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ATTORNEY GENERAL OF TEXAS

August 19, 2019

Mr. Eric C. Farrar
Counsel for the City of Katy
Olson & Olson, LLP
2727 Allen Parkway, Suite 600
Houston, Texas 77019-2133

OR2019-23025

Dear Mr. Farrar:

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# 781111.

The City of Katy (the "city"), which you represent, received a request for information pertaining to a specified park.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate

¹ We note the city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed). You further state, and provide documentation demonstrating, the city sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the city received the required deposit on June 3, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

the proprietary interests of third parties.² Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights 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 Brannon, BGE, BLD, JPH, MEP, MDBA, Typhoon, and Van Stone. We have considered the submitted arguments and reviewed the submitted information.

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 *id.* § 552.305(d)(2)(B). We have received comments from JPH, but they claim no exceptions and make no argument against disclosure of the requested information. As of the date of this letter, we have not received comments from the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude those parties have protected proprietary interests 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 city may not withhold any portion of the submitted information related to the remaining third parties on the basis of any proprietary interest they 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. Typhoon states it has competitors. In addition, Typhoon states release of its information at issue would give advantage to a competitor or bidder. After review of the information and consideration of the arguments, we find Typhoon has

² The notified third parties consist of: Access Surveyors; Allied Fire Protection, LP; American Truss Systems, LLC; Brannon Corp Aquatic Consultants ("Brannon"); Brown & Gay Engineers, Inc. ("BGE"); Bruno Land Design "BLD"); Captive-Aire; Century Engineering, Inc.; DFS Enterprises; Eagle Metal; Element Materials Technology; FTL Happold; Hilti; Hlavinka Construction Co.; Indicom Buildings, Inc.; Joe P. Hill, P.E., Inc. ("JPH"); Kingham Dalton Wilson; MEP Associates Design Group ("MEP"); Michael D. Barham Architects, Inc. ("MDBA"); Milton D. Bluhm Engineer; Profitable Food Facilities Worldwide; ProTech Fire & Security, LLC; R & S Tavares Associates, Inc.; Schulte Building Systems; SMB Engineering LLC; SMSE; Site Tech; Teton Buildings; T & B Equipment Co, Inc.; Typhoon Waterpark of Texas, LLC ("Typhoon"); United Modular; Unity Signs; USA Shade & Fabric Structures; Van Stone Conveyor Inc. ("Van Stone"); Walsh Engineering Services, P.C.; Walter R. Wagner, P.E.; White Water West Industries Ltd.; York Bridge Concepts; and Yoosef Lavi, P.E.

established release of the information would give advantage to a competitor or bidder. Thus, we conclude the city may withhold Typhoon's information we indicated under section 552.104(a) of the Government Code.³

We note some of the remaining information 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 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 city may withhold Typhoon's information we indicated under section 552.104(a) of the Government Code. The city 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/gw

³ As our ruling is dispositive, we need not address the remaining arguments of Brannon, BGE, BLD, MEP, MDBA, and Van Stone against disclosure of this information.

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Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 37 Third Parties
(w/o enclosures)