



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 8, 2020

Ms. Cynthia Tynan
Assistant General Counsel
University of Texas System
210 West 7th Street
Austin, Texas 78701

OR2020-10479

Dear Ms. Tynan:

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# 818209 (OGC Ref. Nos. 194437, 194938, and 194973).

The University of Texas at Arlington (the "university") received three requests from different requestors for information pertaining to specified contracts. You state the university will release some of the requested information to the first requestor. Although the university takes no position as to whether the submitted information is excepted under the Act, the university states release of the submitted information may implicate the proprietary interests of AXS Group, L.L.C. and Bottling Group, L.L.C. d/b/a Pepsi Beverages Company ("Pepsi"). Accordingly, the university states, and provides documentation showing, it notified the third parties of the requests for information and of their 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 Pepsi. We have reviewed the submitted information and considered the submitted arguments.

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 not received comments from the remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude the remaining

third party has 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 university may not withhold the submitted information on the basis of any proprietary interest the remaining third party may have in the information.

Pepsi raises section 552.104 of the Government Code for portions of its information. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov’t Code § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov’t Code § 552.104(a). Therefore, we do not address Pepsi’s arguments under section 552.104.

Section 552.110(b) of the Government Code states, “[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See id.* § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Section 552.110(c) of the Government Code states:

(c) Except as provided by Section 552.0222, 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 is [excepted from required disclosure].

Id. § 552.110(c). Section 552.0222 of the Government Code provides, in relevant part:

(b) The exceptions to disclosure provided by Sections 552.110 and 552.1101 do not apply to the following types of contracting information:

(1) a contract described by Section 2261.253(a), excluding any information that was properly redacted under Subsection (e) of that section;

(2) a contract described by Section 322.020(c), excluding any information that was properly redacted under Subsection (d) of that section;

(3) the following contract or offer terms or their functional equivalent:

(A) any term describing the overall or total price the governmental body will or could potentially pay, including overall or total value, maximum liability, and final price;

(B) a description of the items or services to be delivered with the total price for each if a total price is identified for the item or service in the contract;

(C) the delivery and service deadlines;

(D) the remedies for breach of contract;

(E) the identity of all parties to the contract;

(F) the identity of all subcontractors in a contract;

(G) the affiliate overall or total pricing for a vendor, contractor, potential vendor, or potential contractor;

(H) the execution dates;

(I) the effective dates; and

(J) the contract duration terms, including any extension options; or

(4) information indicating whether a vendor, contractor, potential vendor, or potential contractor performed its duties under a contract, including information regarding:

(A) a breach of contract;

(B) a contract variance or exception;

- (C) a remedial action;
- (D) an amendment to a contract;
- (E) any assessed or paid liquidated damages;
- (F) a key measures report;
- (G) a progress report; and
- (H) a final payment checklist.

Id. § 552.0222(b). Pepsi argues some of its information is subject to section 552.110 of the Government Code. Upon review, we find Pepsi has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the university must withhold the information we marked under section 552.110(c) of the Government Code.¹ However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(c). *See id.* §§ 552.0222(b) (listing certain types of information not excepted under section 552.110). Additionally, we find Pepsi has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the university may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Pepsi also argues some of its information consists of trade secrets subject to section 552.110(b). We find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(b). *See id.* § 552.0222(b) (listing certain types of information not excepted under section 552.110). Additionally, we find Pepsi has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the university may not withhold any of the remaining information at issue under section 552.110(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.”² *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. Accordingly,

¹ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

² 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).

the university must withhold the routing, bank account, and insurance policy numbers we have marked under section 552.136 of the Government Code.

In summary, the university must withhold the information we have marked under section 552.110(c) of the Government Code. The university must withhold the routing, bank account, and insurance policy numbers we have marked under section 552.136 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,

Alexandra C. Burks
Attorney
Open Records Division

ACB/be

Ref: ID# 818209

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

2 Third Parties
(w/o enclosures)