of the arguments, we conclude the county may withhold the information we marked under section 552.104(a).²

Section 552.136 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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, the county must withhold the types of information we marked under section 552.136 of the Government Code.

In summary, the county may withhold the information we marked under section 552.104(a). The county must withhold the information we marked under section 552.136 of the Government Code. The remaining information must be released.

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,



Emily Buchanan
Assistant Attorney General
Open Records Division

EB/nmd

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Ref: ID# 649103

Enc. Submitted documents

c: Requestor
(w/o enclosures)

7 Third parties
(w/o enclosures)