



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 27, 2016

Ms. Cynthia Tynan
Attorney & Public Information Coordinator
The University of Texas System
201 West 7th Street Suite 600
Austin, Texas 78701-2901

OR2016-16849

Dear Ms. Tynan:

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# 620272 (UT OGC# 169658).

The University of Texas M.D. Anderson Cancer Center (the "university") received a request for three categories of information pertaining to the university and a specified individual and specified foundation, including (1) all contracts; (2) all communications; and (3) all progress reports.¹ You state you have no information responsive to item 3 of the request.² Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Parker Institute for Cancer Immunotherapy ("Parker"), the University of California San Francisco ("UCSF"), Memorial Sloan Kettering Cancer Center ("MSK"), and Penn Center for

¹You state the university sought and received clarification of item 2 of the request and the university will either request further clarification or request a separate opinion regarding this information. *See* Gov't Code § 552.222 (providing 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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

Innovation (“Penn”). Accordingly, you state the university notified the third parties of the request for information and of their rights 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 MSK. We have reviewed the submitted information and the submitted arguments.

Initially, 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 not received comments from Parker, UCSF, or Penn explaining why the submitted information should not be released. Therefore, we have no basis to conclude Parker, UCSF, or Penn has 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 university may not withhold the submitted information on the basis of any proprietary interest Parker, UCSF, or Penn may have in the information.

Next, we must address MSK’s assertion that the requested information was not a valid request under the Act. Section 552.301(c) of the Government Code provides “a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail for facsimile transmission.” Gov’t Code § 552.301(c). MSK argues, because the e-mail request was not sent to the university’s officer for public information, or a person designated by that officer, the e-mail request was not a proper written request, and therefore did not require the university to respond. *See generally id.* § 552.301 (governmental body’s duty to request a ruling from the attorney general arises only after it receives a written request). We note, however, the university did treat the request for information as a proper written request and requested a decision from our office under the Act. Accordingly, we will consider the submitted arguments against disclosure of the submitted information.

MSK also asserts the present request for information is legally defective, unclear, and requires interpretation of a legal question. However, we note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the university has submitted information for our review, we find the university has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

We also understand MSK claims some of its information may not be disclosed because it was marked “confidential” and, per MSK’s agreement with the university, the information is precluded from disclosure. However, we note the information is not confidential under the Act simply because the party that submits the information anticipates or requests it will be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the university must release it, notwithstanding any expectations or agreement specifying otherwise.

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). 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. MSK states it has competitors. In addition, MSK states if the information at issue were to be disclosed, it “would cause substantial competitive harm to its business and give [an] advantage to [its] competitor[s]” and seeks to withhold certain terms of the 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 841. After review of the information at issue and consideration of the arguments, we find MSK has established the release of its information at issue, which we have indicated, would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we indicated under section 552.104(a) of the Government Code.³ As no other exceptions to disclosure have been raised, the remaining information must be released.

³As our ruling is dispositive, we need not address MSK’s remaining arguments against disclosure of the submitted information.

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,

A handwritten signature in black ink, appearing to read "Gerald A. Arismendez". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/dm

Ref: ID# 620272

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)