



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 8, 2020

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2020-17083

Dear Mr. Miles:

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# 834176 (ORR No. 21788).

The Health and Human Services Commission (the "commission") received a request for technical and cost proposals submitted by four specified third parties for two specified requests 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 Cognizant Technology Solutions; Deloitte Consulting, LLP ("Deloitte"); Ernst & Young, LLP; and Optum Government Solutions, Inc. ("Optum"). Accordingly, you state, and provide documentation showing, the commission notified these third parties of the request for information and of the 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 Deloitte and Optum. We have reviewed the submitted arguments and the submitted information.

Initially, we note Deloitte and Optum argue against the release of some information that was not submitted by the commission. This ruling does not address information that was not submitted by the commission and is limited to the information the commission has submitted for our review.¹ *See* Gov't Code § 552.301(e)(1)(D) (governmental body

¹ As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

requesting decision from attorney general must submit copy of specific information requested).

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 id.* § 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 submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the commission may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Further, we note the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-24795 (2016). In that ruling, we determined, in pertinent part, the commission must release some of the information at issue. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See id.* § 552.007. We note Deloitte and Optum now seek to withhold some of their information which may have been previously ordered released in the prior ruling under section 552.110 of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address Deloitte's and Optum's claims under section 552.110 for any previously released information. We also note Deloitte now seeks to withhold some of its information which may have been previously ordered released in the prior ruling under section 552.1101 of the Government Code. Because information subject to section 552.1101 is deemed confidential by law, we will address Deloitte's arguments under this exception for any previously released information.

Section 552.1101 of the Government Code provides, in relevant part:

- (a) Except as provided by Section 552.0222, 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;

- (B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

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

(2) give advantage to a competitor.

Id. § 552.1101(a). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.1101(a) does not apply. *See id.* § 552.0222(b). Deloitte asserts disclosure of some of its information would reveal an individual approach to its work, organizational structure, staffing, internal operations, processes, and pricing, and give advantage to its competitors. However, some of the information Deloitte seeks to withhold may have been ordered released pursuant to Open Records Letter No. 2016-24795. Since the issuance of the previous ruling, Deloitte has not disputed this office's conclusions regarding the release of the information at issue. In this regard, we find Deloitte has not taken any measures to protect its information in order for this office to conclude the information now qualifies as proprietary information for purposes of section 552.1101. Accordingly, to the extent the information Deloitte seeks to withhold was ordered released pursuant to Open Records Letter No. 2016-24795, we conclude the commission may not withhold it under section 552.1101 of the Government Code.

To the extent the information at issue was not ordered released pursuant to the previous ruling, we find Deloitte has demonstrated the applicability of section 552.1101(a) to some of its information at issue. Accordingly, the commission must withhold the information we marked, including Deloitte's customer information to the extent the customer information is not publicly available on Deloitte's website, under section 552.1101 of the Government Code.² 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 552.1101(a). In addition, we find Deloitte has failed to provide the specific factual evidence necessary to withhold any of its remaining information under section 552.1101(a), and the commission may not withhold it on that basis.

Deloitte and Optum raise subsections 552.110(b) and (c) of the Government Code for portions of the remaining information. Section 552.110(b) 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." *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 As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(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 exempts 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[.]” *Id.* § 552.110(c). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b).

Deloitte and Optum argue some of the remaining information is subject to section 552.110 of the Government Code. However, Deloitte’s and Optum’s information at issue may have been ordered released pursuant to Open Records Letter No. 2016-24795. Since the issuance of the previous ruling, Deloitte and Optum have not disputed this office’s conclusions regarding the release of the information at issue. In this regard, we find Deloitte and Optum have not taken any measures to protect their information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Deloitte or Optum substantial harm. *See id.* § 552.110. Accordingly, to the extent the information at issue was ordered released pursuant to Open Records Letter No. 2016-24795, we conclude the commission may not withhold the information at issue under section 552.110 of the Government Code.

To the extent the information at issue was not ordered released pursuant to the previous ruling, we find Deloitte and Optum have demonstrated portions of their information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the commission must withhold the information we marked, including Optum’s customer information to the extent the customer information is not publicly available on Optum’s website, under section 552.110(c) of the Government Code.³ 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(b) or section 552.110(c). Additionally, we find Deloitte has failed to provide specific factual evidence demonstrating any portion of its remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm, or is a trade secret. Therefore, the commission may not withhold any of the remaining information at issue under section 552.110 of the Government Code.

We note some of the remaining information is subject to section 552.130 of the Government Code.⁴ Section 552.130 of the Government Code provides information relating to a motor

³ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

⁴ 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).

vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release. *See id.* § 552.130. Accordingly, the commission must withhold the motor vehicle record information we indicated under section 552.130 of the Government Code.

We note some of the remaining information at issue may 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 the information at issue was not ordered released pursuant to Open Records Letter No. 2016-24795, the commission must withhold the information we marked, including Deloitte's customer information to the extent the customer information is not publicly available on Deloitte's website, under section 552.1101 of the Government Code. To the extent the information at issue was not ordered released pursuant to Open Records Letter No. 2016-24795, the commission must withhold the information we marked, including Optum's customer information to the extent the customer information is not publicly available on Optum's website, under section 552.110(c) of the Government Code. The commission must withhold the motor vehicle record information we indicated under section 552.130 of the Government Code. The commission must release the remaining information; however, any information that is subject to copyright may be released only 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,

Deborah Southerland
Assistant Attorney General
Open Records Division

DS/rm

Ref: ID# 834176

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)