



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 2, 2017

Ms. Dena DeNooyer Stroh
General Counsel
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2017-17381

Dear Ms. Stroh:

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# 668919 (NTTA Request ID# 2017-01089).

The North Texas Tollway Authority (the "authority") received a request for information pertaining to a specified agreement, and specified communications between the requestor and the authority.¹ You state you will release information pursuant to Open Records Letter No. 2016-08660 (2016). *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You also state you will release additional information. You claim portions of the submitted information are excepted from disclosure under sections 552.101 and 552.139 of the Government Code. Additionally, although you take no position as to whether the remaining submitted information is excepted from disclosure, you state release of this information may implicate the proprietary interests of a third party. Accordingly, you state you notified Electronic

¹We note the authority sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Transaction Consultants Corporation (“ETC”) of the request for information and of its 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 Act in certain circumstances). We have received comments from ETC. We have considered the submitted arguments and reviewed the submitted 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. ETC states it has competitors. In addition, ETC states release of the information at issue would allow its competitors to have a marked competitive advantage over ETC and could allow competitors to undercut ETC by offering more services and, thus better pricing in future proposals. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find ETC has established the release of the information ETC marked would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold the information ETC marked under section 552.104(a) of the Government Code.²

Section 552.139 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is information that relates to computer network security, to restricted information under Section 2059.055 [of the Government Code], or to the design, operation, or defense of a computer network.

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Gov't Code § 552.139(a). You state a portion of the remaining information relates to the escrow agent who maintains the highly confidential source code and related build instructions for specific software the authority uses for the electronic toll collection system. You explain release of the name of this escrow entity would disclose the location where the source code is maintained as well as the identity of third parties outside of the authority who are responsible for the authority's security. Based on your arguments and our review of the information, we conclude the authority must withhold the information we marked under section 552.139 of the Government Code. However, we find you failed to demonstrate the remaining information at issue relates to the specifics of the authority's computer network security, or to the design, operation, or defense of the city's computer network as contemplated in section 552.139(a). Accordingly, the authority may not withhold any of the remaining information at issue under section 552.139 of the Government Code.

You argue the submitted information is excepted from disclosure by section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. As part of the Texas Homeland Security Act ("HSA"), sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make confidential certain information related to terrorism. Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. Section 418.182 provides, in relevant part,

(a) Except as provided by Subsections (b) and (c), information, including access codes and passwords, in the possession of a governmental entity that relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity is confidential.

Id. § 418.182(a). The fact that information may relate to a governmental body's security concerns does not make the information *per se* confidential under the HSA. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute's key terms is not sufficient to demonstrate the applicability of the claimed provision. As with any exception to disclosure, a governmental body asserting one of the confidentiality provisions of the HSA must adequately explain how the responsive records fall within the scope of the claimed provision. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

You assert the remaining information at issue identifies information that could compromise or cause harm to the authority's toll collection system. You argue if the information at issue were released, a bad actor could infiltrate the authority's systems and obtain general traffic volume and travel pattern or locational data specific to particular vehicles, which could facilitate a terrorist attack. However, upon review, we find the authority has failed to establish any portion of the remaining information at issue reveals the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. *See* Open Records Decision Nos. 542 (1990) (stating that governmental body has burden of establishing that exception applies to requested information), 532 (1989), 515 (1988), 252 (1980). Additionally, we find the authority has failed to demonstrate any of the information at issue relates to the specifications, operating procedures, or location of a security system used to protect public or private property from an act of terrorism or related criminal activity. Thus, we find the authority has not demonstrated the applicability of section 418.181 or section 418.182 to the information at issue, and the authority may not withhold it under section 552.101 of the Government Code on either of these basis.

In summary, the authority may withhold the information ETC marked under section 552.104(a) of the Government Code. The authority must withhold the information we marked under section 552.139 of the Government Code. The authority 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,



D. Michelle Case
Attorney
Open Records Division

DMC/sdk

Ref: ID# 668919

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)