



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 6, 2022

Ms. Cynthia Tynan
Assistant General Counsel & Public Information Coordinator
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2903

OR2022-30430

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# 975186 (OGC# 206856).

The University of Texas at El Paso (the "university") received a request for employment contracts regarding named employees and contracting information pertaining to nine vendor agreements. You inform us the university will release some of the requested information and does not maintain information responsive to portions of the request for information.¹ You claim some of the requested information is subject to previous rulings issued by our office. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Follett Higher Education Group, Inc.; PepsiCo Beverage Sales, LLC ("PepsiCo"); Sodexo Services of Texas Limited Partnership; Teamworks Innovations, Inc.; The Brandr Group, LLC; and Van Wagner Sports & Entertainment, LLC ("Van Wagner"). Accordingly, you state, and provide documentation showing, you 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

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

circumstances). We have received comments from PepsiCo and Van Wagner. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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) of the Government Code 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 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 university may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, you state some of the submitted information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2020-24266 (2020) and 2020-28015 (2020). In response to Open Records Letter Nos. 2020-24266 and 2020-28015, Van Wagner has filed a lawsuit against our office. *See Van Wagner Sports & Entertaining, LLC v. Ken Paxton, in his official capacity as Attorney Gen. of Tex., and the University of Tex. at El Paso*, Cause No. D-1-GN-20-007278 (419th Dist. Ct., Travis County, Tex.). Accordingly, with regard to the information at issue in this lawsuit, we will allow the trial court to resolve the issue of whether the information that is subject of the pending litigation must be released to the public.² However, we will consider the public availability of the remaining information not subject to the pending litigation.

Further, you state some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2020-09991 (2020), 2022-24364 (2022), and 2022-28324 (2022). You state there has not been any change in the law, facts, or circumstances on which the previous rulings were based. 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* Gov't Code § 552.007. We note although PepsiCo raises section 552.104 of the Government Code for some of its information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n. 5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the university may not now withhold the information previously ordered released in Open Records Letter No. 2020-09991 under section 552.104 of the Government Code. Additionally, we note PepsiCo now seeks to withhold information that was previously ordered released by Open Records Letter No. 2020-09991 under section 552.110 of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address the arguments of PepsiCo under section 552.110 of the Government

² As we are able to make this determination, we need not address Van Wagner's arguments against disclosure of this information.

Code for any previously released information. Nonetheless, except with regard to PepsiCo's information, we have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based with respect to the remaining information at issue. Accordingly, the university must continue to rely on Open Records Letter Nos. 2020-09991, 2022-24364, and 2022-28324 as previous determinations and withhold or release the information at issue in accordance with those rulings.³ 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

PepsiCo raises section 552.104 of the Government Code for some of their 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 PepsiCo'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." *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). 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

³ As we are able to make this determination, we need not address the arguments against disclosure of this information.

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). Additionally, we note section 552.0222(b) of the Government Code lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Upon review, we find PepsiCo has demonstrated some of the information at issue constitutes 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.⁴ However, we find the remaining information at issue is either subject to section 552.0222(b) or PepsiCo has failed to provide specific factual evidence demonstrating the information at issue is confidential under section 552.110(b) or section 552.110(c) of the Government Code. Additionally, as mentioned above, the remaining information at issue pertaining to PepsiCo was previously ordered released pursuant to Open Records Letter No. 2020-09991, and PepsiCo did not object to release of the information at issue at that time. Since the issuance of the previous ruling, PepsiCo has not disputed this office's conclusions regarding the release of the information at issue. In this regard, we find PepsiCo has not taken any measures to protect its information in order for this office to conclude the information now qualifies as commercial or financial information, the release of which would cause PepsiCo substantial harm. *See id.* § 552.110(c). Therefore, the university may not withhold any of the remaining information under section 552.110(b), or section 552.110(c) of the Government Code.

In summary, with regard to the information at issue in *Van Wagner Sports & Entertaining, LLC v. Ken Paxton, in his official capacity as Attorney Gen. of Tex.*, we will allow the trial court to resolve the issue of whether the information that is subject of the pending litigation must be released to the public. The university must continue to rely on Open Records Letter Nos. 2020-09991, 2022-24364, and 2022-28324 as previous determinations and withhold or release the information at issue in accordance with those rulings. The university must withhold the information we marked under section 552.110(c) of the Government Code. The university 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.

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,

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

D. Michelle Case
Assistant Attorney General
Open Records Division

DMH/eb

Ref: ID# 975186

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties
(w/o enclosures)