



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 1, 2020

Ms. Amanda M. Bigbee
General Counsel
Keller Independent School District
350 Keller Parkway
Keller, Texas 76248

OR2020-10035

Dear Ms. Bigbee:

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# 817005.

The Keller Independent School District (the "district") received a request for certain information pertaining to a specified request for qualifications.¹ You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of several third parties.² Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of the right 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

¹ You state the district sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. You inform us the requestor modified his request in response to the cost estimate. *See id.* § 552.222(b) (governmental body may communicate with requestor for purposes of clarifying or narrowing request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

² The notified third parties are as follows: Brown Reynolds Watford Architects; CCGI—Canterbury Consulting Group, Inc.; Claycomb Associates, Inc.; Corgan Associates, Inc. ("Corgan"); Hahnfeld Hoffer Stanford; HKS; Huckabee Architects, Inc. ("Huckabee"); Jennings Hackler and Partners, Inc.; KSQ; LBL Architects, Inc.; NATEX Corporation Architects; PBK; Perkins+Will; Stantec; th+a architects; WRA Architects; and VLK Architects, Inc. ("VLK").

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 Corgan, Huckabee, and VLK.³ We have considered the submitted arguments and reviewed the submitted information.

Initially, we note VLK argues against the 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 for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining notified 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 district may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.104 of the Government Code excepts from disclosure “[i]nformation . . . if a *governmental body* demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” Gov't Code § 552.104(a) (emphasis added). 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.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015).

After review of the district's arguments, we find the district has failed to demonstrate the applicability of section 552.104 to the information at issue. Therefore, the district may not withhold the submitted information under section 552.104 of the Government Code.

Additionally, Corgan, Huckabee, and VLK raise section 552.104 of the Government Code for their information at issue. In *Boeing*, the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended

³ Although Huckabee raises section 552.101 of the Government Code, it makes no arguments to support this exception. Therefore, we assume Huckabee has withdrawn its claim that this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

section 552.104 since the issuance of *Boeing*. See Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov't Code § 552.104(a). Therefore, we do not address Corgan's, Huckabee's, and VLK's arguments under section 552.104.

Section 552.110(c) of the Government Code excepts from disclosure “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” See *id.* § 552.110(c). Huckabee and VLK argue some of the information at issue consists of commercial or financial information subject to section 552.110(c). Upon review, we find Huckabee and VLK have demonstrated some of the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the district must withhold the information we marked under section 552.110(c) of the Government Code.⁴ However, we find Huckabee and VLK have failed to provide specific factual evidence demonstrating the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the district may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” See *id.* § 552.110(b). Section 552.110(a) defines trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Corgan, Huckabee, and VLK argue some of the information at issue consists of trade secrets subject to section 552.110(b). Upon review, we find Corgan, Huckabee, and VLK have failed to provide specific factual evidence demonstrating any portion of the information at issue is a trade secret. Therefore, the district may not withhold any portion of the remaining information under section 552.110(b) of the Government Code.

In summary, the district must withhold the information we marked under section 552.110(c) of the Government Code. The district must release the remaining information.

⁴ As our ruling is dispositive, we need not address the remaining arguments of Huckabee and VLK against disclosure of this 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 <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,

Kimbell Kesling
Assistant Attorney General
Open Records Division

KK/eb

Ref: ID# 817005

Enc. Submitted documents

c: Requestor
(w/o enclosures)

18 Third Parties
(w/o enclosures)