



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 16, 2017

Ms. Lisa Calem-Lindström
Public Information Coordinator
Texas Facilities Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR2017-23635

Dear Ms. Calem-Lindström:

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# 678359 (TFC ORR 2017-087).

The Texas Facilities Commission (the "commission") received a request for information pertaining to a specified request for qualifications. You state you have released some information. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of third parties might be implicated.¹ Accordingly, you state, and provide documentation showing, you notified Hensel Phelps ("Hensel") and Zachry Construction Corporation ("Zachry") of the request and of their right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We also understand that you have notified the University of Texas at Austin (the "university") of the instant request for information and of its right to submit comments to this office explaining why the information at issue should not be released. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Hensel, Zachry, and the university. We have reviewed the submitted information and the submitted arguments.

¹We note we asked the commission to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the correspondence received pursuant to that request.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses the Texas Homeland Security Act (the “HSA”). As part of the HSA, sections 418.176 through 418.182 were added to chapter 418 of the Government Code. These provisions make certain information related to terrorism confidential. 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. 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).

The university explains the detailed architectural drawing of a particular building of the university’s medical school contains the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. The university asserts, and we agree, the university’s medical school building is critical infrastructure. *See generally id.* § 421.001 (defining “critical infrastructure” to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation”). The university explains that if this information was released, the university would be susceptible to criminals or terrorists who could use the detailed drawing to undermine the collective efforts of the university and other law enforcement agencies to safeguard the welfare of those using the building. The university further states release of this information would expose the vulnerabilities to the university’s critical infrastructure and undermine the security of the university as a whole. Based on these representations and our review, we find the university has demonstrated the release of the information at issue would identify the technical details of particular vulnerabilities of the university to an act of terrorism. Thus, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code on behalf of the university.

Section 552.104(a) exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 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. Hensel states it has competitors. In addition, Hensel states the information at issue, if released, would give

a competitor an advantage in submitting future competitive bids. After review of the information at issue and consideration of the arguments, we find Hensel has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may withhold Hensel's information at issue, which we have marked, under section 552.104(a) of the Government Code.²

Zachry states portions of its information are excepted from disclosure under section 552.110(b) of the Government Code, which protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (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).

Zachry asserts portions of its information consist of commercial or financial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Zachry has established some of the information at issue, including its pricing information and its customer information, constitutes commercial or financial information, the release of which would cause substantial competitive injury to Zachry. Therefore, the commission must withhold Zachry's pricing information, a representative sample of which we have marked, and Zachry's customer information, to the extent the customer information is not publicly available on Zachry's website, under section 552.110(b) of the Government Code. However, we find Zachry has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause it substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, we conclude the commission may not withhold Zachry's remaining information at issue under section 552.110(b) of the Government Code.

We note some of the remaining information may be subject to copyright law. 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 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

²As our ruling is dispositive, we need not address Hensel's remaining argument against disclosure of its information.

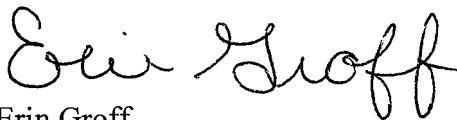
by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. The commission may withhold Hensel's information at issue, which we have marked, under section 552.104(a) of the Government Code. The commission must withhold Zachry's pricing information, a representative sample of which we have marked, and Zachry's customer information, to the extent the customer information is not publicly available on Zachry's website, under section 552.110(b) of the Government Code. The commission must release the remaining information; however, any information protected by 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,



Erin Groff
Assistant Attorney General
Open Records Division

EMG/sb

Ref: ID# 678359

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)