



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 11, 2020

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2438

OR2020-23038

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# 840691.

The Texas Department of Transportation (the "department") received a request for certain information pertaining to nineteen specified solicitations. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. In addition, you state release of the submitted information may implicate the proprietary interests of unspecified third parties. Accordingly, you state, and provide documentation showing, you notified the interested 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 have received comments from numerous interested third parties.¹ We

¹ We have received comments from the following notified third parties: AECOM Technical Services, Inc. ("AECOM"); Atkins North America, Inc. ("Atkins"); BGE, Inc. ("BGE"); Bridgefarmer & Associates, Inc. ("Bridgefarmer"); Cobb, Fendley & Associates, Inc. ("Cobb"); CONSOR Engineers, LLC, f/k/a AIA Engineers ("CONSOR"); CP&Y, Inc. ("CP&Y"); Dannenbaum Engineering Corp. ("Dannenbaum"); Garver, LLC ("Garver"); Halff Associates, Inc. ("Halff"); HDR Engineering, Inc. ("HDR"); Huitt-Zollars, Inc. ("Huitt-Zollars"); H.W. Lochner, Inc. ("H.W. Lochner"); infraTECH Engineers & Innovators, LLC ("infraTECH"); Jacobs Engineering Group, Inc. ("Jacobs"); KCI Technologies, Inc. ("KCI"); Lina T. Ramey and Associates, Inc. ("LTRA"); LJA Engineering, Inc. ("LJA"); Lockwood, Andrews, and Newman, Inc. ("Lockwood"); Maldonado Burkett ("Maldonado"); Michael Baker International ("Baker"); Omega Engineers, Inc. ("Omega"); PGAL; R.G. Miller Engineers, Inc. ("R.G. Miller"); Ramos Consulting, LLC

have considered the submitted arguments and reviewed the submitted information, some of which consists of a representative sample of information.²

Initially, we note you have not submitted the requested information pertaining to solicitation 601CT0000003768. To the extent any information responsive to this portion of the request existed on the date the department received the request, we assume the department has released it. If the department has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note Atkins, Cobb, CONSOR, Dannenbaum, H.W. Lochner, Jacobs, LJA, LTRA, Omega, Ramos, S&B, Stantec, Structural, and VRX 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. *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.³

Huitt-Zollars argues some of its information is not responsive to the request for information. However, the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the department has submitted the information at issue for our review, we find the department has made a good-faith effort to submit information that is responsive to the request, and we will consider whether the information is excepted from disclosure under the Act.

Additionally, we note some of the information at issue, which we indicated, is not responsive to the instant request for information because it does not pertain to any of the requested solicitations. This ruling does not address the public availability of any

("Ramos"); S&B Infrastructure, Ltd. ("S&B"); Stantec Consulting Services, Inc. ("Stantec"); Structural Engineering Associates, Inc. ("Structural"); Vertex Engineering, Inc. ("VRX"), and WSP USA, Inc. ("WSP"). In addition, although Huitt-Zollars raises sections 552.101, 552.113, 552.131, and 552.143 of the Government Code, Huitt-Zollars makes no arguments to support these exceptions. Therefore, we assume Huitt-Zollars has withdrawn its claim that these sections apply to the submitted information. *See* Gov't Code §§ 552.301, .302.

² We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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

information that is not responsive to the request and the department is not required to release such information in response to this request.⁴

We note some of the responsive information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2020-22303 (2020), 2020-12905 (2020), 2020-12724 (2020), and 2020-10996 (2020). We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, we conclude the department may rely on Open Records Letter Nos. 2020-22303, 2020-12905, 2020-12724, and 2020-10996 as previous determinations and withhold or release the identical information in accordance with those rulings. *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). To the extent the responsive information is not encompassed by the previous rulings, we will address the submitted arguments against its disclosure.

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* 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 notified interested third parties explaining why the responsive information should not be released. Therefore, we have no basis to conclude any of the remaining notified interested third parties have protected proprietary interests in the responsive information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the department may not withhold the responsive information on the basis of any proprietary interest any of the remaining notified interested third parties may have in the information.

Atkins, AECOM, BGE, CONSOR, Garver, infraTECH, Jacobs, KCI, LJA, Lockwood, LTRA, Maldonado, Omega, R.G. Miller, Ramos, S&B, and WSP raise section 552.104 of the Government Code for some of the information at issue. 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 specific and demonstrable intent to enter into the competitive situation again in the future." *See 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 841. 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).

⁴ As we are able to make this determination, we need not address the submitted arguments against disclosure of this information.

Therefore, we do not address the arguments of Atkins, AECOM, BGE, CONSOR, Garver, infraTECH, Jacobs, KCI, LJA, Lockwood, LTRA, Maldonado, Omega, R.G. Miller, Ramos, S&B, and WSP under section 552.104.

The department also raises section 552.104(a) 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 arguments, we find the department has established the release of the information at issue would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation. Thus, we conclude the department may withhold the responsive information it indicated under section 552.104(a).⁵

Section 552.110(b) of the Government Code 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.” 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:

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). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Section 552.1101 of the Government Code provides, in relevant part, as follows:

- (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:

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

(1) reveal an individual approach to:

(A) work;

(B) organization 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, Atkins, Dannenbaum, Garver, HDR, Huitt-Zollars, H.W. Lochner, Jacobs, LJA, Lockwood, PGAL, Ramos, R.G. Miller, Stantec, Structural, VRX, and WSP argue some of their information consists of commercial or financial information subject to section 552.110(c). Upon review, we find AECOM, Garver, HDR, Huitt-Zollars, Jacobs, R.G. Miller, and VRX 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 marked and indicated under section 552.110(c) of the Government Code; however, to the extent the customer information of AECOM, Garver, HDR, Huitt-Zollars, Jacobs, R.G. Miller, and VRX is publicly available on their respective websites, it may not be withheld under section 552.110(c).⁶ 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). Additionally, we find Atkins, Dannenbaum, Garver, HDR, Huitt-Zollars, H.W. Lochner, Jacobs, LJA, Lockwood, PGAL, Ramos, R.G. Miller, Stantec, Structural, VRX, and WSP 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.

AECOM, Atkins, Baker, Dannenbaum, Garver, HDR, Huitt-Zollars, H.W. Lochner, Lockwood, LJA, LTRA, PGAL, Ramos, R.G. Miller, Stantec, Structural, and VRX argues some of the information at issue consists of trade secrets subject to section 552.110(b). Upon review, however, we find some of the information at issue is subject to section 552.0222(b), and may not be withheld on the basis of section 552.110(b). Additionally, we

⁶ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

find AECOM, Atkins, Baker, Dannenbaum, Garver, HDR, Huitt-Zollars, H.W. Lochner, Lockwood, LJA, LTRA, PGAL, Ramos, R.G. Miller, Stantec, Structural, and VRX 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 department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

AECOM, Atkins, Baker, Cobb, CP&Y, Dannenbaum, Halff, HDR, Huitt-Zollars, H.W. Lochner, LJA, Maldonado, Stantec, and VRX assert disclosure of some of the remaining information at issue would reveal an individual approach to work, organizational structure, staffing, internal operations, and processes and give advantage to a competitor. Upon review, we find Cobb, Halff, and Huitt-Zollars have demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the department must withhold the information we marked and indicated under section 552.1101 of the Government Code; however, to the extent the customer information of Cobb, Halff, and Huitt-Zollars is publicly available on their respective websites, it may not be withheld under section 552.1101 of the Government Code. However, we find some of the remaining information consists of information subject to section 552.0222(b), and may not be withheld on the basis of section 552.1101(a). *See id.* § 552.0222(b). Additionally, we find AECOM, Atkins, Baker, Cobb, CP&Y, Dannenbaum, Halff, HDR, Huitt-Zollars, H.W. Lochner, LJA, Maldonado, Stantec, and VRX have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is subject to section 552.1101(a). Therefore, the department may not withhold any of the remaining information at issue under section 552.1101(a) of the Government Code.

Garver and Ramos also argue their information fits the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the Texas Uniform Trade Secrets Act (the “TUTSA”). Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *See id.* § 552.101. This section encompasses information made confidential by other statutes. Section 134A.002(6) provides:

“Trade secret” means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or supplies, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

- (A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (B) 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.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134.002(6)'s definition of trade secret expressly applies to chapter 134A only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134.002(6); *see also id.* § 134.007(d) (TUTSA does not affect disclosure of public information by governmental bodies under the Act). *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1978), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the department may not withhold any of Garver's or Ramos' information under section 552.101 of the Government Code in conjunction with section 134.002(6) of the Civil Practice and Remedies Code.

VRX seeks to withhold certain information under section 552.102(a) of the Government Code. Although VRX raises section 552.102(a), this section only applies to information in the personnel files of governmental employees, as opposed to private employees. Gov't Code § 552.102(a). As such, section 552.102(a) is not applicable in this instance. Consequently, the department may not withhold any portion of the remaining information under section 552.102(a) of the Government Code.

In summary, to the extent the responsive information is identical to the information previously requested and ruled upon by this office, we conclude the department may rely on Open Records Letter Nos. 2020-22303, 2020-12905, 2020-12724, and 2020-10996 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold the information it indicated under section 552.104(a) of the Government Code. The department must withhold the information we marked and indicated under section 552.110(c) of the Government Code; however, to the extent the customer information of AECOM, Garver, HDR, Huitt-Zollars, Jacobs, R.G. Miller, and VRX is publicly available on their respective websites, it may not be withheld under section 552.110(c) of the Government Code. The department must withhold the information we marked and indicated under section 552.1101 of the Government Code; however, to the extent the customer information of Cobb, Halff, and Huitt-Zollars is publicly available on their respective websites, it may not be withheld under section 552.1101 of the Government Code. The department must release the remaining responsive 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/mo

Ref: ID# 840691

Enc. Submitted documents

c: Requestor
(w/o enclosures)

28 Third Parties
(w/o enclosures)