



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 24, 2020

Ms. Cynthia Tynan
Senior Attorney & Public Information Coordinator
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2901

OR2020-21202

Dear Ms. Tynan:

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# 841675 (Ref. No. 197562).

The University of Texas Medical Branch at Galveston (the "university") received a request for information pertaining to a specified request for proposals. You state the university has released some information. You state you will withhold certain information pursuant to section 552.136(c) of the Government Code.¹ You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code. You also state, and provide documentation showing, you notified Alpha Building Corporation ("Alpha"), Archer Western ("Archer"), BC Commercial, Brown & Root ("Brown"), CA Walker Construction ("CA Walker"), Flintco, JW Kelso, Nash Industries, Nouveau Construction, SpawGlass, The Trevino Group, Vaughn Construction ("Vaughn"), Westway Construction, and York Construction 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 have received comments from Alpha, Archer, Brown, CA Walker, Flintco, and Vaughn. We have considered the submitted arguments and reviewed the submitted information.

¹ Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. *See* Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

You inform us the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2018-16660A (2018). In Open Records Letter No. 2018-16660A, we determined the university may withhold the information you marked under section 552.111 of the Government Code; may withhold Alpha's and Westway's information in their entirety, Trevino's pricing information, and the information we indicated under section 552.104(a) of the Government Code; must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code; and must release the remaining information; however, any information protected by copyright may only be released in accordance with copyright law. We note, since the previous ruling was issued, the law regarding section 552.104 has changed. *See* Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3. Therefore, the university may not rely on Open Records Letter No. 2018-16660A as a previous determination with respect to the information previously withheld under section 552.104. *See* Open Records Decision No. 673 (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 that information is or is not excepted from disclosure). Nevertheless, as we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based with respect to the information withheld under sections 552.111 and 552.136, the university must rely on Open Records Letter No. 2018-16660A as a previous determination with respect to that information and withhold the identical information in accordance with that ruling.² *See id.*

We note Archer, CA Walker, Flintco, and Vaughn argue against disclosure of information that was previously released in Open Records Letter No. 2018-16660A. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007. The university notified Archer, CA Walker, Flintco, and Vaughn pursuant to section 552.305 of the Government Code when it received the request for information at issue in Open Records Letter No. 2018-16660A. However, Archer, CA Walker, Flintco, and Vaughn did not submit comments objecting to the release of their information in that ruling and, as a result, we concluded the university must release their information. Archer, CA Walker, Flintco, and Vaughn now argue sections 552.101, 552.102, 552.104, 552.110, and 552.1101 of the Government Code for the previously released information. Section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, the university may not now withhold the previously released information under section 552.104. However, because information subject to sections 552.101, 552.102, 552.110, and 552.1101 is deemed confidential by law, we will consider the arguments from

² As we are able to make this determination, we need not consider the arguments against disclosure of this information.

Archer, CA Walker, Flintco, and Vaughn under these exceptions for the previously released 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 id.* § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from the remaining third parties explaining why the information at issue should not be released. Thus, we have no basis to conclude the remaining third parties have a protected proprietary interest in the information at issue. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Therefore, the university may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

CA Walker raises section 552.101 of the Government Code for a portion of the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *Id.* § 552.101. However, CA Walker has not pointed to any confidentiality provision, nor are we aware of any, that would make the information at issue confidential for purposes of section 552.101. *See, e.g.,* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the university may not withhold the information at issue under section 552.101 of the Government Code.

CA Walker also raises section 552.102(a) of the Government Code for a portion of the submitted information. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). We note section 552.102(a) applies to information in the personnel file of a governmental employee. *See id.* The information at issue does not consist of information in the personnel file of a governmental employee. Therefore, we find none of the information at issue is subject to section 552.102(a) and the university may not withhold it on that basis.

Brown raises section 552.104 of the Government Code for a portion of the submitted information. 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." *Id.* § 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, as noted above, 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 Brown's argument under section 552.104.

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 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 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[.]" *Id.* § 552.110(c). Archer, Brown, CA Walker, Flintco, and Vaughn argue some of the remaining information consists of trade secrets subject to section 552.110(b) or commercial or financial information subject to section 552.110(c).³ Upon review, we find Brown has demonstrated portions of the information at issue, which we indicated, constitute trade secrets. Accordingly, the university must withhold the information we indicated under section 552.110(b) of the Government Code. However, as mentioned above, the information at issue from Archer, CA Walker, Flintco, and Vaughn was the subject of a previous ruling and these third parties did not object to release of the information at that time. Since the issuance of Open Records Letter No. 2018-16660A on September 6, 2018, Archer, CA Walker, Flintco, and Vaughn have not disputed this office's conclusions regarding the release of the information at issue. In this regard, we find Archer, CA Walker, Flintco, and Vaughn have not taken any measures to protect the information at issue in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause substantial harm. Therefore, the university may not withhold any of the remaining information at issue under section 552.110(b) or section 552.110(c) of the Government Code.

Section 552.1101 of the Government Code provides, in relevant part:

- (a) . . . [I]nformation submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a

³ Although some of the third parties cite to former sections 552.110(a) and 552.110(b) of the Government Code, we understand the third parties to raise current sections 552.110(b) and 552.110(c) of the Government Code based on the substance of the arguments.

request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

(A) work;

(B) organizational structure;

(C) staffing;

(D) internal operations;

(E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

Id. § 552.1101(a). Alpha, Vaughn, and Archer assert disclosure of some of the remaining information would reveal an individual approach to work, organizational structure, staffing, internal operations, processes, or pricing and give advantage to a competitor. Upon review, we find Alpha has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the university must withhold the information we indicated under section 552.1101 of the Government Code. However, as noted above, the information pertaining to Vaughn and Archer was the subject of Open Records Letter No. 2018-16660A and these third parties did not object to release of the information at issue at that time. Since the issuance of the previous ruling on September 6, 2018, Vaughn and Archer have not disputed this office's conclusions regarding the release of the information at issue. In this regard, we find Vaughn and Archer have not taken any measures to protect the information at issue in order for this office to conclude the information now qualifies as proprietary information for purposes of section 552.1101. Therefore, the university may not withhold any of the remaining information under section 552.1101.

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, with respect to the information withheld under sections 552.111 and 552.136 of the Government Code, the university must rely on Open Records Letter No. 2018-16660A as a previous determination and withhold the identical information in accordance with that ruling. The university must withhold the information we indicated under section 552.110(b) of the Government Code. The university must withhold the information we indicated under section 552.1101 of the Government Code. The university 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,

Michelle Garza
Assistant Attorney General
Open Records Division

MG/mo

Ref: ID# 841675

Enc. Submitted documents

c: Requestor
(w/o enclosures)

14 Third Parties
(w/o Enclosures)