



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 6, 2017

Ms. Renee Posey
Associate General Counsel
Texas Tech University System
Stop 6246
3601 4th Street, Suite 2B141
Lubbock, Texas 79430-6246

OR2017-27715

Dear Ms. Posey:

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# 686459.

The Texas Tech University Health Sciences Center (the "university") received a request for specified contracts from a specified time period. Although you take no position regarding whether the submitted information is excepted from disclosure, you state its release may implicate the proprietary interests of Covenant Health System ("Covenant") and MEDNAX Health Solutions Partner ("MEDNAX"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request and their right to submit arguments to this office. *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 Covenant and MEDNAX. We have considered the submitted arguments and reviewed the submitted information.

Initially, MEDNAX contends a portion of the submitted information is not responsive to the present request for information because the provisions of the contract at issue have been modified by amendments to the contract. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See Open Records Decision No. 561 at 8-9 (1990).* In this instance, the university has reviewed its records and determined the documents at issue are responsive to the request. Thus, we find

the university has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether the university must release this information to the requestor under the Act.

Next, 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[.]

Gov't Code § 2261.253(a)(1). Some of the contracts are valued at more than \$15,000, are between the university, which is a state agency, and private vendors for the purchases of services, and the contracts are not expired or completed. *See id.* §§ 2261.002(2) (“state agency” has meaning assigned by Gov't Code § 2151.002), 2151.002(3) (“state agency” includes university system or institution of higher education as defined by Educ. Code § 61.003). Covenant seeks to withhold some of contacts that are subject to section 2261.253 under section 552.104 of the Government Code. However, we note 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 the information at issue under section 552.104 of the Government Code. Consequently, the university must release the information we have marked pursuant to section 2261.253 of the Government Code.

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). 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. Covenant and MEDNAX each state they have competitors. In addition, Covenant states release of its information at issue “would allow a competitor to copy [its] business model . . . and significantly harm [its] position in the highly competitive academic healthcare industry.” Also, MEDNAX states release of the information it indicated “would provide competitors with competitively sensitive information . . . that could be used to outbid [it] and disadvantage [it] in [future] contract negotiations.” Covenant and MEDNAX each seek to

withhold the terms of the contracts at issue. 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 831, 839. After review of the information at issue and consideration of the arguments, we find Covenant and MEDNAX have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we have marked under section 552.104(a) of the Government Code.

In summary, the university must release the information we have marked pursuant to section 2261.253 of the Government Code. The university may withhold the information we have 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,



Matthew Taylor
Assistant Attorney General
Open Records Division

MHT/tdw

Ref: ID# 686459

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)