



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 6, 2017

Ms. Barbara Martinez
Manager of Corporate Records
Records Management & Public Information Officer
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2017-27684

Dear Ms. Martinez:

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# 686913 (SAWS# 6385, 6476).

The San Antonio Water System (the "system") received two requests for information pertaining to a specified bidding situation. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of LNV, Inc.; Maestas & Associates, Inc.; Civil Design Services, Inc. d/b/a CDS Muery; Unintech Consulting Engineers, Inc.; K Friese & Associates, Inc.; Brown & Gay Engineers, Inc. ("Brown"); Arcadis U.S., Inc. ("Arcadis"); and Lockwood, Andrews & Newman, Inc. ("Lockwood"). Accordingly, you state, and provide documentation demonstrating, you notified the third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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 Brown, Arcadis and Lockwood. We have reviewed the submitted information and considered the submitted arguments.

Initially, 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) of the Government Code

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 any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have 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 system may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the 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. Lockwood states it has competitors. In addition, Lockwood states release of its information at issue would allow competitors to use Lockwood’s information in its own proposals. Brown states it has competitors. In addition, Brown states release of its information at issue would give competitors an advantage. After review of the information at issue and consideration of the arguments, we find Lockwood and Brown have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold Lockwood’s and Brown’s information at issue under section 552.104(a) of the Government Code.¹

Arcadis claims some of its information is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) 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* ORD 661 at 5-6.

Upon review, we find Arcadis has established the release of its customer information would cause it substantial competitive injury. Nevertheless, to the extent Arcadis has published any of the customer information at issue on its website, this information is not confidential under section 552.110. Accordingly, the system must withhold Arcadis’s customer information, which we marked, in the submitted documents under section 552.110(b), provided Arcadis

¹As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

has not published the information on its website. However, we find Arcadis has failed to demonstrate that release of any of the remaining information at issue, including any customer information published on Arcadis's website, would result in substantial damage to its competitive position. Thus, the third party has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* ORD 661. Accordingly, the system may not withhold any of Arcadis's remaining information, including any customer information published on Arcadis's website, under section 552.110(b) of the Government Code.

The remaining documents also include information that is subject to section 552.136 of the Government Code.² Section 552.136 of the Government Code provides, "Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Accordingly, the system must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information appears to 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 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 system may withhold Lockwood's and Brown's information at issue under section 552.104 of the Government Code. The system must withhold Arcadis's customer information, which we marked, under section 552.110(b) of the Government Code, provided Arcadis has not published the information on its website. The system must withhold insurance policy numbers under section 552.136 of the Government Code. The system must release the remaining information in accordance with copyright law.³

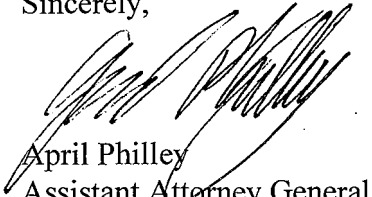
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³The information being released contains social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office. *See* Gov't Code § 552.147(b).

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,



April Philley
Assistant Attorney General
Open Records Division

AP/som

Ref: ID# 686913

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

8 Third Parties
(w/o enclosures)