



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 3, 2023

Ms. Nelly R. Herrera
Vice Chancellor and General Counsel
The Texas State University System
601 Colorado Street
Austin, Texas 78701-2904

OR2022-34392A

Dear Ms. Herrera:

This office issued Open Records Letter No. 2022-34392 (2022) on November 4, 2022. We have examined this ruling and determined we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on November 4, 2022. Your request was assigned ID# 979432 (Texas State University File No. 22066.28).

Texas State University (the "university") received a request for information pertaining to a specified request for proposals. Although the university takes no position as to whether the submitted information is excepted under the Act, the university states release of the submitted information may implicate the proprietary interests of Flash Photography. Accordingly, the university states, and provides documentation showing, it notified Flash Photography 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 Flash Photography. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state some of the information at issue was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2022-26283 (2022). In that ruling, we determined the university must withhold certain information under section 552.110(c) of the Government Code, and must release the remaining

information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the university must continue to rely on Open Records Letter No. 2022-26283 as a previous determination and withhold or release the information at issue 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). We will address the public availability of the submitted information, which was not at issue in the previous ruling.

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* Gov’t Code § 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:

(c) [C]ommercial 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].

Id. § 552.110(c). Flash Photography argues some of its information consists of trade secrets subject to section 552.110(b) and commercial or financial information subject to section 552.110(c). Upon review, we find Flash Photography has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the university must withhold the information we indicated under section 552.110(c) of the Government Code; however, to the extent Flash Photography’s customer information is made available to the public by Flash Photography, including but not limited to on its website or social media accounts, it may not be withheld under section 552.110.¹

We note some of the materials 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

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

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 continue to rely on Open Records Letter No. 2022-26283 as a previous determination and withhold or release the information at issue in accordance with that ruling. The university must withhold the information we indicated under section 552.110(c) of the Government Code; however, to the extent Flash Photography's customer information is made available to the public by Flash Photography, including but not limited to on its website or social media accounts, it may not be withheld under section 552.110 of the Government Code. The university 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,

D. Michelle Case
Assistant Attorney General
Open Records Division

DMH/mo

Ref: ID# 979432

c: Requestor