



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 8, 2020

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

OR2020-22524

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# 843317.

The Texas Department of Transportation (the "department") received two requests from different requestors for information pertaining to two specified solicitations.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Aecom Technical Services, Inc.; ("Aecom"); Aguirre & Fields, LP; American Structurepoint, Inc. ("Structurepoint"); ARS Engineers, Inc.; Atkins North America, Inc.; Brown & Gay Engineers, Inc. ("BGE"); Burns & McDonnell Engineering Company, Inc. ("B&M"); Civiltech Engineering, Inc.; Cobb, Fendley & Associates, Inc. ("CFA"); Consor Engineers, LLC ("Consor"); Costello, Inc. ("Costello"); Entech Civil Engineers, Inc.; Garver, LLC ("Garver"); Half Associates, Inc. ("Half"); HDR Engineering, Inc. ("HDR"); H. W. Lochner, Inc. ("Lochner"); Huitt-Zollars, Inc. ("HZ"); Idcus, Inc.; Infratech Engineers & Innovators, LLC; I.S. Engineers, LLC; Kennedy Consulting, Inc. ("KCI"); Landtech, Inc; Lina T. Ramey and Associates, Inc. ("LTRA"); LJA Engineering, Inc; ("LJA"); Lockwood,

¹ You state the department sought and received clarification of the request for information. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Andrews & Newnam, Inc. (“LAN”); Midtown Engineers, LLC (“Midtown”); Omega Engineers, Inc.; PGAL, Inc (“PGAL”); R. G. Miller Engineers, Inc. (“RGM”); Rodriguez Transportation Group, Inc. (“RTG”); RPS Infrastructure, Inc.; Stantec Consulting Services, Inc. (“Stantec”); Surveying and Mapping, LLC (“SAM”); and WSP USA Inc. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to submit arguments to this office as to why the information at issue 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 Aecom, Structurepoint, BGE, B&M, CFA, Consor, Costello, Dannebaum, Garver, Halff, Lochner, HZ, KCI, LJA, LTRA, LAN, Midtown, PGAL, RGM, RTG, Stantec, and SAM. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note Dannebaum, Garver, PGAL, Structurepoint, and SAM argue against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the department has submitted to us for our review.² *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information.

Next, you state some of the submitted information was the subject of previous requests for rulings. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, the department must continue to rely on the previous rulings as previous determinations and withhold or release the information at issue in accordance with those rulings.³ *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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 any remaining third party 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, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception).

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

³ As we our able to make this determination, we need not address the arguments against disclosure of this information.

Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest any remaining third party may have in the information.

B&M argues its information may not be released because it provided the information to the department with the expectation the information would remain confidential. However, information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to 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 Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

BGE, B&M, CFA, Garver, Lochner, LJA, LAN, RGM, and RTG raise section 552.104 of the Government Code for a portion of their 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.” 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 these arguments under section 552.104.

B&M and HZ raise section 552.101 of the Government Code for 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, B&M and HZ have not pointed to any confidentiality provision, nor are we aware of any, that would make any of the submitted information 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 B&M and HZ may not withhold any of the submitted information under section 552.101 of the Government Code. *See id.* §§ 552.301, .302.

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

(a) Except as provided by Section 552.0222, information submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a 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). Aecom, Halff, HZ, Lochner, LJA, and Stantec assert disclosure of some of the submitted information would reveal an individual approach to their work, organizational structure, staffing, internal operations, internal processes and discounts, and pricing and pricing methodology and give advantage to a competitor. Upon review, we find Aecom, Halff, HZ, Lochner, LJA, and Stantec have demonstrated the applicability of

section 552.1101(a) to some of the information at issue.⁴ Accordingly, the department must withhold the information we have marked under section 552.1101 of the Government Code. However, we find Halff, HZ, Lochner, LJA, and Stantec have failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a), and the department may not withhold it on that basis.

Garver, HZ, Lochner, LJA, LAN, RGM, and Stantec argue some of their information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Garver and LAN have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the department must withhold the information we have marked under section 552.110(c) of the Government Code.⁵ However, we find Garver, HZ, Lochner, LJA, LAN, RGM, and Stantec 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 department may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

Garver, HZ, Lochner, LJA, LAN, RGM, and Stantec argue some of their information consists of trade secrets subject to section 552.110(b). Upon review, however, we find Garver, HZ, Lochner, LJA, LAN, RGM, and Stantec have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

RGM asserts that portions of its remaining information are protected under the common-law as trade secrets. Section 552.101 of the Government Code also encompasses the common-law. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other

⁴ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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

operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Huffines*, 314 S.W.2d at 776. In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁶ RESTATEMENT OF TORTS § 757 cmt. b. Having considered its arguments, we find RGM has failed to demonstrate any of the information it seeks to withhold meets the definition of a trade secret, nor has RGM demonstrated the necessary factors to establish a trade secret claim for this information. Thus, none of the remaining information may be withheld under section 552.101 in conjunction with the common-law as a trade secret.

In summary, the department must continue to rely on the previous rulings as previous determinations and withhold or release the information at issue in accordance with those rulings. The department must withhold the information we have marked under section 552.1101 of the Government Code. The department must withhold the information we have marked under section 552.110(c) of the Government Code. The department must release the remaining 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

⁶ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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,

Kelly McWethy
Assistant Attorney General
Open Records Division

KM/rm

Ref: ID# 843317

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

21 Third Parties
(w/o enclosures)