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ATTORNEY GENERAL OF TEXAS

February 7, 2020

Mr. Ronn P. Garcia
Counsel for Region 17 Education Service Center
Underwood Law Firm, P.C.
P.O. Box 16197
Lubbock, Texas 79490

OR2019-35695A

Dear Mr. Garcia:

This office issued Open Records Letter No. 2019-35695 (2019) on December 17, 2019. We have examined this ruling and determined we will correct the previously issued ruling. *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 (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on December 17, 2019. Your request was assigned ID# 802166.

The Regional 17 Education Service Center (the "center") received a request for information pertaining to requests for proposals numbers CL-SY19-21 and CP-SY19. Although the center takes no position as to whether the submitted information is excepted under the Act, the center states release of the submitted information may implicate the proprietary interests of numerous third parties.¹ Accordingly, the center states, and provides documentation showing, it notified third parties of the request for information and of the right to submit

¹ Alpha Foods Company; Asian Food Solutions, Inc.; Bake Crafters Food Company; Basic American Foods; Bongards Creameries; Brookwood Farms, Inc.; Buena Vista Foods; Cargill Kitchen Solutions, Inc.; Cargill Meat Solutions Corporation; Cavendish Farms, Inc.; Channel Fish Processing Company, Inc.; Chef's Corner Foods; Comida Vida; Conagra Foods; Don Lee Farms; ES Foods; Foster Farms; Fresh Innovations, LLC; High Liner Foods (USA), Inc.; Idahoan Foods; Integrated Food Service; J&J Snack Foods; Jennie-O Turkey Store Sale, LLC; JM Smucker Company; J.R. Simplot Company; JSB Industries dba Muffin Town; JTM Provisions Company, Inc.; Kraft Heinz North America; Land O'Lakes, Inc.; Lux Bakery, Inc.; McCain Food USA, Inc.; MCI Foods, Inc.; Michael Foods, Inc. ("Michael Foods"); Nardone Brothers Baking Company; National Food Group; Peterson Farms Fresh, Inc.; Pilgrim's Pride Corporation; Red Gold, LLC; Rich Chicks, LLC; Rich Products Corporation; Rodriguez Foods, LTD.; Rose & Shore; SA Piazza & Association, LLC; Schwan's Food Service, Inc.; Tabatchnick Fine Foods, Inc.; Tasty Brands; The Father's Table; Trident Seafoods Corporation; Tools for Schools; Tyson Sales & Distribution, Inc. ("Tyson"); and Uno Foods, Inc.

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 Michael Foods and Tyson. We have reviewed the submitted arguments and 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 only received comments from Michael Foods and Tyson explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third parties have 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 center may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Next, we note Tyson seeks to withhold information not submitted to this office by the center. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the center, this ruling does not address this information and is limited to the information submitted as responsive by the center.²

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. Michael Foods states it has competitors. In addition, Michael's Foods states release of its pricing information would provide an advantage to its competitors. 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

² As we are able to make this determination, we need not address Tyson's arguments against disclosure of this information.

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 only to 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 Michaels Foods has established the release of its pricing information would give advantage to a competitor or bidder. Thus, we conclude the center may withhold Michaels Foods' pricing information under section 552.104(a) of the Government Code.³ The center 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,



Katie Stallcup
Attorney
Open Records Division

AKS/eb

Ref: ID# 802166
Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)

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