



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 3, 2019

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

OR2019-18296

Dear Ms. Marshall:

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# 773583 (ORR# C000806-041519).

The Texas A&M University System (the "system") received a request for information related to a specified request for proposals for campus dining services, including all submitted proposals, the final contract and amendments, and scoring and evaluation documents. Although the system takes no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of ARAMARK Educational Services, Inc., Compass Group USA, Inc., d/b/a Chartwells ("Compass"), and Sodexo. Accordingly, you state, and provide documentation showing, the system 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 Compass.¹ We have reviewed the submitted arguments and the submitted information.

¹Although Compass raises section 552.101 of the Government Code for its information at issue, it has not submitted arguments in support of this exception; therefore, we assume Compass has withdrawn its claim this exception applies to the information at issue. *See* Gov't Code §§ 552.301, .302.

Initially, we note some of the information at issue was the subject of previous requests for information. As a result of these requests, this office issued Open Records Letter Nos. 2012-17662 (2012), 2012-18440 (2012), and 2013-02678 (2013). In Open Records Letter No. 2012-17662, we ruled the system must withhold the information we marked under section 552.136 of the Government Code and release the remaining information in accordance with copyright law. In Open Records Letter No. 2012-18440, we ruled the system may withhold certain privileged information under section 552.107(1) of the Government Code, must withhold the information we marked under sections 552.110 and 552.136 of the Government Code, and must release the remaining information. In Open Records Letter No. 2013-02678, we ruled the system must continue to rely on Open Records Letter Nos. 2012-17662 and 2012-18440 as previous determinations and withhold or release the information we have previously ruled on in accordance with these prior rulings, must withhold the insurance policy numbers it marked under section 552.136 of the Government Code, and must release the remaining information in accordance with copyright law. We note Compass seeks to withhold portions of its information under section 552.104 of the Government Code. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the system may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although Compass raises section 552.104 of the Government Code for its information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n. 5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the system may not now withhold any of Compass's previously released information under section 552.104 of the Government Code. However, because section 552.110 of the Government Code makes information confidential by law, we will address Compass's arguments under this section for the information that was previously released. Additionally, with regard to the remaining submitted information that was previously released, there is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, we conclude the system must continue to rely on these prior rulings as previous determinations and withhold or release the information we have previously ruled on in accordance with Open Records Letter Nos. 2012-17662, 2012-18433, and 2012-18440.² *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). With respect to the information that was not at issue in the previous rulings, we will consider the submitted arguments.

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. Compass states it has competitors. In addition, Compass states release of the information at issue would cause competitive harm. 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 832. After review of the information at issue and consideration of the arguments, we find Compass has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold the information we marked under section 552.104(a) of the Government Code.³

Compass asserts its information that was released pursuant to Open Records Letter No. 2012-17662 is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d

³As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) 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

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

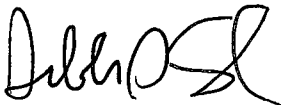
As mentioned above, Compass's information was subject to Open Records Letter No. 2012-17662. Since the issuance of the previous ruling on November 5, 2012, Compass has not disputed this office's conclusions regarding the release of the information at issue. Accordingly, we find Compass has not taken any measures to protect the information at issue in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Compass substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Therefore, the system may not withhold any of the remaining information under section 552.110 of the Government Code.

In summary, the system must continue to rely on Open Records Letter Nos. 2012-17662, 2012-18433, and 2012-18440 as previous determinations and withhold or release the information we have previously ruled on in accordance with these rulings. The system may withhold the information we marked under section 552.104(a) of the Government Code. The system 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,



Deborah Southerland
Attorney
Open Records Division

DS/be

Ref: ID# 773583

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)