



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 17, 2013

Mr. Roger D. Hepworth  
The Fowler Law Firm, P.C.  
919 Congress Avenue, Suite 900  
Austin, Texas 78701

OR2013-16086

Dear Mr. Hepworth:

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# 499390.

The Kerrville Independent School District (the "district"), which you represent, received two requests from different requestors for the Sodexo proposal, the current food service contract with all amendments, and portions of specified proposals related to the district's food service management contract. You take no position regarding the public availability of some of the submitted information and claim that some of the submitted information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Aramark Education ("Aramark"), Chartwells School Dining Services ("Chartwells"), and Sodexo. Accordingly, you have notified the third parties of the request and of their right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the circumstances). We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted for our review the requested contract information. To the extent any such information was maintained by the district on the date the district received the request, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, you inform us Sodexo's proposal was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-20077 (2012). You state the information at issue is "substantially" the same as the information ruled on in the previous ruling. We note, however, in the previous ruling, the Leander Independent School District ("LISD") sought a ruling on a Sodexo proposal, which was submitted to LISD, a different governmental body. Therefore, because the Sodexo proposal at issue in the present ruling is not precisely the same information as the information ruled on in Open Records Letter No. 2012-20077 and Open Records Letter No. 2012-20077 was issued to a different governmental body, the district may not rely on the previous ruling as a previous determination. *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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note the district did not fully comply with section 552.301 of the Government Code. Subsection (b) of section 552.301 requires a governmental body requesting an open records ruling from this office to "ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the tenth business-day after the date of receiving the written request." Gov't Code § 552.301(b). While you raised sections 552.104 and 552.110 of the Government Code within the ten-business-day time period required by subsection 552.301(b) for the information you submitted as responsive to the second request, you did not raise section 552.104 or section 552.110 until after the ten-business-day deadline had passed for some of the same information, which you also submitted as responsive to the first request. Generally, if a governmental body fails to timely raise an exception, that exception is waived. *See generally id.* § 552.302; Open Records Decision No. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions). Section 552.104 is a discretionary exception that protects a governmental body's interests and may be waived. Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government). Consequently, by failing to comply with section 552.301(b) with respect to its claim under section 552.104 for the information you submitted as responsive to the first request, the district has waived its claim under this section for this information. In waiving section 552.104 for the first request, you have waived this section for the same information in the second request. Accordingly, the district may not withhold the information at issue under section 552.104 of the Government Code for either request. However, we will consider your argument under section 552.104 for the remaining information that is responsive to only the second request. Additionally, because section 552.110 can provide a compelling reason to withhold information, we will consider whether the information at issue in both requests may be withheld under this exception.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code

§ 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See id.* We understand the submitted information pertains to a contract that has already been awarded. You state keeping the information at issue confidential "would help school districts or other governmental entities that are submitting bids to receive a greater variety of bids." However, because the district failed to demonstrate how release of the information at issue would result in actual or specific harm in a particular competitive situation, the district may not withhold the information at issue under section 552.104 of the Government Code.

We note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received arguments from the notified third parties. Thus, these parties have not demonstrated they have protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)-(b); 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. Although you raise section 552.110, we note section 552.110 protects the interests of third parties that provide information to governmental bodies, not the interests of governmental bodies themselves. *See generally* Open Records Decision No. 592 (1991). Thus, we do not address the district's argument under section 552.110 on behalf of these third parties. Accordingly, the district may not withhold the submitted information on the basis of any proprietary interests the notified third parties may have in the information.

Section 552.136 of the Government Code provides, "[n]otwithstanding 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."<sup>1</sup> Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Thus, the district must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code. As you raise no further exceptions against disclosure of this information, the remaining information must be released.

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<sup>1</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).

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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

SEC/tch

Ref: ID# 499390

Enc. Submitted documents

c: Two Requestors  
(w/o enclosures)

Mr. Ken Holdman  
Director of Business Development  
Sodexo  
P.O. Box 2811  
Cedar Park, Texas 78630  
(w/o enclosures)

Mr. Orlando Montan  
Director of Business Development  
Aaramark  
4790 Regent Boulevard  
Irving, Texas 75063  
(w/o enclosures)

Mr. Brad Matous  
Compass Group  
Chartwells School Dining Services  
c/o Mr. Roger D. Hepworth  
The Fowler Law Firm, P.C.  
919 Congress Avenue, Suite 900  
Austin, Texas 78701  
(w/o enclosures)