



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 6, 2013

Mr. W. Montgomery Meitler
Assistant Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2013-21278

Dear Mr. Meitler:

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# 507809 (TEA PIR No. 20555).

The Texas Education Agency (the "agency") received a request for the top three proposals submitted in response to RFQ No. 701-14-007, excluding the requestor's proposal; a list of all bidders; the prices submitted; and the evaluation criteria scores. You state you have released some of the requested information to the requestor. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you notified Deer Oaks EAP Services ("Deer Oaks"), FEI Behavioral Health ("FEI"), and New Directions Behavioral Health ("New Directions") of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). You also notified the University of Texas Health Science Center at Houston (the "university") of the request for information and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received arguments from the university. Thus, we have considered its arguments and reviewed the submitted information.

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from the university. Thus, Deer Oaks, FEI, and New Directions have failed to demonstrate that 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. Accordingly, the agency may not withhold the submitted information on the basis of any proprietary interest Deer Oaks, FEI, or New Directions may have in the information.

Next, we note a portion of the information the university seeks to withhold was not submitted by the agency for our review. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See Gov't Code* § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Because this information was not submitted by the agency, this ruling does not address the university's arguments against its disclosure.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 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). This office has held that a governmental body may seek protection as a competitor in the marketplace under section 552.104 and avail itself of the "competitive advantage" aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate that it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body's legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body's demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See Open Records Decision* No. 514 at 2 (1988).

The university states it engages in the business of providing to employers Employee Assistance Programs ("EAPs"), which are employer benefit programs. The university states it competes with private entities for contracts to provide EAPs. Based on these representations, we conclude that the university has demonstrated that it has specific marketplace interests and may be considered a "competitor" for the purposes of section 552.104. *See ORD* 593.

The university contends release of the information at issue would harm the university's marketplace interests by making public the details of the university's pricing and service structure for EAP services, thereby undermining the university's ability to compete in the employer benefit program marketplace and facilitating the misappropriation of its offered

services. Based on these representations and arguments, we conclude the university has shown release of the information at issue would cause specific harm to the university's marketplace interests. *See id.* Therefore, we conclude the agency may withhold the information at issue, which we have marked, under section 552.104 of the Government Code.¹

We note some of the remaining information appears to 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 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 agency may withhold the information we have marked under section 552.104 of the Government Code. The remaining information must be released; however, any information protected by copyright may only be released 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 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,



Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

¹As our ruling is dispositive, we need not address the university's remaining argument against disclosure of its information.

Ref: ID# 507809

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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