



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2021

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

OR2020-23692A

Dear Mr. Miles:

This office issued Open Records Letter No. 2020-23692A (2020) on November 23, 2020. We have determined the prior ruling should be corrected. *See* Gov't Code §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. Consequently, this decision is substituted for Open Records Letter No. 2020-23692A and serves as the correct ruling. *See generally id.* § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")). Your request was assigned ID# 869226 (HHSC ORR No. 22791).

The Health and Human Services Commission (the "commission") received a request for information pertaining to a specified request for proposals. Although the commission takes no position as to whether the submitted information is excepted under the Act, the commission states release of the submitted information may implicate the proprietary interests of Delta Dental; DentaQuest L.L.C.; Liberty Dental Insurance Company ("Liberty"); MCNA Insurance Company ("MCNA"); The Guardian Life Insurance Company of America; and United Healthcare Dental. Accordingly, you state, and provide documentation showing, the commission notified the 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 id.* § 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 Liberty and MCNA. We have reviewed the submitted information and considered the submitted arguments.

Initially, the commission and Liberty state some of the requested information was the subject of previous requests for information, as a result of which this office issued Open

Records Letter Nos. 2019-24286 (2019), 2019-29256 (2019), and 2020-01280 (2020). In Open Records Letter Nos. 2019-24286 and 2019-29256, we determined the commission may withhold the information at issue under section 552.104 of the Government Code. In Open Records Letter No. 2020-01280, we determined, in relevant part, the commission: (1) may rely on Open Records Letter Nos. 2019-24286 and 2019-29256 as previous determinations and withhold the information at issue in accordance with those rulings; (2) may withhold certain information under section 552.104 of the Government Code; (3) must withhold the information we marked under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; and (4) must withhold certain information under section 552.136 of the Government Code. As we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based with respect to the information withheld under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and section 552.136 of the Government Code, the commission must continue to rely on Open Records Letter No. 2020-01280 as a previous determination with respect to that information and withhold 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 note the 86th Legislature recently amended section 552.104 of the Government Code. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Therefore, we find the law regarding section 552.104 has changed. *See* ORD 673. Thus, the commission may not rely on Open Records Letter Nos. 2019-24286, 2019-29256, and 2020-01280 as previous determinations with respect to the information previously withheld under section 552.104 of the Government Code. Accordingly, we will consider the submitted arguments against disclosure of the 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 any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of 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 any of the remaining third parties may have in the information.

Next, we note Liberty argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the commission 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 commission submitted as responsive to the request for information.¹

Liberty and MCNA raise section 552.104 of the Government Code for some of the 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, as mentioned above, 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 Liberty’s or MCNA’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[.]” *Id.* § 552.110(c). Liberty and MCNA argue some of the information at issue consists of commercial or financial information subject to section 552.110(c). Upon review, we find Liberty and MCNA have 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 MCNA’s customer information is not publicly available on its company’s website, the commission must withhold MCNA’s customer information under section 552.110(c) of the Government Code.² However, to the extent it is publicly available on its company’s website, we find the commission may not withhold MCNA’s customer information under section 552.110(c) of the Government Code. Regardless, the commission must withhold Liberty’s and MCNA’s information we have marked under section 552.110(c) of the Government Code.³ However, we find Liberty and MCNA have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the commission may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

¹ As we are able to make this determination, we need not address Liberty’s arguments against disclosure of this information.

² In this instance, as our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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

Section 552.110(b) of the Government Code states “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). Liberty and MCNA also argue some of the remaining information consists of trade secrets subject to section 552.110(b). Upon review, we find Liberty and MCNA have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the commission 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:

(a) . . . [I]nformation 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). Liberty asserts disclosure of some of the remaining information would reveal an individual approach to work, organizational structure, internal operations, or processes and give advantage to a competitor. Upon review, we find Liberty has failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a), and the commission may not withhold it on that basis.

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.”⁴ *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the commission must withhold the routing and bank account numbers within the remaining information under section 552.136 of the Government Code.

We note some of the remaining information 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, with respect to the information withheld under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code and section 552.136 of the Government Code, the commission must continue to rely on Open Records Letter No. 2020-01280 as a previous determination with respect to that information and withhold the identical information in accordance with that ruling. To the extent MCNA’s customer information is not publicly available on its company’s website, the commission must withhold MCNA’s customer information under section 552.110(c) of the Government Code. The commission must withhold Liberty’s and MCNA’s information we have marked under section 552.110(c) of the Government Code. The commission must withhold the routing and bank account numbers within the remaining information under section 552.136 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.⁵

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.

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).

⁵ We note the information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person’s social security number from public release without the necessity of requesting a decision from this office. *See* Gov’t Code § 552.147(b).

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,

Alexandra C. Burks
Assistant Attorney General
Open Records Division

ACB/jxd

Ref: ID# 869226

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties
(w/o enclosures)