KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 16, 2016

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701

OR2016-13751

Dear Ms. Parker:

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# 614431.

The Texas Department of Transportation (the "department") received a request for information pertaining to a specified request for proposals.[1] You state you have released some information. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of Claret Consulting ("Claret"); Ernst & Young Infrastructure Advisors, L.L.C. ("EY"); and Macquarie Capital ("Macquarie"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this

[1]We note the department failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office with respect to some of the submitted information. *See* Gov't Code § 552.301(e) (requiring governmental body to submit within fifteen business days of receiving request for information comments explaining applicability of raised exceptions, copy of request for information, signed statement of date governmental body received request or evidence sufficient to establish date, and copy of information governmental body seeks to withhold or representative samples). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977). Because third party interests are at stake in this instance, we will consider the arguments against disclosure of the information at issue.

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 Macquarie and EY. We have considered the submitted arguments and reviewed the submitted representative sample of information.[2]

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 Claret. Therefore, we have no basis to conclude Claret 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 department may not withhold any of the submitted information on the basis of any proprietary interests Claret 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. You represent Exhibit C pertains to a competitive bidding situation. In addition, you state "releasing preliminary information at this time would provide an advantage to future proposers." After review of the information at issue and consideration of the arguments, we find the department has established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the department may withhold Exhibit C under section 552.104(a) of the Government Code.[3] Moreover, Macquarie and EY state they have competitors. In addition, Macquarie states release of its remaining information would "provide a competitive advantage to vendors in a relatively small market." EY states releasing its information at issue "could be particularly detrimental to EY's prospects in future competitive advisory procurements." After review of the information at issue and consideration of the arguments, we find Macquarie and EY have

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[2]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[3]As our ruling is dispositive, we need not address Macquarie's arguments against disclosure of this information.

established the release of the information at issue would give an advantage to a competitor or bidder. Thus, we conclude the department may withhold Macquarie's remaining information under section 552.104(a) of the Government Code.[4] The department may also withhold EY's information at issue, which we indicated, under section 552.104(a).

Section 552.110(b) of the Government Code protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6.

EY argues some of its remaining information consists of commercial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we conclude EY has established the release of its financial information would cause the company substantial competitive injury. Accordingly, the department must withhold EY's information at issue, which we indicated, under section 552.110(b).

We note some of the remaining information may 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 department may withhold Exhibit C under section 552.104(a) of the Government Code. The department may withhold Macquarie's remaining information and EY's information we indicated under section 552.104(a) of the Government Code. The department must withhold EY's information we indicated under section 552.110(b) of the Government Code. The remaining information must be released; however, any information subject to copyright must 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.

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[4]As our ruling is dispositive, we need not address Macquarie's remaining argument against disclosure of this information.

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,

Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

Ref: ID# 614431

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)