



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 10, 2019

Mr. Rahat Huq
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2019-34772

Dear Mr. Huq:

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# 797915 (GC 26131).

The City of Houston (the "city") received a request for the city's disadvantaged business enterprise ("DBE") and small business enterprise files related to five specified third parties, and correspondence with these third parties.¹ You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code.² Additionally, you state release of the submitted information may implicate the proprietary interests of Access Data Supply, Inc. ("Access"); Elite Change, Inc.; JOLT! Consultants & Business Advisors, LLC; MCA Communications, Inc. ("MCA"); and Virtuo Group Corporation. Accordingly, you state, and provide documentation showing, the city notified these third parties of the request for information and of their rights to submit arguments to this office as to why the submitted 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

¹ You state the city 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² Although you also raise section 552.104 of the Government Code, you have not provided any arguments to support this exception. Therefore, we assume you have withdrawn the claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

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 Access and MCA. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information may not relate to the specified third parties' files. To the extent the submitted information does not relate to the specified third parties' files, such information is not responsive to the request. This ruling does not address the public availability of the non-responsive information, and the city need not release it in response to this request.

Next, 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) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). 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 the remaining third parties have a protected proprietary interest 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 the responsive information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.128 of the Government Code provides the following:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from the requirements of Section 552.021, except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Gov't Code § 552.128. Access asserts that its information was submitted to the city in connection with an application for certification as a DBE under the city's DBE program. Access states, and we agree, that the requestor is not a governmental entity and that the city does not have express written permission from Access or its agent to release the information. We also find that Access's information was not submitted to the city in connection with a specific bid or bidder's list or in connection with a specific proposed contractual relationship. Based on these representations and our review, we find, with the exception of the information we marked for release, the city must withhold Access's information under section 552.128 of the Government Code.³ We note, however, that section 552.128 applies only to "[i]nformation *submitted by* a potential vendor or contractor[.]" *Id.* § 552.128(a) (emphasis added). The information we marked for release consists of correspondence from the city to Access or documents that were not submitted to the city by Access. Accordingly, the information we marked for release was not submitted by Access for certification as a DBE and may not be withheld under section 552.128 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. This section encompasses information protected by other statutes. You raise section 26.109(a)(2) of title 49 of the Code of Federal Regulations⁴ for the remaining responsive information. Title 49, part 26 of the Code of Federal Regulations governs the

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

⁴ A federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

participation of disadvantaged business enterprises in the United States Department of Transportation ("DOT") financial assistance programs, and provides in part the following:

(a) Availability of records.

...

(2) Notwithstanding any provision of Federal or state law, you must not release any information that may reasonably be construed as confidential business information to any third party without the written consent of the firm that submitted the information. This includes applications for DBE certification and supporting information. However, you must transmit this information to DOT in any certification appeal proceeding under § 26.89 of this part or to any other state to which the individual's firm has applied for certification under § 26.85 of this part.

49 C.F.R. § 26.109(a)(2). Part 26 applies to recipients of certain federal-aid highway funds, federal transit funds, and airport funds. *See id.* § 26.3(a). Section 26.5 states that "You refers to a recipient, unless a statement in the text of this part or the context requires otherwise[.]" *See id.* § 26.5. You state the city receives federal funds from DOT. Upon review, we agree that section 26.109 makes confidential certain business information, including applications for DBE certification and supporting information held by the city. Therefore, with the exception of the information we marked for release, the city must withhold the remaining responsive information under section 552.101 of the Government Code in conjunction with section 26.109(a)(2) of title 49 of the Code of Federal Regulations.⁵ However, no portion of the information we marked for release constitutes confidential business information, applications for DBE certification, or supporting information. Therefore, the city may not withhold any portion of the information we marked for release pursuant to section 26.109(a)(2) of title 49 of the Code of Federal Regulations and section 552.101 of the Government Code.

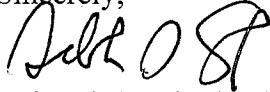
In summary, with the exception of the information we marked for release, the city must withhold Access's information under section 552.128 of the Government Code. With the exception of the information we marked for release, the city must withhold the remaining responsive information under section 552.101 of the Government Code in conjunction with section 26.109(a)(2) of title 49 of the Code of Federal Regulations. The city must release the remaining responsive 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.

⁵ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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,



Deborah Southerland
Attorney
Open Records Division

DS/mo

Ref: ID# 797915

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third party
(w/o enclosures)