



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 20, 2019

Ms. Ingrid Gunter
Paralegal
Lewisville Independent School District
P.O. Box 217
Lewisville, Texas 75067

OR2019-07769

Dear Ms. Gunter:

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# 755473.

The Lewisville Independent School District (the "district") received a request for bid tabulations and pricing related to a specified bid. Although you take no position regarding whether the submitted information is excepted from disclosure, you state its release may implicate the proprietary interests of Apex TITAN, Inc.; ERC Environmental & Construction Services, Inc. ("ERC"); Ensolum, LLC ("Ensolum"); Farmer Environmental Group, LLC; and Terracon Consultants, Inc. ("Terracon"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information 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 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 ERC, Ensolum, and Terracon. We have considered the submitted arguments and reviewed the submitted information.

Initially, 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 Gov't Code § 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 remaining third party 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 district may not withhold any of the submitted information on the basis of any proprietary interest any remaining third party may have in the information.

Next, we note ERC argues against release of information that was not submitted by the district. This ruling does not address information that was not submitted by the district and is limited to the information the district has submitted as responsive for our review.¹ *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Ensolum and Terracon raise section 552.104 of the Government Code for their information. Section 552.104(a) excepts 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. Ensolum and Terracon each state they have competitors. In addition, Ensolum and Terracon assert release of the information at issue would cause harm to the companies’ interests and provide advantage to their competitors. We note Ensolum was a winning bidder for the bid at issue. 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 841. After review of the information at issue and consideration of the arguments, we find Ensolum and Terracon have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we

¹As we are able to make this determination, we need not address the arguments against disclosure of this information.

conclude the district may withhold the information we have marked under section 552.104(a) of the Government Code.²

In summary, the district may withhold the information we have marked under section 552.104(a) of the Government Code. The district 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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/mo

Ref: ID# 755473

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)

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