



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 9, 2019

Mr. Nicholas Lealos  
Assistant General Counsel  
Texas Workforce Commission  
101 East 15th Street  
Austin, Texas 78778-0001

OR2019-12446

Dear Mr. Lealos:

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# 764467 (TWC Tracking No. 181212-023).

The Texas Workforce Commission (the "commission") received a request for information pertaining to expenditures and income related to a particular program during specified fiscal years. You state you do not have information responsive to a portion of the request.<sup>1</sup> You state portions of the submitted information are excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Allen Tharp, LLC ("Tharp"); Austex Freedom Dining, LLC ("Austex"); and Rolmar, Inc. ("Rolmar"). Thus, pursuant to section 552.305 of the Government Code, you notified the third parties of the request and of the right to submit arguments to this office as to why the submitted information should not be released. 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 to disclosure in certain circumstances). We have received comments from Austex, Rolmar, and Tharp. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the commission's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant

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<sup>1</sup>The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). The commission received the request for information on February 5, 2019, and informs us it was closed for business on February 18, 2019. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, the commission's ten-business-day deadline under section 552.301(b) was February 20, 2019, and the fifteen-business-day deadline under section 552.301(e) was February 27, 2019. The commission states it sought clarification of the request on February 21, 2019, and received clarification from the requestor on the same day. Thus, we understand the commission to claim the deadlines should be reset because the commission asked for clarification from the requestor. However, we note the commission did not request clarification of the request until after the ten-business-day deadline for the request had passed. As such, the statutory deadlines for requesting an opinion from this office and submitting the required documentation for the request were not reset by the request for clarification and must be measured from the date the commission received the request for information. *See generally City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (after requesting clarification within ten-business-day deadline, city timely submitted request for opinion within ten business days after receiving clarification). Thus, as stated above, the commission's ten-business-day deadline under section 552.301(b) was February 20, 2019, and the fifteen-business-day deadline under section 552.301(e) was February 27, 2019. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). However, the commission did not request a ruling from this office until March 7, 2019. Further, the information required by section 552.301(e) was provided to this office on March 14, 2019. *See id.* Therefore, we find the commission failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). The city claims sections 552.104 and 552.110 for the submitted information. We find the commission has failed to establish a compelling reason to address its claim under section 552.104. Further, because section 552.110 protects the interests of third parties that provide the information, not a governmental body's interest, we do not address the commission's section 552.110 assertion. *See* Gov't Code § 552.110 (section excepts from disclosure trade secrets and commercial or

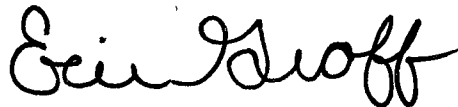
financial information obtained from person). However, we note third party interests can provide a compelling reason to overcome the presumption of openness against disclosure of the submitted information. Accordingly, we will consider Austex's, Rolmar's, and Tharp's arguments against disclosure of the submitted information.

Austex, Rolmar, and Tharp raise section 552.104 of the Government for some or all of 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. Austex, Rolmar, and Tharp state they have competitors. In addition, Austex, Rolmar, and Tharp state 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 Austex, Rolmar, and Tharp have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may withhold Rolmar's information we have marked, and Austex's and Tharp's information in its entirety, under section 552.104(a).<sup>2</sup> 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](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

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<sup>2</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Ref: ID# 764467

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

3 Third Parties  
(w/o enclosures)