



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 13, 2017

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

OR2016-26722A

Dear Ms. Parker:

This office issued Open Records Letter No. 2016-26722 (2016) on December 2, 2016, to the Texas Department of Transportation (the "department"). Since that date, the department has provided new information that affects the facts on which this ruling was based. Consequently, this decision is substituted for Open Records Letter No. 2016-26722 and serves as the correct ruling. *See generally* Gov't Code § 552.011 (Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 645631.

The department received a request for responses submitted in response to specified requests for qualifications.¹ The department does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, it states, and provides documentation showing, it notified the following third parties of the department's receipt of the request for information and of their right to submit arguments to this office as to why the requested information should not be released: Aecom Technical Services, Inc.; Aguirre & Fields, L.P. ("Aguirre"); AIA Engineers, Ltd.; Arias & Associates, Inc. ("Arias"); Atkins North America, Inc.; Balcones Geotechnical, P.L.L.C.; Civilcorp, L.L.C.; CP&Y, Inc.; D&S Engineering Labs, L.L.C.; HVJ Associates, Inc. ("HVJ"); IEA Inc.; Kleinfelder, Inc.; PaveTex Engineering Inc. ("PaveTex"); Professional Services Industries, Inc.; Raba Kistner, Inc. ("Raba"); Rodriguez Engineering Laboratories; Sam-Construction Services, L.L.C.; TEAM Consultants Inc.; Terracon Consultants, Inc. ("Terracon"); and VRX, Inc. *See id*

¹The requestor clarified her initial request for information.

§ 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 Arias, HJV, PaveTex, Raba, and Terracon objecting to the release of some of the information at issue under sections 552.101, 552.104, and 552.110 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

Initially, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-26021A (2016). We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, the department may rely on Open Records Letter No. 2016-26021A as a previous determination and withhold or release the identical information in accordance with that ruling.² We will address the arguments against the release of the submitted information that is not encompassed by Open Records Letter No. 2016-26021A.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the remaining third parties has submitted to this office any reasons explaining why the requested information should not be released. Accordingly, we have no basis for concluding the submitted information constitutes proprietary information of these third parties, and the department may not withhold any portion of it on that basis. *See* 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, 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.

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, 841 (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.* Arias, Aguirre, HVJ, PaveTex, Raba, and Terracon state they have competitors and argue release of the information they have indicated would cause them substantial competitive harm. Upon review, we find Arias, Aguirre, HVJ, PaveTex, Raba and Terracon have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information

²*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).

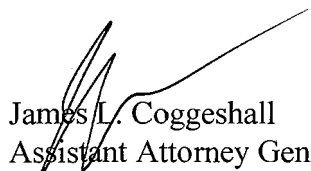
that Arias, Aguirre, HVJ, PaveTex, Raba, and Terracon have indicated under section 552.104(a) of the Government Code.³

To conclude, the department may rely on Open Records Letter No. 2016-26021A as a previous determination and withhold or release the identical information in accordance with that ruling. The department may withhold the information that Arias, Aguirre, HVJ, PaveTex, Raba, and Terracon have indicated 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, 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/bw

Ref: ID# 645631

c: Requestor

20 Third Parties

³As we are able to make this determination, we need not address the remaining arguments against disclosure of this information.