



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 25, 2020

Mr. Bryan Benway
Officer for Public Information
Boerne Independent School District
235 West Johns Road
Boerne, Texas 78006

OR2020-21367

Dear Mr. Benway:

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# 839451 (BISD Req. No. 16-2020).

The Boerne Independent School District (the "district") received a request for information submitted by four named companies in response to a specified procurement. Although the district takes no position as to whether the submitted information is excepted under the Act, the district states release of the submitted information may implicate the proprietary interests of FoodService Peeps, LLC ("FSP"); Sodexo, Inc. ("Sodexo"); Southwest Foodservice Excellence ("SFE"); and Taher, Inc. ("Taher"). Accordingly, the district states, and provides documentation showing, it notified each third party 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 FSP, SFE, and Sodexo.¹ We have reviewed the submitted information and the submitted arguments.

Initially, we note some of the submitted information is not responsive to the instant request because it does not pertain to any of the four named companies. This ruling does not

¹ We note FSP raises section 552.101 of the Government Code for its information at issue. However, as FSP has not provided any arguments to support this exception, we assume FSP has withdrawn its claim this section applies to its information at issue. *See* Gov't Code §§ 552.301, .302.

address the public availability of the non-responsive information, which we have marked, and the district need not release it in response to the request.

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 Taher explaining why the submitted information should not be released. Therefore, we have no basis to conclude Taher has a protected proprietary interest in the responsive information, and the district may not withhold any portion of it on that basis. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception).

Next, we note FSP argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the district has submitted to us for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the district submitted as responsive to the request for information.

FSP, SFE, and Sodexo raise section 552.104 of the Government Code for their 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." *Id.* § 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 FSP's, SFE's, or Sodexo's arguments under section 552.104.

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) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). FSP and Sodexo argue some of their information consists of commercial or financial information

subject to section 552.110(c).² Upon review, we find FSP and Sodexo have demonstrated portions of their information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the district must withhold the information we marked under section 552.110(c) of the Government Code.³ However, we find 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). Therefore, the district may not withhold any portion of the remaining information 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.” *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). As noted above, section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). FSP, SFE, and Sodexo argue portions of their remaining information consist of trade secrets subject to section 552.110(b). Upon review, we find SFE has demonstrated portions of the information at issue constitute trade secrets. Accordingly, the district must withhold the information we marked under section 552.110(b) of the Government Code. However, we find the remaining information at issue is subject to 552.0222(b) and may not be withheld on the basis of section 552.110(b). Therefore, the district may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the district must withhold the information we marked under section 552.110(c) of the Government Code. The district must withhold the information we marked under section 552.110(b) of the Government Code. The district 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.

² Although FSP and Sodexo cite to subsections 552.110(a) and 552.110(b) of the Government Code, we note the Eighty-sixth Legislature amended section 552.110 effective January 1, 2020. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Accordingly, we understand FSP and Sodexo to raise subsections 552.110(b) and 552.110(c) for their information at issue.

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

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,

Gerald Arismendez
Assistant Attorney General
Open Records Division

GAA/rm

Ref: ID# 839451

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)