



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 1, 2017

Ms. Ana Vieira Ayala
Assistant General Counsel & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

OR2017-11983

Dear Ms. Ayala:

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# 660117 (OGC# 174608).

The University of Texas at Austin (the "university") received a request for information pertaining to multimedia rights contracts. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of ESPN, Inc. ("ESPN"), Highfield Marketing, and IMG College, LLC. Accordingly, you state, and provide documentation demonstrating, you notified the third parties of the request for information and of their right 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). You also inform us Highfield Marketing does not object to the release of its information. We have received comments from ESPN. We have reviewed the submitted information and considered the submitted arguments.

Initially, we note some of the responsive information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2011-17468 (2011), 2014-22031 (2014), 2015-22576 (2015), 2016-00074 (2016), 2016-

06117 (2016), and 2016-08306 (2016). In Open Records Letter No. 2011-17468, we determined the university must release the entirety of the submitted information. In Open Records Letter No. 2014-22031, we ruled the university must withhold the indicated information under section 552.110(b) of the Government Code, but release the remaining information in accordance with copyright law. In Open Records Letter No. 2015-22576, we ruled the university must release the entirety of the submitted information. In Open Records Letter No. 2016-00074, we determined, in part, the university may withhold the marked information under section 552.104 of the Government Code. In Open Records Letter No. 2016-06117, we determined the university may withhold the submitted information under section 552.104 of the Government Code. In Open Records Letter No. 2016-08306, we determined the university may withhold the indicated information under section 552.104 of the Government Code, but must release the remaining information.

However, we note some of the responsive information in this case may have been previously released. Thus, we understand ESPN now seeks to withhold some of its information previously ordered released under section 552.104 of the Government Code. Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See Gov't Code* § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, to the extent any of the submitted information was previously released pursuant to the prior rulings, the university may not now withhold ESPN's previously released information under section 552.104. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the university must continue to rely on Open Records Letter Nos. 2011-17468, 2014-22031, 2015-22576, 2016-00074, 2016-06117, and 2016-08306 as previous determinations and withhold or release the identical information in accordance with those rulings. *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, we will address ESPN's arguments against disclosure of the information not subject to the prior rulings.

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 IMG College, LLC explaining why the submitted information should not be released. Therefore, we have no basis to conclude this 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 university may not withhold the submitted information on the basis of any proprietary interest IMG College, LLC 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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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. ESPN states it has competitors. In addition, ESPN states release of the information it marked would give ESPN’s competitors a competitive advantage in negotiating future contracts by outbidding ESPN in multimedia agreements. 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 ESPN has established the release of the information at issue would give advantage to a competitor or bidder. Thus, to the extent the information at issue was not subject to the prior rulings, we conclude the university may withhold the information ESPN marked under section 552.104(a) of the Government Code.¹

In summary, the university must continue to rely on Open Records Letter Nos. 2011-17468, 2014-22031, 2015-22576, 2016-00074, 2016-06117, and 2016-08306 as previous

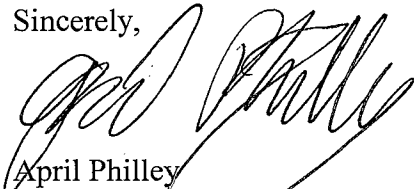
¹As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

determinations and withhold or release the identical information in accordance with those rulings. To the extent the information at issue was not previously ruled upon, the university may withhold the information ESPN marked under section 552.104(a) of the Government Code. The university 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 providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



April Philley
Assistant Attorney General
Open Records Division

AP/sb

Ref: ID# 660117

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)