



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 7, 2016

Ms. Sarah Parker  
Associate General Counsel  
Texas Department of Transportation  
125 East 11th Street  
Austin, Texas 78701-2483

OR2016-20143

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# 625487.

The Texas Department of Transportation (the "department") received a request for information pertaining to twelve solicitations, including all (1) statements of qualifications cover pages, submittal packets, and attachments; (2) certification documents; and (3) evaluation and scoring materials. You claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Although you take no position as to whether the remaining submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state you notified these third parties of the request for information and of their rights 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). We have received comments from Garver, LLC ("Garver"), Huitt-Zollars, Inc. ("Huitt"), Johnson, Mirmiran & Thompson Engineering, Inc. ("JMT"), Lockwood, Andrews & Newnam, Inc. ("LAN"), Michael Baker International, Inc. ("MBI"), Pape-Dawson Engineers, Inc. ("PDE"), Rodriguez Transportation Group, Inc. ("RTG"), S&B Infrastructure, Ltd. ("SBI"), and VRX, Inc. ("VRX"). We have considered the submitted

arguments and reviewed the submitted information, a portion of which includes a representative sample of information.<sup>1</sup>

We note some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-26573 (2015), 2016-03677 (2016), 2016-05954 (2016), 2016-07611 (2016), 2016-08401 (2016), 2016-11133A (2016), 2016-11428 (2016), 2016-11620 (2016), 2016-14418 (2016), 2016-15635 (2016), and 2016-16042 (2016). We also note some of the third parties now seek to withhold some of their information previously ordered released under section 552.104 of the Government Code. Section 552.007 of the Government Code provides that, 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 under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although these third parties now raise section 552.104 of the Government Code for the information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the department may not now withhold any of the previously released information under section 552.104 of the Government Code on behalf of these third parties. Furthermore, there is no indication the law, facts, and circumstances on which most of the prior rulings were based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the department may continue to rely on Open Records Letter Nos. 2015-26573, 2016-03677, 2016-05954, 2016-07611, 2016-08401, 2016-11133A, 2016-11428, 2016-11620, 2016-15635, and 2016-16042 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 that information is or is not excepted from disclosure).

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<sup>1</sup>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.

However, you inform us the circumstances have changed in regard to Solicitation 601CT0000001740, which we addressed in Open Records Letter No. 2016-14418. Therefore, the department may not rely on Open Records Letter No. 2016-14418 as a previous determination for the proposals the department received in response to the solicitation at issue; nonetheless, to the extent the law, facts, and circumstances on which the prior ruling was based have not changed, the department may continue to rely on Open Records Letter 2016-14418 for the remaining information at issue. Next, we address the arguments against disclosure of the submitted information that is not subject to these 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 id.* § 552.305(d)(2)(B). As noted above, as of the date of this letter we have only received comments from Garver, Huitt, JMT, LAN, MBI, PDE, RTG, SBI, and VRX. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *See Gov't Code* § 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 portion of the submitted information on the basis of any proprietary interest the remaining third parties 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). 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The department represents Exhibits B and C pertain to competitive bidding situations. The department explains Exhibit B pertains to solicitations that are still under negotiations and the related contracts have not been executed. The department states disclosure of Exhibit B would allow third-party competitors to tailor their negotiation strategy depending on the competition and undermine the negotiation process. Further, the department explains Exhibit C consists of scoring and evaluation criteria documents that relate to contracts that have been awarded and executed. However, the department states it "solicits proposals for professional services, including the same types of services at issue here, on a recurring basis." The department asserts the disclosure of Exhibit C would "undercut [the department]'s negotiating position with respect to future procurements for such contracts." After review of the information at issue and consideration of the arguments, we find the department has established the release of Exhibits B and C

would give advantage to a competitor or bidder. Thus, we conclude the department may withhold Exhibits B and C under section 552.104(a) of the Government Code.<sup>2</sup>

We note a private third party may also invoke section 552.104(a) of the Government Code. *See generally id.* Garver, Huitt, JMT, LAN, MBI, PDE, RTG, SBI, and VRX state they have competitors. In addition, Garver, Huitt, JMT, LAN, MBI, PDE, RTG, SBI, and VRX state the release of some of their information would negatively affect their ability to compete in the market. After review of the information at issue and consideration of the arguments, we find Garver, Huitt, JMT, LAN, MBI, PDE, RTG, SBI, and VRX have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we have indicated in Exhibit D under section 552.104(a) of the Government Code.<sup>3</sup>

SBI states portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person 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(a)-(b). 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, which holds a trade secret to be:

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 Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

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secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.<sup>4</sup> 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. Open Records Decision No. 402 (1983).

Upon review, we conclude SBI has established a *prima facie* case that its customer information constitutes trade secret information. Accordingly, to the extent SBI's customer information is not publicly available on SBI's website, the department must withhold SBI's customer information under section 552.110(a) of the Government Code.

In summary, with the exception of Solicitation 601CT0000001740 addressed in Open Records Letter No. 2016-14418, the department may continue to rely on Open Records Letter Nos. 2015-26573, 2016-03677, 2016-05954, 2016-07611, 2016-08401, 2016-11133A, 2016-11428, 2016-11620, 2016-14418, 2016-15635, and 2016-16042 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold Exhibit B, Exhibit C, and the information we have indicated in Exhibit D under section 552.104 of the Government Code. To the extent SBI's customer information is not publicly available on SBI's website, the department must withhold SBI's customer information under section 552.110(a). The remaining information must be released.

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<sup>4</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

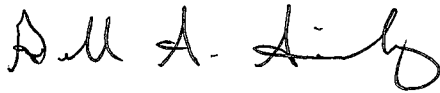
- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information 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).

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,



Gerald A. Arismendez  
Assistant Attorney General  
Open Records Division

GAA/dls

Ref: ID# 625487

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

41 Third Parties  
(w/o enclosures)