



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 31, 2020

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2020-21821

Dear Ms. Parker:

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# 841188.

The Texas Department of Transportation (the "department") received a request for specified portions of the winning bid for a specified request for proposals. You state the department will release some information to the requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of TransCore ITS, LLC ("TransCore"). Accordingly, you state, and provide documentation showing, the department notified TransCore 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 TransCore. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note TransCore argues against the release of some information that was not submitted by the department. This ruling does not address information that was not submitted by the department and is limited to the information the department 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).

TransCore raises section 552.104 of the Government Code for a portion of its 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, 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 TransCore’s arguments under section 552.104.

Further, we note the submitted information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2016-03981 (2016). In that ruling, we determined, in pertinent part, the department must release some of the information at issue. 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 id.* § 552.007. We note TransCore now seeks to withhold some of its information which may have been previously ordered released in the prior ruling under section 552.110 of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address TransCore’s claims under section 552.110 for any previously released information.

TransCore raises 552.110(b) and (c) of the Government Code for portions of the submitted information. 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.” *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).

TransCore argues some of the submitted information is subject to section 552.110 of the Government Code. However, TransCore's information at issue may have been ordered released pursuant to Open Records Letter No. 2016-03981. Since the issuance of the previous ruling, TransCore has not disputed this office's conclusions regarding the release of the information at issue. In this regard, we find TransCore has not taken any measures to protect its information 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 TransCore substantial harm. *See id.* § 552.110. Accordingly, to the extent the information at issue was ordered released pursuant to Open Records Letter No. 2016-03981, we conclude the department may not withhold the information at issue under section 552.110 of the Government Code.

To the extent the information at issue was not ordered released pursuant to the previous ruling, we find TransCore has demonstrated some of its information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the department must withhold TransCore's information we marked, including TransCore's customer information to the extent TransCore's customer information is not publicly available on its website, under section 552.110(c) of the Government Code.¹ However, we find TransCore has failed to provide specific factual evidence demonstrating its remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm, or is a trade secret. Therefore, the department may not withhold any of the remaining information under section 552.110 of the Government Code.

We note some of the materials at issue 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, to the extent the information at issue was not ordered released pursuant to Open Records Letter No. 2016-03981, the department must withhold the information we marked, including TransCore's customer information to the extent the customer information is not publicly available on TransCore's website, under section 552.110(c) of the Government Code. The department 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.

¹ As our ruling is dispositive, we need not address the remaining argument against disclosure of the information at issue.

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
Assistant Attorney General
Open Records Division

DS/mo

Ref: ID# 841188

Enc. Submitted documents

c: Requestor
(w/o enclosures)