



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 10, 2020

Ms. Anastasia Broadfoot  
Attorney  
Texas Alcoholic Beverage Commission  
P.O. Box 13127  
Austin, Texas 78711-3127

OR2020-03928

Dear Ms. Broadfoot:

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# 808182 (ID No. R001904-103019).

The Texas Alcoholic Beverage Commission (the "commission") received a request for information pertaining to a specified request for proposals.<sup>1</sup> 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 Loblolly Consulting, LLC ("Loblolly"). Accordingly, you state, and provide documentation showing, the commission notified the third party of the request for information and of the right to submit arguments to this office as to why the requested 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 Loblolly. We have reviewed Loblolly's arguments and the submitted information.

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<sup>1</sup> We note the commission failed to comply with the procedural requirements of section 552.301(e) of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(e) (requiring governmental body to submit within fifteen business days of receiving request for information comments explaining applicability of raised exceptions, copy of request for information, signed statement of date governmental body received request or evidence sufficient to establish date, and copy of information governmental body seeks to withhold or representative samples). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake in this instance, we will consider the arguments against disclosure of the information at issue.

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. Loblolly states it has competitors. In addition, Loblolly states release of its pricing information and detailed specifications would provide its competitors an advantage in the bidding process. After review of the information at issue and consideration of the arguments, we find Loblolly has established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the commission may withhold the information we have marked under section 552.104(a).<sup>2</sup>

Loblolly argues its information is excepted from disclosure 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.*; 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).

Loblolly asserts some of the remaining information is commercial or financial information, release of which would cause substantial competitive harm to Loblolly. Upon review of Loblolly’s arguments under section 552.110(b), we conclude Loblolly has established the release of its financial information, which we have marked, would cause the company substantial competitive injury. Accordingly, the commission must withhold the information we have marked under section 552.110(b).<sup>3</sup>

We note some of the remaining information appears to be subject to copyright law. 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.

In summary, the commission may withhold the information we have marked under section 552.104(a) of the Government Code and must withhold the information we have marked under section 552.110(b) of the Government Code. The commission must release the

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

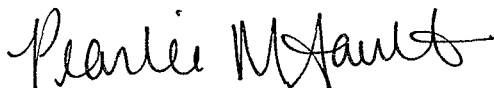
<sup>3</sup> As our ruling is dispositive, we need not address Loblolly’s remaining argument against disclosure of this information.

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,



Pearlie Gault  
Attorney  
Open Records Division

PG/eb

Ref: ID# 808182

Enc. Submitted documents

c: Requestor  
(w/o enclosures)