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ATTORNEY GENERAL OF TEXAS

June 5, 2019

Mr. John M. Hopkins
Counsel for the Region 4 Education Service Center
Thompson & Horton, LLP
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027-7554

OR2019-06948A

Dear Mr. Hopkins:

This office issued Open Records Letter No. 2019-06948 (2019) on March 13, 2019. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on March 13, 2019. *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). Your request was assigned ID# 769272.

The Region 4 Education Service Center (the "center") received a request for two specified proposals in response to a specified solicitation. The center does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the center states, and provides documentation showing, it notified J.T. Vaughn Construction, LLC ("Vaughn") and Weatherproofing Technologies, Inc. ("Weatherproofing") of the center's receipt of the request for information and their right to submit arguments to this office as to why the requested 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).¹ We have received comments from Vaughn and Weatherproofing. We have considered the submitted arguments and reviewed the submitted information.

¹We note, however, the center received the request for information on December 4, 2018 but did not provide notice to Weatherproofing until February, 27, 2019, the 45th business day after this office received the center's request for a decision. *See* Gov't Code § 552.306 (attorney general shall render decision by 45th business day after date request for decision is received unless period for issuing decision is extended).

Initially, in each of their briefings to this office, the center and Weatherproofing inform us some of the submitted information was created with the expectation of confidentiality. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Vaughn and Weatherproofing assert some of their information is protected under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, 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. Vaughn and Weatherproofing state they have competitors. Vaughn states it is a “closely held company and does not publish its financial information [and its] size, financial strength, capabilities and limitations are closely guarded secrets.” Additionally, Vaughn states, “disclosure of this information would allow [its] competitors to predict which projects [it] might pursue and the terms under which [it] would pursue those opportunities.” Further, Vaughn states release of its information at issue would diminish its competitive advantage. Weatherproofing states “disclosure of [its information at issue] would be of great benefit to competitors of [Weatherproofing] who perform similar work.” After review of the information at issue and consideration of the arguments, we find Vaughn and Weatherproofing have established the release of their information at issue would give advantage to a competitor or bidder. Thus, we conclude the center may withhold the information it marked and the additional information we marked on behalf of Vaughn, as well as the information we indicated on behalf of Weatherproofing 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 is dispositive, we need not address the remaining arguments against disclosure of this information.

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 center may withhold the information it marked and the additional information we marked on behalf of Vaughn, as well as the information we indicated on behalf of Weatherproofing under section 552.104(a) of the Government Code. The center must release the remaining information; however, any information that is subject to copyright may be released only 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,



Lecelle Clarke
Attorney
Open Records Division

LC/gw

Ref: ID# 769272

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 2 Third Parties
(w/o enclosures)