



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

April 8, 2020

Ms. Rebekah Wendt  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2020-10564

Dear Ms. Wendt:

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# 821134 (GC No. 26449).

The City of Houston (the "city") received a request for information pertaining to a particular request for proposals. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, the city states release of some of the submitted information may implicate the proprietary interests of Texas Sterling Construction Co.; Boyer, Inc. ("Boyer"); Oscar Renda Contracting, Inc. ("Oscar"); Harper Brothers, L.L.C.; Thalle Construction Co., Inc. ("Thalle"); and Main Lane Industries, Ltd. Accordingly, the city states, and provides documentation showing, it 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 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 received comments from Boyer, Oscar, and Thalle. We have considered the submitted arguments and reviewed the submitted information.

Initially, Boyer and Thalle note the submitted information may have been the subject of previous requests for information. We agree the submitted information may have been the subject of previous requests for information in response to which this office issued Open Records Letter Nos. 2018-22404 (2018), 2019-00469 (2019), and 2019-34659 (2019). In Open Records Letter No. 2018-22404, we determined the city may withhold the submitted information under section 552.104(a) of the Government Code. In Open Records Letter Nos. 2019-00469 and 2019-34659, we determined the city may withhold certain

information under section 552.104(a) of the Government Code and must release the remaining information. We note since the previous rulings were issued, the law regarding section 552.104 has changed. Therefore, because the law has changed with respect to the information at issue, the city may not rely on Open Records Letter Nos. 2018-22404, 2019-00469, and 2019-34659 as previous determinations and withhold any of the information at issue in accordance with those rulings. *See* Open Records Decision No. 673 at 6-7 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). Accordingly, we will consider the submitted arguments against disclosure of the submitted information.

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) 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party has 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 submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Next, we understand Boyer and Oscar assert their information was supplied with the expectation of confidentiality. Information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

The city, as well as Boyer, Oscar, and Thalle, argue section 552.104 of the Government Code. Section 552.104 excepts from disclosure information “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). In

*Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), 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 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 Boyer's, Oscar's, or Thalle's arguments under section 552.104 of the Government Code. 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*, 466 S.W.3d at 841. After review of the information at issue and consideration of the city's arguments, we find the city has failed to demonstrate the applicability of section 552.104 to the information at issue. Thus, we conclude the city may not withhold any of the submitted information under section 552.104(a) of the Government Code.

Boyer and Oscar argue portions of their information are subject to section 552.110 of the Government Code. Section 552.110(b) states, "[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret." *See* Gov't Code § 552.110(b). Section 552.110(a) defines a 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). Section 552.110(c) of the Government Code states:

- (c) Except as provided by Section 552.0222, 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 is [excepted from required disclosure].

*Id.* § 552.110(c). Section 552.0222 of the Government Code provides, in relevant part:

- (b) The exceptions to disclosure provided by Sections 552.110 and 552.1101 do not apply to the following types of contracting information:

- (1) a contract described by Section 2261.253(a), excluding any information that was properly redacted under Subsection (e) of that section;
- (2) a contract described by Section 322.020(c), excluding any information that was properly redacted under Subsection (d) of that section;
- (3) the following contract or offer terms or their functional equivalent:

- (A) any term describing the overall or total price the governmental body will or could potentially pay, including overall or total value, maximum liability, and final price;
  - (B) a description of the items or services to be delivered with the total price for each if a total price is identified for the item or service in the contract;
  - (C) the delivery and service deadlines;
  - (D) the remedies for breach of contract;
  - (E) the identity of all parties to the contract;
  - (F) the identity of all subcontractors in a contract;
  - (G) the affiliate overall or total pricing for a vendor, contractor, potential vendor, or potential contractor;
  - (H) the execution dates;
  - (I) the effective dates; and
  - (J) the contract duration terms, including any extension options; or
- (4) information indicating whether a vendor, contractor, potential vendor, or potential contractor performed its duties under a contract, including information regarding:
- (A) a breach of contract;
  - (B) a contract variance or exception;
  - (C) a remedial action;
  - (D) an amendment to a contract;
  - (E) any assessed or paid liquidated damages;
  - (F) a key measures report;
  - (G) a progress report; and
  - (H) a final payment checklist.

*Id.* § 552.0222(b). Boyer and Oscar argue some of their information consists of trade secrets subject to section 552.110(b). Upon review, we find Boyer and Oscar have demonstrated portions of the information at issue constitute trade secrets. Therefore, the city must withhold the information we have indicated under section 552.110(b) of the Government Code.<sup>1</sup> However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(b). *See id.* (listing certain types of information not excepted under section 552.110). Further, we find

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<sup>1</sup> As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Boyer and Oscar have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is a trade secret. Therefore, the city may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

We understand Boyer and Oscar to argue some of their remaining information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Boyer and Oscar have demonstrated portions of their information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the city must withhold the information we have marked under section 552.110(c) of the Government Code. However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(c). *See id.* (listing certain types of information not excepted under section 552.110). Additionally, we find Boyer and Oscar have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the city may not withhold any of the remaining information at issue under section 552.110(c) 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. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. Additionally, this office has concluded some kinds of medical information are generally highly intimate or embarrassing. *See* Open Records Decision No. 455 (1987). Upon review, we conclude the information we have marked meets the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Accordingly, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator’s license, driver’s license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release.<sup>2</sup> *See* Gov’t Code § 552.130. Accordingly, the city must withhold the motor vehicle record information we have indicated under section 552.130 of the Government Code.

Section 552.136 of the Government Code states “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected,

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<sup>2</sup> The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined an insurance policy number is an access device for purposes of this exception. Thus, the city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may be subject to copyright law. 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 must withhold the information we have indicated under section 552.110(b) of the Government Code. The city must withhold the information we have marked under section 552.110(c) of the Government Code. The city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The city must withhold the motor vehicle record information we have indicated under section 552.130 of the Government Code. The city must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The city must release the remaining information; however, any information protected by copyright may only be released 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,

Erin Groff  
Assistant Attorney General  
Open Records Division

EMG/eb

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Enc. Submitted documents

c: Requestor  
(w/o enclosures)

6 Third Parties  
(w/o enclosures)