



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

February 10, 2017

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

OR2016-26021A

Dear Ms. Parker:

This office issued Open Records Letter No. 2016-26021 (2016) on November 22, 2016. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision is substituted for Open Records Letter No. 2016-26021 and serves as the correct ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act ("Act")).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 645278.

The Texas Department of Transportation (the "department") received a request for information pertaining to two specified solicitation numbers. You claim some of the submitted information is exempted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Aecom Technical Services, Inc. ("Aecom"); AIA Engineers, Ltd. (AIA); Atkins North America, Inc. ("Atkins"); Civilcorp, LLC ("Civilcorp"); Raba Kistner, Inc. ("Raba"); and VRX, Inc. ("VRX"). Accordingly, you state, and provide documentation showing, you 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 Raba and VRX. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the submitted information, which we have indicated, was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-20143 (2016). In that ruling, we determined, in part, the department may withhold VRX's information under section 552.104 of the Government Code. We understand there has not been any change in the law, facts, or circumstances on which Open Records Letter No. 2016-20143 was based with respect to VRX's information. Accordingly, the department may continue to rely on Open Records Letter No. 2016-20143 as a previous determination and withhold VRX's information in accordance with that ruling.<sup>2</sup> *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).

Next, 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Aecom, AIA, Atkins, or Civilcorp explaining why the submitted information should not be released. Therefore, we have no basis to conclude Aecom, AIA, Atkins, or Civilcorp 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 the submitted information on the basis of any proprietary interest Aecom, AIA, Atkins, or Civilcorp may have in the information.

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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 those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>As we are able to make this determination, we need not address VRX's arguments against disclosure of this 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 states the information at issue relates to contracts that have been awarded and executed; however, it solicits proposals for similar services on a recurring basis and release of the information at issue “will 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 the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold Exhibit B under section 552.104(a) of the Government Code.<sup>3</sup>

Additionally, a private third party may invoke section 552.104 of the Government Code. *Id.* at 831. As noted above, 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. Raba states it has competitors. In addition, Raba states release of the information at issue would give an unfair advantage to its competitors. After review of the information at issue and consideration of the arguments, we find Raba has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold Raba’s information under section 552.104(a) of the Government Code.

In summary, the department may continue to rely on Open Records Letter No. 2016-20143 as a previous determination and withhold VRX’s information in accordance with that ruling. The department may withhold Exhibit B under section 552.104(a) of the Government Code. The department may withhold Raba’s information under section 552.104(a) of the Government Code. The department 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.

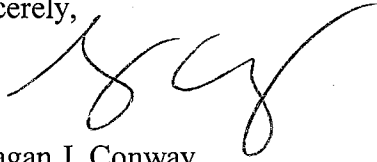
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

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<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

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 'Meagan J. Conway', written in a cursive style.

Meagan J. Conway  
Assistant Attorney General  
Open Records Division

MJC/sb

Ref: ID# 645278

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

6 Third Parties  
(w/o enclosures)