



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 12, 2017

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

OR2017-20873

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# 675284.

Ector County (the "county"), which you represent, received a request for purchasing records during a specified time period. 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 Consolidated Traffic Controls, Inc. ("CTC"); Wireless Ventures, LLC d/b/a Amerizon Wireless ("Amerizon"); Oberkampf Supply of Odessa, Ltd. ("Oberkampf"); Instant Tech Subsidiary Acquisition Inc. d/b/a U.S. Diagnostics ("U.S. Diagnostics"); Alere Toxicology Services, Inc. ("Alere"); Redwood Toxicology Laboratory, Inc. ("Redwood"); NARDIS Public Safety ("NARDIS"); Kofile Technologies, Inc. d/b/a Kofile Solutions, Inc. ("Kofile"); and Safety International, Inc. ("Safety International"). 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). We note that although Amerizon and Safety International submitted correspondence to our office generally objecting to the release of their information, Amerizon and Safety International have not provided arguments explaining why any of the exceptions under the Act are applicable to the information at issue. Therefore, we have no basis to conclude Amerizon and Safety International have protected proprietary interests in the submitted information. *See id.* § 552.305(b); 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 any of the submitted information on the basis of any proprietary interests Amerizon and Safety International may have in it. Further, 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 remaining third parties may have in the information.

NARDIS asserts its information is confidential because it was confidentially negotiated with the county. We note information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

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). 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 information. 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, CTC, Oberkamp, U.S. Diagnostics, Alere, Redwood, and Kofile 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. CTC, Oberkamp, U.S. Diagnostics, Alere, Redwood, and Kofile 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).¹

We understand NARDIS to assert section 552.108 of the Government Code for its information. We note section 552.108 protects the interests of governmental bodies, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 177 at 3 (1977) (section 552.108 may be waived by a governmental body), 522 (1989) (discretionary exceptions in general). As the county does not raise section 552.108, we will not consider NARDIS's argument under that exception. Therefore, the county may not withhold any of NARDIS's information under section 552.108 of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release.² Gov't Code § 552.130. Accordingly, the county must

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

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

withhold the motor vehicle record information we marked under section 552.130 of the Government Code.

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 motor vehicle record information we marked under section 552.130 of the Government Code. The county must withhold the types of information we marked under section 552.136 of the Government Code. The remaining information must be released.³

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,



Melanie J. Villars
Assistant Attorney General
Open Records Division

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³We note the remaining information contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov’t Code § 552.147(b).

Ref: ID# 675284

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)