



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

October 16, 2019

Ms. Paige Saenz  
Counsel for City of Leander  
The Knight Law Firm  
223 West Anderson Lane, Suite A-105  
Austin, Texas 78752

OR2019-21333A

Dear Ms. Saenz:

This office issued Open Records Letter No. 2019-21333 (2019) on August 1, 2019. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on August 1, 2019. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). This ruling was assigned ID# 795560.

The City of Leander (the "city"), which you represent, received a request for property and sales tax information pertaining to businesses participating in a specified city program. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.131 of the Government Code. You also state you notified 5th Element Brewing ("5th Element"), Casa Costa Bake Shop, Leander Beer Market, Ponyfoot Public House, Smooth Hair & Wax Studio ("Smooth"), and Texas Office Machines of the request for information and of the right to submit arguments to this office as to why the submitted information should not be released. *See id.* § 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 5th Element and Smooth. 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 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from the remaining third parties. Thus, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in 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 city may not withhold any of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses section 321.3022 of the Tax Code, which provides in part:

(a-1) Except as otherwise provided by this section, the [Texas Comptroller of Public Accounts (the “comptroller”)] on request shall provide to a municipality or other local governmental entity that has adopted a tax under [chapter 321 of the Tax Code]:

(1) information relating to the amount of tax paid to the municipality or other local governmental entity under [chapter 321 of the Tax Code] during the preceding or current calendar year by each person doing business in the municipality or other local governmental entity who annually remits to the comptroller state and local sales tax payments of more than \$5,000; and

(2) any other information as provided by this section.

...

(f) Information received by a municipality or other local governmental entity under this section is confidential, is not open to public inspection, and may be used only for the purpose of economic forecasting, for internal auditing of a tax paid to the municipality or other local governmental entity under [chapter 321 of the Tax Code], or for the purpose described in Subsection (g).

(g) Information received by a municipality or other local governmental entity under Subsection (b) may be used by the municipality or other local governmental entity to assist in determining revenue sharing under a revenue sharing agreement or other similar agreement.

Tax Code § 321.3022(a-1), (f)-(g). You assert the information you indicated is tax information obtained from the comptroller pursuant to section 321.3022(a-1). We have no indication the information at issue is being sought for economic forecasting, to conduct an internal audit, or on behalf of the city to determine revenue sharing under a revenue sharing agreement. Based on the submitted representations and our review, we find the information you indicated is confidential under section 321.3022(f) of the Tax Code, and the city must withhold it under section 552.101 of the Government Code.<sup>1</sup>

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

Section 552.101 also encompasses section 151.027 of the Tax Code. Section 151.027(a) provides confidentiality for information collected under the Limited Sales, Excise, and Use Tax Act. *Id.* § 151.027(a). Section 151.027(b) provides for the confidentiality of information obtained during the course of an examination of a taxpayer's books. *Id.* § 151.027(b). The city contends the remaining information in Exhibit B is subject to section 151.027. However, section 151.027 applies only to information furnished to and reviewed by the comptroller during its investigation of a taxpayer. *Id.* § 151.027; *see* Open Records Decision No. 520 (1989) (section 151.027 applies only to information in comptroller's custody, not to information in another governmental body's possession). Thus, section 151.027 applies only to the comptroller, and not the city. *See* Tax Code § 151.027; ORD 520. Accordingly, as the information at issue is not in the custody of the comptroller, we find it is not subject to section 151.027, and the city may not withhold the information under section 552.101 of the Government Code on that basis.

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. Smooth states it has competitors. In addition, Smooth indicates release of its information would cause Smooth competitive harm. After review of the information at issue and consideration of the arguments, we find Smooth has established the release of the information at issue would give advantage to competitors or bidders. Thus, we conclude the city may withhold the information pertaining to Smooth under section 552.104(a) of the Government Code.<sup>2</sup>

Section 552.131 of the Government Code relates to economic development information and provides, in part:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(2) commercial 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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

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

Gov't Code § 552.131(a)-(b). Section 552.131(a) excepts from disclosure only “trade secret[s] of [a] business prospect” and “commercial 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.” *Id.* § 552.131(a). This aspect of section 552.131 is co-extensive with section 552.110 of the Government Code. *See id.* § 552.110(a)-(b); ORDs 552 at 5, 661 at 5-6. Upon review, we find 5th Element has not shown any of the information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.131(a)(1). We also find 5th Element has failed to establish release of the information at issue would cause it substantial competitive injury. *See id.* § 552.131(a)(2). We note section 552.131(a) does not protect the interests of a governmental body regarding the release of information pertaining to economic development negotiations. Thus, we do not address your arguments under section 552.131(a) for the information at issue. Accordingly, we conclude none of the remaining information may be withheld pursuant to section 552.131(a).

Section 552.131(b) protects information about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. *See id.* § 552.131(b). Section 552.131(b) protects the interests of governmental bodies, not third parties. You assert the information in Exhibits C and D “relates to economic development negotiations related to the offer of economic development incentives[.]” Upon review, however, we find you have failed to demonstrate any portion of the remaining information reveals financial or other incentives that are being offered to a business prospect. Thus, we conclude the city may not withhold any of the remaining information under section 552.131(b) 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.”<sup>3</sup> *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Accordingly, the city must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

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<sup>3</sup> The 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).

In summary, the city must withhold the information you indicated under section 552.101 of the Government Code in conjunction with section 321.3022(f) of the Tax Code. The city may withhold the information pertaining to Smooth under section 552.104(a) of the Government Code. The city must withhold the insurance policy numbers within the remaining information under section 552.136 of the Government Code. The city must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Matthew Taylor  
Assistant Attorney General  
Open Records Division

MHT/eb

Ref: ID# 795560

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

6 Third Parties  
(w/o enclosures)