



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 2, 2018

Ms. Julie A. Masek
Assistant General Counsel
The Texas A&M University System
301 Tarrow Street, 6th Floor
College Station, Texas 77840-7896

OR2018-02411

Dear Ms. Masek:

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# 693789 (R002134-110617).

Texas A&M University (the "university") received a request for three categories of information pertaining to cellular communications facilities. You state the university does not have information responsive to one category of the request.¹ You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.139 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Dallas MTA, LP d/b/a Verizon Wireless ("Verizon"); New Cingular Wireless PCS, LLC; SBA 2012 TC Assets, LLC; and T-Mobile West, LLC. Accordingly, you state you notified the 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).

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

We have received comments from Verizon. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments stating why information should or should not be released). We have reviewed the submitted arguments and reviewed the submitted representative sample of information.²

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from the remaining third parties. Thus, these third parties have not demonstrated they have protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)-(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 university may not withhold the information at issue on the basis of any proprietary interests the remaining third parties may have in the information.

Next, the requestor claims the submitted information is subject to section 552.022(a)(3) of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The submitted information consists of information in an account, contract, or voucher relating to the receipt or expenditure of funds by the university that is subject to section 552.022(a)(3). This information must be released unless it is made confidential under the Act or other law. *See id.* We note, however, information subject to section 552.022 may be withheld under section 552.104 of the Government Code. *See id.* § 552.104(b) (information protected by section 552.104 not subject to required public

²We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

disclosure under section 552.022(a)). Therefore, we will consider the submitted arguments under section 552.104 for the information at issue. Furthermore, section 552.139 of the Government Code makes information confidential under the Act. Accordingly, we will consider the applicability of this section to the information at issue. We will also consider Verizon's arguments under section 552.110 of the Government Code, as that exception also makes information confidential under the Act for purposes of section 552.022. Accordingly, we will consider the applicability of sections 552.104, 552.110, and 552.139 to the submitted information.

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). 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. Verizon states it has competitors. In addition, Verizon states release of its information at issue "would provide [its] competitors an opportunity to obtain an indisputable competitive advantage." We note the information Verizon seeks to withhold consists of the terms of contracts with the university. 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 Verizon has established release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we marked under section 552.104(a) of the Government Code.³

The university states the contract terms and pricing information it marked are protected under section 552.104 of the Government Code. As noted above, section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give

³As our ruling is dispositive, we need not address Verizon's remaining arguments or the university's arguments against disclosure of this information.

advantage to a competitor or bidder.” Gov’t Code § 552.104(a). The university states it has specific marketplace interests in the information at issue because the university has “ongoing competitive situations with current and future bidding opportunities for telecommunication services.” In addition, the university states release of the information at issue would harm the university’s position in the marketplace by allowing telecommunication vendors to use the university’s structure and strategies in pursuing service agreements to the university’s detriment. After review of the information at issue and consideration of the arguments, we find the university has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the contract terms and pricing information you marked under section 552.104(a) of the Government Code.⁴

Section 552.139 of the Government Code provides, in part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; [and]

(2) any other assessment of the extent to which data processing operations, a computer, a computer program, network, system, or system interface, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body’s or contractor’s electronically stored information containing sensitive or critical information is vulnerable to alteration, damage, erasure, or inappropriate use[.]

Id. § 552.139(a), (b)(1)-(2). Section 2059.055 of the Government Code provides, in part:

(b) Network security information is confidential under this section if the information is:

(1) related to passwords, personal identification numbers, access codes, encryption, or other components of the security system of a state agency;

⁴As our ruling is dispositive, we need not address the university’s argument against disclosure of this information.

(2) collected, assembled, or maintained by or for a governmental entity to prevent, detect, or investigate criminal activity; or

(3) related to an assessment, made by or for a governmental entity or maintained by a governmental entity, of the vulnerability of a network to criminal activity.

Id. § 2059.055(b). The university states the information at issue pertains “to the operation of the university’s fiber optic plant and computer network” and release of the information at issue would threaten “the physical security of the university’s information management systems and other university property.” You also state release of the information at issue would “compromise the university’s ability to defend the university’s network” by providing “a short list of locations to focus on for reconnaissance and probing, while knowledge of the equipment specifications [would] provide insight on how best to target the university’s network.” Based on your representations and our review of the information, we conclude the university must withhold the remaining information you marked under section 552.139 of the Government Code.

In summary, the university may withhold the information we marked and the contract terms and pricing information the university marked under section 552.104(a) of the Government Code. The university must withhold the remaining information you marked under section 552.139 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,



Kaelan A. Henze
Assistant Attorney General
Open Records Division

KAH/gw

Ref: ID# 693789

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)