



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

October 22, 2019

Ms. Cecilia Alvarez  
Assistant General Counsel  
University of Houston System  
4302 University Drive, Room 311  
Houston, Texas 77204-2028

OR2019-29771

Dear Ms. Alvarez:

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# 792788.

The University of Houston (the "university") received a request for a specified beverage agreement and e-mails between specified parties that include certain search terms during a defined time period. The university claims the submitted information is excepted from disclosure under section 552.111 of the Government Code. Additionally, the university states release of the submitted information may implicate the proprietary interests of The Coca-Cola Company ("Coca-Cola"). Accordingly, the university states, and provides documentation showing, it notified Coca-Cola of the request for information and of its 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 received comments from Coca-Cola. We have also received comments from a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information, a portion of which is a representative sample.<sup>1</sup>

Initially, we must address the university's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant

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<sup>1</sup> We assume 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 those records contain substantially different types of information than that submitted to this office.

to section 552.301(b); a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The university received the original request for information on June 27, 2019. The university informs us, and provides documentation showing, it sought clarifications from the requestor on July 1, 2019; July 8, 2019; and July 29, 2019, and received clarifications on July 2, 2019; July 9, 2019; and July 31, 2019, respectively. The university claims its deadlines under section 552.301 should be calculated from the date it received the third clarification from the requestor, July 31, 2019. However, we note the university did not send its third clarification of the request until after the ten-business-day deadline from the second clarified request had passed. As such, the statutory deadlines for requesting an opinion from this office and submitting the required documentation for the request were not reset by the third request for clarification and must be measured from the date the university received the second clarified request for information, July 9, 2019. *See generally City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (after requesting clarification within ten-business-day deadline, city timely submitted request for opinion within ten business days after receiving clarification). This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, the university's ten-business-day deadline under section 552.301(b) was July 23, 2019, and the fifteen-business-day deadline under section 552.301(e) was July 30, 2019. However, the envelope in which the university provided the information required by sections 552.301(b) and 552.301(e) was postmarked August 14, 2019. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we conclude the university failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). The university claims section 552.111 for the submitted information. We find the university has failed to establish a compelling reason to address its claim under section 552.111. However, we note third party interests can provide a compelling reason to overcome the presumption of openness against disclosure of the submitted information. Accordingly, we will consider Coca-Cola's arguments against disclosure of the submitted information.

Coca-Cola asserts the submitted information is protected under section 552.104 of the Government Code. Section 552.104(a) 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. Coca-Cola indicates it has competitors. In addition, Coca-Cola states release of the submitted information would provide its competitors an advantage. We note some of the information Coca-Cola seeks to withhold consists of the terms of a contract 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 841. After review of the information at issue and consideration of the arguments, we find Coca-Cola has established release of some of the submitted information 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.<sup>2</sup> However, we find Coca-Cola has failed to establish the release of the remaining information would give advantage to a competitor or bidder. Thus, we conclude the remaining information may not be withheld under section 552.104(a).

Coca-Cola claims its remaining information is excepted under section 552.110 of the Government Code. 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 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.

In advancing its arguments, we understand Coca-Cola to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if

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<sup>2</sup> As our ruling is dispositive, we need not address Coca-Cola's remaining argument against disclosure of this information.

disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interest of Coca-Cola in the information at issue.

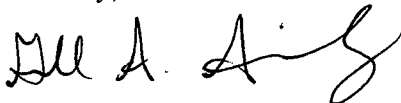
Coca-Cola contends its information at issue is commercial or financial information, the release of which would cause substantial competitive harm to the company. However, upon review, we find Coca-Cola has not established any of the remaining information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. See Gov't Code § 552.110(b). Therefore, the university may not withhold any of the remaining information on this basis.

In summary, 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 <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,



Gerald Arismendez  
Assistant Attorney General  
Open Records Division

GAA/rm

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)