



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 18, 2020

Ms. Cynthia Tynan
Senior Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2901

OR2020-13965

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# 828971 (OGC# 195844).

The University of Texas at Austin (the "university") received a request for all contracts and proposals pertaining to certain services during a specified period of time. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the information at issue may implicate the proprietary interests of the following third parties: Coca-Cola Enterprises, Inc., Coca-Cola Refreshments USA, Inc., Coca-Cola Bottling Company of Austin, and Coca-Cola Southwest Beverages, LLC; Compass Group, Inc. d/b/a Canteen ("Compass"); and Pepsi Beverages Company and PepsiCo Foodservice (collectively, "Pepsi"). Accordingly, you state, and provide documentation demonstrating, the university notified the 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 Compass. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us some of the submitted information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2020-11925 (2020). In that ruling, we determined the university must withhold the information pertaining to Pepsi we marked under section 552.110(c) of the Government Code and release the remaining information. We have no indication there has been any

change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, the university must rely on Open Records Letter No. 2020-11925 as a previous determination and withhold or 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 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 the arguments against disclosure of the remaining submitted information.

Next, 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 parties explaining why the information at issue should not be released. Thus, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the information at issue. *See id.* § 552.110. Therefore, the university may not withhold any portion of the information at issue on the basis of any proprietary interest the remaining third parties may have in it.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, 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." *Id.* § 552.104(a). 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). After review of the information at issue and consideration of the arguments, we find the university has failed to demonstrate the applicability of section 552.104 to the information at issue. Therefore, we conclude the university may not withhold any portion of the information at issue under section 552.104(a) of the Government Code.

Compass asserts portions of its information at issue are excepted from disclosure under section 552.110(c) of the Government Code. Section 552.110(c) of the Government Code states:

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].

Gov't Code § 552.110(c). Additionally, we note section 552.0222(b) of the Government Code lists certain types of information to which sections 552.110 and 552.1101 do not apply. *See id.* § 552.0222(b). Compass asserts some of its information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Compass has demonstrated portions of its information 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 the remaining information at issue includes information subject to section 552.0222(b) and may not be withheld on the basis of section 552.110. Additionally, we find Compass 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 portion of the remaining information at issue under section 552.110(c) of the Government Code.

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). Compass argues its remaining information at issue constitutes trade secrets subject to section 552.110(b). As noted above, 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. Additionally, we find Compass has failed to provide specific factual evidence demonstrating any portion of the rest 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 552.1101 of the Government Code provides, in relevant part, as follows:

- (a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

- (1) reveal an individual approach to:

- (A) work;

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

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

See id. § 552.1101(a). Compass asserts disclosure of its remaining information at issue would reveal an individual approach to work, organizational structure, staffing, internal operations, processes, or pricing and give advantage to a competitor. However, as noted above, some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.1101. Additionally, we find Compass has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is subject to section 552.1101(a). Therefore, the university may not withhold any of the remaining information at issue under section 552.1101(a).

Some of the remaining information is subject to section 552.136 of the Government Code.² 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.” *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. *See* Open Records Decision No. 684 (2009). Accordingly, the university must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may 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 university must rely on Open Records Letter No. 2020-11925 as a previous determination and withhold or release the identical information in accordance with that

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).

ruling. The university must withhold the information we marked under section 552.110(c) of the Government Code. The university must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The university must release the 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,

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/eb

Ref: ID# 828971

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 11 Third Parties
(w/o enclosures)