



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 10, 2017

Ms. Elizabeth Haws Connally
Counsel for the Cibolo Creek Municipal Authority
Connally Law
601 Northwest Loop 410, Suite 390
San Antonio, Texas 78216

OR2017-07482

Dear Ms. Connally:

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# 652274.

The Cibolo Creek Municipal Authority (the "authority"), which you represent, received a request for specified bid proposals. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties.¹ Accordingly, you state, and provide documentation showing, you notified Evoqua Water Technologies, LLC ("Evoqua"); Hydro International ("Hydro"); OVIO USA, LLC ("OVIO"); and WesTech Engineering, Inc. ("WesTech") 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 Hydro and OVIO. We have considered the submitted arguments and reviewed the submitted information.

¹We note the authority did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). Nevertheless, because the interests of third parties can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352.

Initially, we note portions of the submitted information are not responsive to the instant request because they do not consist of the requested bid proposals or were created after the date the request was received. The authority need not release nonresponsive information in response to this request, and this ruling will not address that information.

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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Evoqua and WesTech explaining why their information should not be released. Therefore, we have no basis to conclude Evoqua or WesTech 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 authority may not withhold any of the information at issue on the basis of any proprietary interest Evoqua or WesTech may have in it.

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. Hydro and OVIO state they have competitors. In addition, Hydro states release of the information it seeks to withhold would provide its competitors with a "clear and distinct competitive advantage in . . . future competitive bidding [and] expose the technical information necessary to reverse engineer valuable proprietary technology developed by Hydro." Further, OVIO states release of the information it seeks to withhold would give an unfair competitive advantage to its competitors for future projects and cause irreparable harm to OVIO. After review of the information at issue and consideration of the arguments, we find Hydro and OVIO established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold the information we have marked under section 552.104(a) of the Government Code.²

We note some of the materials at issue 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

²As our ruling on this information is dispositive, we need not address Hydro's remaining arguments against its disclosure.

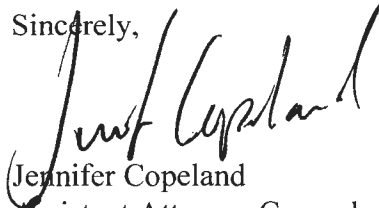
information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the authority may withhold the information we have marked under section 552.104 of the Government Code. The remaining information must be released, but any information subject to copyright may only 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.

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,



Jennifer Copeland
Assistant Attorney General
Open Records Division

JC/som

Ref: ID# 652274

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)