



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 11, 2017

Ms. Jennifer Burnett
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
210 West 6th Street, Room b.140E
Austin, Texas 78701

OR2017-15910A

Dear Ms. Burnett:

This office issued Open Records Letter No. 2017-15910 (2017). We have examined this ruling and determined we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on July 17, 2017. Your request was assigned ID# 677580 (OCG# 175419).

The University of Texas at Arlington (the "university") received a request for contracts and amendments between the university and Elsevier B.V. ("Elsevier") during a specified time period. Although the university takes no position as to whether the submitted information is excepted under the Act, the university states release of the submitted information may implicate the proprietary interests of Elsevier. Accordingly, the university states, and provides documentation showing, it notified Elsevier of the request for information and of the 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 Elsevier. We have reviewed the submitted arguments and the submitted information.

Initially, we note some of the submitted information consists of information that is subject to section 2261.253 of the Government Code. Section 2261.253(a) provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

(b) A state agency monthly may post contracts described by Subsection (a) that are valued less than \$15,000.

Gov't Code § 2261.253(a)(1), (b). The contracts at issue are valued at more than \$15,000, are between the university, which is a state agency, and a private vendor for the purchase of services, and the contract is not expired or completed. Although Elsevier seeks to withhold portions of the information at issue under sections 552.104 and 552.110 of the Government Code, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the university may not withhold any portion of the information we indicated under section 552.104 of the Government Code or section 552.110 of the Government Code. Consequently, the university must release the information we indicated pursuant to section 2261.253 of the Government Code.

Elsevier argues its information was supplied with the expectation of confidentiality. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the university must release it, notwithstanding any expectations or agreement specifying otherwise.

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. Elsevier states it has competitors. In addition, Elsevier states release of some of its information would allow its competitors to underbid Elsevier on government contracts by offering a lower price. Elsevier further seeks to withhold the terms of the contract. 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 831, at 831, 842. After review of the information at issue and consideration of the arguments, we find Elsevier has established the release of the information at issue, which Elsevier indicated, would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the portions of the remaining information Elsevier indicated under section 552.104(a) of the Government Code.¹

In summary, the university must release the information we indicated pursuant to section 2261.253 of the Government Code. The university may withhold the portions of the remaining information Elsevier indicated under section 552.104(a) of the Government Code. The remaining information must be released.

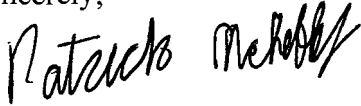
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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/>

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

[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,



Patrick P. Mehaffy
Attorney
Open Records Division

PPM/eb

Ref: ID# 677580

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)