



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 13, 2019

Ms. Kirsty Dymond
Assistant General Counsel
Stephen F. Austin State University
SFA Station
P.O. Box 13065
Nacogdoches, Texas 75962-3065

OR2019-07013

Dear Ms. Dymond:

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# 754356.

The Stephen F. Austin State University (the "university") received a request for proposals submitted in response to request for proposals number CMR-BLDG-2018. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified KDW, Ltd. ("KDW"); SpawGlass Construction Corporation ("SpawGlass"); and Webber Commercial Construction, LLC ("Webber") of the request for information and of their 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 SpawGlass and Webber. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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) 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 KDW explaining why its information should not be released. Therefore, we

have no basis to conclude KDW 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 any of the information at issue on the basis of any proprietary interest KDW may have in it.

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. SpawGlass states it has competitors. In addition, SpawGlass states release of its information would give undue advantage to its competitors. After review of the information at issue and consideration of the arguments, we find SpawGlass has established the release of its information would give advantage to a competitor or bidder. Thus, we conclude the university may withhold SpawGlass’s information under section 552.104(a) of the Government Code.¹

Section 552.110(b) of the Government Code protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (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). Upon review of Webber’s arguments under section 552.110(b), we find Webber has established its financial information, which we have marked, constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Therefore, the university must withhold the information we have marked under section 552.110(b) of the Government Code.

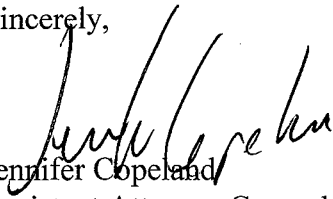
In summary, the university may withhold SpawGlass’s information under section 552.104(a) of the Government Code. The university must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining information must be released.

¹As our ruling on this information is dispositive, we need not consider SpawGlass’s remaining arguments against its disclosure.

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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/gw

Ref: ID# 754356

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 3 Third Parties
(w/o enclosures)