



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

June 13, 2016

Mr. Barry L. Macha  
General Counsel  
Midwestern State University  
3410 Taft Boulevard  
Wichita Falls, Texas 76308-2099

OR2016-13362

Dear Mr. Macha:

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# 614090.

Midwestern State University (the "university") received a request for all bids regarding construction of the Mass Communications building submitted as of a specified date. You claim the submitted information is excepted from disclosure under section 552.128 of the Government Code. We have considered the exception you claim and reviewed the submitted information. You also state release of this information may implicate the proprietary interests of seventy-two third parties. Accordingly, you state, and provide documentation showing, you notified the seventy-two 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. *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 Advanced Connections, Inc. ("ACI"); Anthony Inman Construction, Inc. ("Inman"); Calloway's Carpet, Inc. ("Calloway's"); M & F Littleken Co. ("Littleken"); and North American Steel Corp ("NASCO"). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information is not responsive to the instant request because it does not consist of bids regarding construction of the Mass Communications building submitted as of a specified date. This ruling does not address the public availability

of any information that is not responsive to the request and the university is not required to release that information in response to the request.<sup>1</sup>

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 Inman explaining why its 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 responsive 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 portion of the responsive information on the basis of any proprietary interest any of the remaining parties may have in the information.

Section 552.104(a) of the Government Code exempts 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 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. Inman states it has competitors. In addition, Inman states release of this information could give unfair advantage to its competitors and allow them to undercut Inman's bids in the future. After review of the information at issue and consideration of the arguments, we find Inman has established the release of its submitted information would give advantage to a competitor or bidder. Thus, we conclude the university may withhold Inman's submitted information under section 552.104(a) of the Government Code.<sup>2</sup>

The university seeks to withhold the remaining responsive information under section 552.128 of the Government Code, which provides the following:

- (a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or

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<sup>1</sup>As we make this determination, we do not address the arguments submitted by the university, ACI, Calloway's, Littleken, or NASCO against the disclosure of this information.

<sup>2</sup>As our ruling is dispositive, we need not address Inman's remaining arguments against disclosure of this information.

federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. In this instance, the information at issue was submitted in connection with a specified proposed contractual relationship. Accordingly, the university may not withhold any portion of the submitted information under section 552.128 of the Government Code.

The remaining documents include information subject to section 552.136 of the Government Code.<sup>3</sup> Section 552.136 of the Government Code provides, "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"). This office has determined insurance policy numbers are access device numbers for purposes of

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<sup>3</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).

section 552.136. Upon review, we find the university must withhold the insurance policy numbers we marked under section 552.136 of the Government Code.<sup>4</sup>

In summary, the university may withhold Inman's information under section 552.104(a) of the Government Code. The university must withhold the information we marked under section 552.136 of the Government Code. The remaining responsive 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,



Ian Lancaster  
Assistant Attorney General  
Open Records Division

IML/akg

Ref: ID# 614090

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Parties  
(w/o enclosures)

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<sup>4</sup>Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).