



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 2, 2016

Mr. R. Brooks Moore  
Managing Counsel, Governance  
The Texas A&M University System  
301 Tarrow Street, Sixth Floor  
College Station, Texas 77840-7896

OR2016-09842

Dear Mr. Moore:

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# 608280 (TAMUS SO-15-114).

The Texas A&M University System (the "system") received a request for (1) all contracts and agreements between the system and the 12th Man Foundation during a specified time frame; and (2) all contracts and agreements regarding Kyle Field during a specified time frame.<sup>1</sup> You state the system has released some responsive information. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>2</sup> You also state release of this information may implicate the proprietary interests of Crown Castle NG Central Inc. f/k/a NextG Networks of Illinois, Inc. d/b/a/ NextG Networks Central ("Crown Castle"); Dallas MTA L.P. d/b/a Verizon Wireless

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<sup>1</sup>We note the requestor clarified this request. *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).

<sup>2</sup>We note we asked the system to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have considered the system's response to that request. Further, although the system does not explicitly raise section 552.101 of the Government Code, we understand the system to raise this exception based on the substance of its arguments.

("Verizon"); DPJJ, LLC d/b/a Wireless Services; IBM Credit LLC; International Business Machines Corporation; and New Cingular Wireless PCS, LLC. Accordingly, you state, and provide documentation showing, you notified these 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.<sup>3</sup> *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 Crown Castle and Verizon. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the purchase orders we have marked are not responsive to the instant request because they do not constitute contracts or agreements between the system and the 12th Man Foundation, or regarding Kyle Field. This ruling does not address the public availability of any information that is not responsive to the request and the system is not required to release such information in response to this request. Additionally, we understand Crown Castle to assert a portion of its information is not responsive to the instant request because, pursuant to the agreement at issue, Crown Castle is no longer providing service to Kyle Field. Nevertheless, upon review, we find the information at issue is a contract or agreement regarding Kyle Field from the specified time frame. Thus, we find the information at issue is responsive to the request for information and we will consider Crown Castle's remaining arguments against disclosure of this 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 only received comments from Crown Castle and Verizon 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 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 system may not withhold any of the information at issue on the basis of any proprietary interest the remaining third parties may have in it.

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<sup>3</sup>You acknowledge, and we agree, the system did not comply with its requirements under section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b), (e). However, because third-party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider whether the information at issue may be withheld on this basis. *See id.* §§ 552.007, .302. Further, because sections 552.101 and 552.136 of the Government Code can also provide compelling reasons to overcome the presumption of openness, we will address the applicability of these sections to the submitted information.

Verizon argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the system has submitted to us for our review. *See* Gov't Code § 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 system submitted as responsive to the request for information.

Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 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 841. Verizon states it has competitors. In addition, Verizon states release of its information would enable its competitors to undercut to the company on cost and meet the company’s high standards for coverage without undertaking any investment. Verizon also seeks to withhold the terms of its contract. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (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 at 832. After review of the information at issue and consideration of the arguments, we find Verizon has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold Verizon’s information under section 552.104(a) of the Government Code.<sup>4</sup>

Crown Castle asserts some of its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas

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<sup>4</sup>As our ruling is dispositive, we do not address the other arguments to withhold this information.

Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . It may . . . relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>5</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5 (1990)*. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *Open Records Decision No. 402 (1983)*.

Section 552.110(b) 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,

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<sup>5</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661.

Upon review, we find Crown Castle has established some its information constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. However, the remaining information Crown Castle seeks to withhold under section 552.110(b) includes its pricing information. Crown Castle was a winning bidder, and we note the pricing information of a winning bidder is generally not excepted under section 552.110(b). 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* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see also* Open Records Decision 319 at 3 (1982). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Moreover, we find Crown Castle has failed to demonstrate release of its remaining information would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. *See* Open Records Decision Nos. 661 at 5-6 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, with the exception of the information we have marked for release, the system must withhold the information Crown Castle has marked under section 552.110(b) of the Government Code.<sup>6</sup>

Crown Castle argues some of its remaining information, including its pricing information, constitutes trade secret information under section 552.110(a). However, we note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." Restatement of Torts § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). Further, we find Crown Castle has failed to establish a *prima facie* case that any portion of the information at issue meets the definition of a trade secret, and has failed to demonstrate the necessary factors to establish a trade secret claim for any this information. *See* ORDs 402 (section 552.110(a) does not apply unless

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<sup>6</sup>As our ruling is dispositive, we do not address Crown Castle's other argument to withhold this information.

information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Consequently, the system may not withhold any of Crown Castle's remaining information under section 552.110(a) of the Government Code.

We note some of the remaining information is subject to section 552.136 of the Government Code.<sup>7</sup> Section 552.136 of the Government Code states "Notwithstanding 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." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Upon review, we find the system must withhold the information we have marked under section 552.136 of the Government Code.

In summary, the system may withhold Verizon's information under section 552.104(a) of the Government Code. With the exception of the information we have marked for release, the system must withhold the information Crown Castle has marked under section 552.110(b) of the Government Code. The system must withhold the information we have marked under section 552.136 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/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_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

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<sup>7</sup>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).

Ref: ID# 608280

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

6 Third Parties  
(w/o enclosures)