



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 9, 2015

Ms. Jennifer Burnett
Office of the General Counsel
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2015-25788

Dear Ms. Burnett:

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# 590527 (OGC# 164583).

The University of Texas Medical Branch at Galveston (the "university") received a request for the bid tabulation form and winning bidder for each item for a specified invitation to bid.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of eight third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights 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 two of the third parties. We have considered the submitted arguments and reviewed the submitted information.

¹We note the university sought and received clarification of this request from the requestor. *See* Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

You state ParMed Pharmaceuticals LLC (“ParMed”) has informed the university it does not object to the release of its information. Accordingly, the university may not withhold any portion of the information at issue on the basis of any proprietary interest ParMed may have in it. Further, 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 only received comments from The Harvard Drug Group, L.L.C. (The “Harvard Drug Group”) and one other third party explaining why their information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the university may not withhold any of the information at issue on the basis of any proprietary interest the remaining third parties may have in it.

The Harvard Drug Group argues its pricing information is excepted from disclosure under section 552.110(b) of the Government Code, which protects “[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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

The Harvard Drug Group claims its pricing information constitutes commercial or financial information that, if released, would cause the company substantial competitive harm. However, we note a portion of the contract at issue was awarded to the Harvard Drug Group. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* ORD 514. *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009). Therefore, the university may not withhold any portion of the Harvard Drug Group’s pricing information for the portion of the contract it was awarded under section 552.110(b). However, we find the Harvard Drug Group’s pricing information for the portion of the contract it was not awarded constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Accordingly, the university must withhold this information under section 552.110(b) of the Government Code.

The other third party that submitted comments to this office asserts its name, phone number, contact information, gender/ethnicity information, and pricing information are excepted from disclosure under section 552.104(a) of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at *9. This third party states it has competitors. In addition, this third party states release of the information at issue would reveal its status as a bidder and enable its competitors to negotiate better terms. For many years, this office concluded the pricing information of a winning bidder is public and generally not excepted from disclosure. Open Records Decision Nos. 514 (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d 831, at *1, *8. After review of the information at issue and consideration of the arguments, we find this third party has established the release of its pricing information would give advantage to a competitor or bidder. Thus, we conclude the university may withhold this third party’s pricing information under section 552.104(a) of the Government Code. However, we find none of the remaining information this third party seeks to withhold would give advantage to a competitor or bidder. Therefore, the university may not withhold any of the remaining information under section 552.104(a).

In summary, the university must withhold the Harvard Drug Group’s pricing information for the portion of the contract it was not awarded under section 552.110(b) of the Government Code. The university may withhold the other third party’s pricing information under section 552.104(a) of the Government Code. The remaining information must be released.

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 <http://www.texasattorneygeneral.gov/open/>

[url_ruling_info.shtml](#), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Brian E. Berger
Assistant Attorney General
Open Records Division

BB/akg

Ref: ID# 590527

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)

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