



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 12, 2016

Ms. Nancy Nelson
Associate Vice President
Employee Relations
El Paso Community College
P. O. Box 20500
El Paso, Texas 79998-0500

OR2016-20572

Dear Ms. Nelson:

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# 625995.

The El Paso Community College District (the "district") received a request for all contracts and communications regarding contracts pertaining to Ellucian Company, L.P. ("Ellucian"). 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 Ellucian. Accordingly, you state, and provide documentation showing, you notified the third party of the request for information and of its rights to submit arguments to this office as to why the information at issue 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 Ellucian. We have considered the submitted arguments and reviewed the submitted information.

Ellucian claims the information it has marked is protected under section 552.104 of the Government Code. Section 552.104(a) of the Government Code 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 841. Ellucian states it has competitors. In addition, Ellucian states that releasing the marked information “would provide a direct competitor of insider knowledge of Ellucian’s confidential bid information, and further allow the requestor to utilize Ellucian’s confidential, proprietary competitively sensitive, and trade secret information to the benefit of its customers in order to underbid Ellucian in future bids.” Ellucian seeks to withhold some of the terms of the contract, which it has marked. 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 831, 839. After review of the information at issue and consideration of the arguments, we find Ellucian has established the release of the marked information would give advantage to a competitor or bidder. Thus, we conclude the district may withhold the information Ellucian has highlighted in blue under section 552.104(a).¹

We note some of the remaining information is subject to section 552.136 of the Government Code.² Section 552.136 of the Government Code states “[n]otwithstanding any other provision of this chapter, 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; *see also id.* § 552.136(a) (defining “access device”). Accordingly, we find the district must withhold the ABA routing numbers we have marked under section 552.136 of the Government Code.

In summary, the district may withhold the information Ellucian has highlighted in blue under section 552.104(a) of the Government Code. The district must withhold the ABA routing

¹As our ruling is dispositive, we do not address the remaining argument against disclosure.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

numbers 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, 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,



Erin Groff
Assistant Attorney General
Open Records Division

EMB/eb

Ref: ID# 625995

Enc. Submitted documents

c: Requestor
(w/o enclosures)

1 Third Party
(w/o enclosures)