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ATTORNEY GENERAL OF TEXAS

May 16, 2019

Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2019-05866A

Dear Mr. Miles:

This office issued Open Records Letter No. 2019-05866 (2019) on March 4, 2019. We have examined this ruling and determined we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that 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). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on March 4, 2019. Your request was assigned ID# 766215 (HHSC Reference No. 17137).

The Texas Health and Human Services Commission (the "commission") received a request for copies of seven specified contracts. You state the commission has made some information available to the requestor. Although the commission takes no position regarding whether the submitted information is excepted from disclosure, we understand its release may implicate the proprietary interests of Allied Consultants, Inc.; C&T Information Technology Consulting, Inc.; DXC Technology Services, LLC; Deloitte Consulting, LLP ("Deloitte"); Public Consulting Group, Inc.; and Northrop Grumman Civil Division ("Northrop").¹ Accordingly, you were required to notify these third parties of the request and their right to submit arguments to this office. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits

¹We note, and you acknowledge, the commission did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301. Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness. *See id.* §§ 552.007, .302, .352. Thus, we will consider whether the submitted information is excepted from disclosure under the Act, notwithstanding the commission's violation of section 552.301 in requesting this decision.

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 Deloitte and Northrop. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Deloitte and Northrop object to disclosure of information the commission has not submitted to this office for review. This ruling does not address information that was not submitted by the commission and is limited to the information the commission has submitted for our review.² See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See *id.* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from the remaining third parties. Thus, we have no basis to conclude any of these third parties has a protected proprietary interest in the submitted information. See *id.* § 552.110(a)-(b); 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 commission may not withhold any of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, you inform us contract numbers 529-14-0074-00001 and 529-12-0006-00001 were the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-16724 (2015) and 2017-21392 (2017). In Open Records Letter No. 2015-16724, we concluded, in relevant part, the commission must continue to rely on Open Records Letter No. 2015-12442 (2015) as a previous determination and release contract number 529-14-0074-00001 in accordance with that ruling. In Open Records Letter No. 2017-21392, we concluded the commission may withhold the information we marked in contract number 529-12-0006-00001 under section 552.104(a) of the Government Code and must release the remaining. We note Northrop seeks to withhold portions of its information under sections 552.104 and 552.110 of the Government Code. We further note some of the information at issue may have been previously ordered released in Open Records Letter No. 2017-21392. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. See Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive

²As we are able to make this determination, we need not address the arguments against disclosure of this information.

exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the commission may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although Northrop now raises section 552.104 of the Government Code for its information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n. 5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the commission may not now withhold any of Northrop's previously released information under section 552.104 of the Government Code. However, because section 552.110 makes information confidential by law, we will address Northrop's arguments under section 552.110 for the information that was previously released. Further, with regard to the submitted information that was not previously released, there is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, we conclude the commission may continue to rely on Open Records Letter Nos. 2015-16724 and 2017-21392 as previous determinations and withhold or release the identical information in accordance with those rulings. *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). With respect to the information that was not at issue in the previous rulings, we will consider Northrop's arguments under sections 552.104 and 552.110 of the Government Code.

Next, we note some of the remaining information is subject to section 2261.253 of the Government Code. Section 2261.253 provides, in relevant part, as follows:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

(b) A state agency monthly may post contracts described by Subsection (a) that are valued less than \$15,000.

...

(e) A state agency that posts a contract on its Internet website as required under this section shall redact from the posted contract

...

(2) information the attorney general determines is excepted from public disclosure under [the Act]; and

...

(f) The redaction of information under Subsection (e) does not exempt the information from the requirements of Section 552.021 or 552.221.

Gov't Code § 2261.253(a)(1), (b), (e)(2), (f). Contract numbers HHS000045800001, HHS000106200001, 529-16-0011-00001, and HHS000284800001 are valued at more than \$15,000, are between the commission, which is a state agency, and private vendors for the purchase of goods or services, and the contracts are not expired or completed. Deloitte raises sections 552.104 and 552.110 of the Government Code for portions of their information at issue; however, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). The 85th Legislature amended section 2261.253; pursuant to the amendments, state agencies shall redact from contracts subject to section 2261.253 information that the attorney general determines is excepted from public disclosure under the Act. Gov't Code § 2261.253(e)(2); *see also id.* § 2261.253(f). Although Deloitte asserts these amendments allow both of their contracts at issue to be withheld under exceptions to disclosure found in the Act, the amendments “apply only in relation to a contract for which a state agency first advertises or otherwise solicits bids, proposals, offers, or qualifications on or after [September 1, 2017].” Act of May 29, 2017, 85th Leg., R.S., ch. 556, § 17(c), 2017 Tex. Sess. Law Serv. 1535, 1540. We note contract numbers HHS000106200001, 529-16-0011-00001, and HHS000284800001 resulted from requests for proposals that were solicited prior to September 1, 2017. Consequently, the amendments do not apply to these contracts. Therefore, the commission may not withhold any portion of these contracts under section 552.104 or section 552.110, and the commission must release these contracts pursuant to section 2261.253 of the Government Code. However, upon review, we find contract number HHS000045800001 is subject to the amendments; therefore, we will address Deloitte’s claims under sections 552.104 and 552.110 for contract number HHS000045800001.

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. Deloitte and Northrop state they have competitors. Further, Deloitte and Northrop state release of the information at issue would give an advantage to their competitors. 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 831, at 831, 842. After review of the information at issue and consideration of the arguments, we find Deloitte and Northrop have established the release of their information at issue would give advantage to a competitor or bidder. Thus, to the extent the information at issue was not previously ordered released pursuant to Open Records Letter No. 2017-21392, we conclude the commission may withhold Deloitte's and Northrop's information we have indicated under section 552.104(a) of the Government Code.³

Northrop also asserts its information at issue, some of which may have been released pursuant to Open Records Letter No. 2017-21392, is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's

³As our ruling is dispositive for the information at issue, we need not address the remaining arguments against disclosure of this information.

list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. See ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

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.

We note, to the extent Northrop’s information was previously ordered released in Open Records Letter No. 2017-21392, we address Northrop’s argument under section 552.110 of the Government Code. However, since the issuance of the previous ruling on September 19, 2017, Northrop has not disputed this office’s conclusion regarding the release of the information. In this regard, we find Northrop has not taken any measures to protect its information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause Northrop substantial harm. See Gov’t Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; see also ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the commission may not withhold Northrop’s information that was previously ordered released in Open Records Letter No. 2017-21392 under section 552.110 of the Government Code.

In summary, the commission must release contract number 529-14-0074-00001 pursuant to Open Records Letter No. 2015-16724. The commission must release contract numbers HHS000106200001, 529-16-0011-00001, and HHS000284800001 pursuant to section 2261.253 of the Government Code. To the extent the requested information is identical to the information previously requested and ruled upon by this office in Open

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Records Letter No. 2017-21392, the commission must rely on that ruling as a previous determination and withhold or release the identical information in accordance with that ruling. However, to the extent the information at issue was not subject to Open Records Letter No. 2017-21392, the commission may withhold Deloitte's and Northrop's information we have indicated under section 552.104(a) of the Government Code. The commission 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,



Erin Groff
Assistant Attorney General
Open Records Division

EMG/jxd

Ref: ID# 766215

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

5 Third Parties
(w/o enclosures)

