

Office of the Attorney General
State of Texas
Informal Letter Ruling No. OR2017-11983
June 1, 2017

Ms. Ana Vieira Ayala
Assistant General Counsel & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West 7th Street, Suite 600
Austin, Texas 78701-2901

Dear Ms. Ayala:

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# 660117 (OGC# 174608).

The University of Texas at Austin (the "university") received a request for information pertaining to multimedia rights contracts. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of ESPN, Inc. ("ESPN"), Highfield Marketing, and IMG College, LLC. Accordingly, you state, and provide documentation demonstrating, you notified the third parties of the request for information and of their right 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). You also inform us Highfield Marketing does not object to the release of its information. We have received comments from ESPN. We have reviewed the submitted information and considered the submitted arguments.

Initially, we note some of the responsive information may have been the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2011-17468 (2011), 2014-22031 (2014), 2015-22576 (2015), 2016-00074 (2016), 2016-06117 (2016), and 2016-08306 (2016). In Open Records Letter No. 2011-17468, we determined the university must release the entirety of the submitted information. In Open Records Letter No. 2014-22031, we ruled the university must withhold the indicated information under [section 552.110\(b\) of the Government Code](#), but release the remaining information in accordance with copyright law. In Open Records Letter No. 2015-22576, we ruled the university must release the entirety of the submitted information. In Open Records Letter No. 2016-00074, we determined, in part, the university may withhold the marked information under [section 552.104 of the Government Code](#). In Open Records Letter No. 2016-06117, we determined the university may withhold the submitted information under [section 552.104 of the Government Code](#). In Open Records Letter No. 2016-08306, we determined the university may withhold the indicated information under [section 552.104 of the Government Code](#), but must release the remaining information.

However, we note some of the responsive information in this case may have been previously released. Thus, we understand ESPN now seeks to withhold some of its information previously ordered released under [section 552.104 of the Government Code](#). Although the law has changed with regard to a third party's right to assert [section 552.104\(a\)](#), see *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), [section 552.007 of the Government Code](#) provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. See [Gov't Code § 552.007](#). We note [section](#)

[552.104](#) does not prohibit the release of information or make information confidential. *See id.* [§ 552.104](#). Thus, to the extent any of the submitted information was previously released pursuant to the prior rulings, the university may not now withhold ESPN's previously released information under [section 552.104](#). Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the university must continue to rely on Open Records Letter Nos. 2011-17468, 2014-22031, 2015-22576, 2016-00074, 2016-06117, and 2016-08306 as previous determinations and withhold or release the identical information in accordance with those rulings. *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 information is or is not excepted from disclosure). However, we will address ESPN's arguments against disclosure of the information not subject to the prior rulings.

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\(d\) of the Government Code](#) 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 IMG College, LLC explaining why the submitted information should not be released. Therefore, we have no basis to conclude this third party 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 IMG College, LLC may have in the information.

[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. ESPN states it has competitors. In addition, ESPN states release of the information it marked would give ESPN's competitors a competitive advantage in negotiating future contracts by outbidding ESPN in multimedia agreements. 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 ESPN has established the release of the information at issue would give advantage to a competitor or bidder. Thus, to the extent the information at issue was not subject to the prior rulings, we conclude the university may withhold the information ESPN marked under [section 552.104\(a\) of the Government Code](#).¹

In summary, the university must continue to rely on Open Records Letter Nos. 2011-17468, 2014-22031, 2015-22576, 2016-00074, 2016-06117, and 2016-08306 as previous determinations and withhold or release the identical information in accordance with those rulings. To the extent the information at issue was not previously ruled upon, the university may withhold the information ESPN marked under [section 552.104\(a\) of the Government Code](#). The university must release the remaining 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,

April Philley
Assistant Attorney General
Open Records Division

Footnotes

- ¹ As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

Office of the Attorney General
State of Texas
Informal Letter Ruling No. OR2017-28130
December 12, 2017

Ms. Ana Vieira Ayala
Assistant General Counsel & Public Information Coordinator
Office of General Counsel
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2901

Dear Ms. Ayala:

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# 687677 (OGC # 177326).

The University of Texas System (the "system") received a request for information pertaining to purchases made by the system for a named third party's products during a specified time period and any terms of a contract agreement between the system and the third party. Although the system takes no position as to whether the submitted information is excepted under the Act, the system states release of the submitted information may implicate the proprietary interests of Rapid7, LLC ("Rapid7"). Accordingly, the system states, and provides documentation showing, it notified Rapid7 of the request for information and of its 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 Rapid7. We have reviewed the submitted information and the submitted arguments.

[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. Rapid7 states it has competitors. Further, Rapid7 states release of its information at issue would provide a competitive advantage to its competitors. 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 831, 839. After review of the information at issue and consideration of the arguments, we find Rapid7 has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we

conclude the system may withhold the information we have marked under [section 552.104\(a\) of the Government Code](#).

[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.”¹ [Gov’t Code § 552.136\(b\)](#); see *id.* [§ 552.136\(a\)](#) (defining “access device”). Upon review, the system must withhold the information we have marked under [section 552.136 of the Government Code](#).

In summary, the system may withhold the information we have marked under [section 552.104\(a\) of the Government Code](#). The system must withhold the information we have marked under [section 552.136 of the Government Code](#). The system must release the remaining 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,

Sidney M. Pounds
Assistant Attorney General
Open Records Division

Footnotes

¹ 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).

Office of the Attorney General
State of Texas
Informal Letter Ruling No. OR2017-08873
April 26, 2017

Ms. Jennifer Burnett
Attorney & Public Information Coordinator
The University of Texas System
201 West Seventh Street, Suite 600
Austin, Texas 78701-2902

Dear Ms. Burnett:

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# 653821 (OGC# 173737).

The University of Texas at Austin (the "university") received a request for information pertaining to the winning bid of a specified request for proposals. 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 Attain, LLC ("Attain"); Deutser; and FSG, Inc. ("FSG"). Accordingly, you state, and provide documentation showing, you notified Attain, Deutser, and FSG 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 FSG. We have considered the submitted 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 [Gov't Code § 552.305\(d\)\(2\)\(B\)](#). As of the date of this ruling, we have not received comments from Attain or Deutser. Thus, we have no basis to conclude Attain or Deutser has a protected proprietary interest in 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 university may not withhold any of the submitted information on the basis of any proprietary interest Attain or Deutser may have in the information.

[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. FSG states it has competitors. In addition, FSG states the release of its information at issue would "harm FSG's competitive advantage by allowing competitors to determine FSG's bid amount and propose bids below FSG's bid, serving to undercut FSG's attractiveness to proposed clients." After review of the information at issue and consideration of the arguments, we find FSG has established the release of the information at issue, which we have marked, would give advantage to a competitor or bidder. Thus, we conclude the university may withhold the information we have marked under [section 552.104\(a\) of the Government Code](#).

FSG claims portions of its information are excepted under [section 552.110 of the Government Code](#), which protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See [Gov't Code § 552.110](#). [Section 552.110\(a\)](#) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* [§ 552.110\(a\)](#). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also Open Records Decision No. 552 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business ... in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

[RESTATEMENT OF TORTS § 757](#) cmt. b (1939); see also *Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.¹ [RESTATEMENT OF TORTS § 757](#) cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. See ORD 552 at 5. However, we cannot conclude [section 552.110\(a\)](#) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." [Restatement of Torts § 757](#) cmt. b; see also *Huffines*, 314 S.W.2d at 776; Open Record Decision Nos. 255 (1980), 232 (1979), 217 (1978).

FSG asserts portions of its information constitute trade secrets under [section 552.110\(a\) of the Government Code](#). Upon review, we conclude FSG has failed to establish a *prima facie* case that any portion of its information at issue meets the definition of a trade secret. We further find FSG has not demonstrated the necessary factors to establish a trade secret claim for its information. See ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under [section 552.110](#)). Therefore, none of FSG's information may be withheld under [section 552.110\(a\)](#).

In summary, the university may withhold the information we marked under [section 552.104\(a\) of the Government Code](#). The university must release the remaining 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,

Kaelan A. Henze
Assistant Attorney General
Open Records Division

Footnotes

- ¹ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:
- (1) the extent to which the information is known outside of [the company];
 - (2) the extent to which it is known by employees and other involved in [the company's] business;
 - (3) the extent of measures taken by [the company] to guard the secrecy of the information;
 - (4) the value of the information to [the company] and [its] competitors;
 - (5) the amount of effort or money expended by [the company] in developing the information;
 - (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.
- [RESTATEMENT OF TORTS § 757](#) cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).