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ATTORNEY GENERAL OF TEXAS

May 6, 2020

Ms. Kirsty Dymond
Assistant General Counsel
Stephen F. Austin State University
P.O. Box 13065, SFA Station
Nacogdoches, Texas 75962-3065

OR2020-12806

Dear Ms. Dymond:

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# 826514.

Stephen F. Austin State University (the "university") received a request for specified responses submitted in response to a specified request for proposals. 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 Bank of America Merchant Services, LLC ("BoA"); Elavon, Inc.; Focus Merchant Services, LLC ("Focus"); Paymentech, LLC; Priority Payment System Holdings, LLC; and Southside Bank ("Southside"). Accordingly, you state, and provide documentation showing, you notified these interested third parties of the request 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 BoA, Focus, and Southside.¹ We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of

¹ Although BoA submitted comments, BoA only raises section 552.305 of the Government Code. We note section 552.305 is not an exception to public disclosure under the Act. *See* Gov't Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *Id.*

this ruling, we have only received comments from BoA, Focus, and Southside. Thus, we have no basis to conclude any of the remaining interested third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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 any of the submitted information on the basis of any proprietary interest any of the remaining interested third parties may have in the information.

Focus and Southside raise section 552.104 of the Government Code for a portion 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 Focus’s or Southside’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* Gov’t Code § 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). Upon review, we find Focus has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, to the extent any of the customer information Focus seeks to withhold has not been published on the company's website, the university must withhold Focus's customer information under section 552.110(c) of the Government Code. However, we find some of the 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). Further, we find Focus 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.

Focus argues its information consists of trade secrets subject to section 552.110(b). However, we find some of the 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 Focus has failed to provide specific factual evidence demonstrating any portion of the information at issue is a trade secret. Therefore, the university may not withhold any of the information at issue under section 552.110(b) of the Government Code.

Section 552.147 of the Government Code excepts from disclosure the social security number of a living person. Gov't Code § 552.147. Upon review, we find the university may withhold the social security number in Focus's information under section 552.147 of the Government Code.

We note some of the remaining information appears to be protected by copyright. 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, to the extent any of the customer information Focus seeks to withhold has not been published on the company's website, the university must withhold Focus's customer information under section 552.110(c) of the Government Code. The university may withhold the social security number in Focus's information under section 552.147 of the Government Code. The university must release the remaining information; however, any information subject to 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,

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/rm

Ref: ID# 826514

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties
(w/o enclosures)