



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 10, 2020

Mr. Ross Laughead
General Counsel
Alamo Community College District
2222 North Alamo Street
San Antonio, Texas 78215

OR2020-00979

Dear Mr. Laughead:

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# 805894.

The Alamo Community College District (the "district") received a request for a specified contract, proposals related to the specified contract, and evaluation documents related to the specified contract. You state the district does not maintain proposals related to the specified contract and evaluation documents related to the specified contract.¹ Although you take 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 Intellidemia, Inc. ("Intellidemia"). Accordingly, you state, and provide documentation showing, you notified Intellidemia 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 have received comments from Intellidemia. We have considered the submitted arguments and reviewed the submitted information.

Initially, we understand Intellidemia to argue the submitted information is not responsive to the instant request. We note a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No.

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

561 at 8 (1990). In this instance, the district submitted the information at issue as responsive to the request. Upon review, we find all of the submitted documents are responsive to the request. We will therefore address Intellidemia's claimed exceptions to disclosure of the submitted information.

Next, we note the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2017-10402 (2017). In that ruling, Intellidemia did not submit any arguments in response to the request for information and we held the information at issue must be released. Thus, Intellidemia now seeks to withhold some of its information under section 552.104 of the Government Code that may have been previously ordered released. Section 552.007 of the Government Code provides, 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 by law. *See* Gov't Code § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, to the extent any of the information at issue was previously released pursuant to the prior ruling, the district may not now withhold Intellidemia's previously released information under section 552.104. We also note Intellidemia now seeks to withhold some of its information which may have been previously ordered released in the prior ruling under section 552.110 of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address Intellidemia's claims under section 552.110 for any previously released information. Furthermore, except with regard to Intellidemia's claims under section 552.110, there is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, except with regard to the Intellidemia's claims under section 552.110, for the submitted information that is identical to the information previously requested and ruled upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2017-10402 as a previous determination and release the identical information in accordance with that ruling. *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 addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will address Intellidemia's arguments under section 552.104 against disclosure of any information not subject to the prior ruling.

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. Intellidemia states it has competitors. In addition, Intellidemia states portions of the submitted information, if released, 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 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 831, 839. After review of the information at issue and consideration of the arguments, we find Intellidemia has established the release of the information at issue would give advantage to a competitor or bidder. Thus, to the extent the information we have marked was not previously released pursuant to Open Records Letter No. 2017-10402, we conclude the district may withhold the information we have marked under section 552.104(a) of the Government Code. To the extent the information we have marked was previously released pursuant to Open Records Letter No. 2017-10402, we will address Intellidemia's arguments under section 552.110 of the Government Code for the information at issue.

Intellidemia claims portions of their information 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, which holds a trade secret to be:

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* *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.² RESTATEMENT OF TORTS § 757 cmt. b. This

² The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

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* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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 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 (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).

As mentioned above, Intellidemia’s information may have been subject to Open Records Letter No. 2017-10402. Since the issuance of the previous ruling on May 15, 2017, Intellidemia has not disputed this office’s conclusion regarding the release of the information at issue. In this regard, we find Intellidemia has not taken any measures to protect its information 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 Intellidemia 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. Accordingly, to the extent the information at issue was previously released pursuant to Open Records Letter No. 2017-10402, we conclude the district may not withhold the information at issue under section 552.110 of the Government Code.

In summary, for the submitted information that is identical to the information previously requested and ruled upon by this office, we conclude the district must continue to rely on Open Records Letter No. 2017-10402 as a previous determination and release the identical information in accordance with that ruling. To the extent the information we have marked

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- (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.

was not previously released pursuant to Open Records Letter No. 2017-10402, we conclude the district may withhold the information we have marked under section 552.104(a) of the Government Code. The district 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/rm

Ref: ID# 805894

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)