



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 13, 2020

Ms. Cynthia Tynan
Assistant General Counsel & Public Information Coordinator
The University of Texas System
210 West 7th Street
Austin, Texas 78701

OR2020-10805

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# 818918 (OGC Nos. 194263 and 194985).

The University of Texas System (the "system") received two requests for certain information pertaining to a specified contract between the system and Husch Blackwell, LLP ("Husch Blackwell"). You state the system does not have information responsive to a portion of the requests.¹ You also state the system has released some information to the requestors. Although you take no position regarding whether the submitted information is excepted from disclosure, you state release of the information at issue may implicate the proprietary interests of Husch Blackwell. Accordingly, you state, and provide documentation demonstrating, the system notified Husch Blackwell 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 Husch Blackwell.² We

¹ The Act does not require a governmental body to release information that did not exist when it received a request, create responsive information, or obtain information that is not held by the governmental body or on its behalf. *See Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

² Although Husch Blackwell generally asserts its information is privileged pursuant to the attorney-client and work product privileges, it makes no arguments to support these assertions. Therefore, we assume Husch Blackwell has withdrawn its claim that these privileges apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

have also received comments submitted by the first 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.

Initially, we address the first requestor's assertion that some of the information at issue has previously been made available to the public. The Act does not permit the selective disclosure of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that exact same information may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). The first requestor asserts the system has released some of the information at issue because the system has previously released the contract with Husch Blackwell. However, we note section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. We note the submitted information consists of Husch Blackwell's response to a request for qualifications. Upon review, we have no indication the information at issue has been previously released in its exact form to any members of the public. Accordingly, we find section 552.007 is inapplicable to the information at issue and we will address the arguments against its disclosure.

Husch Blackwell raises section 552.104 of the Government Code for its information at issue. 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, 841 (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 Husch Blackwell's arguments under section 552.104 of the Government Code.

Section 552.110(c) of the Government Code excepts from disclosure "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[.]"³ *Id.* § 552.110(c). Husch Blackwell argues its information

³ Although Husch Blackwell cites to section 552.110(b) of the Government Code, we understand it to raise section 552.110(c) of the Government Code based on the substance of its arguments.

consists of commercial or financial information subject to section 552.110(c). Upon review, we find Husch Blackwell has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the system must withhold the information we marked under section 552.110(c) of the Government Code. However, we find Husch Blackwell has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the system may not withhold any portion of the remaining information under section 552.110(c) of the Government Code. The system 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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/mo

Ref: ID# 818918

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

c: Third Party
(w/o enclosures)