



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

September 18, 2020

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

OR2020-23691

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# 844518.

The Texas Department of Transportation (the "department") received a request for a specified number of awarded submittals regarding three specified requests for qualifications. The department claims some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, the department indicates release of the information at issue may implicate the proprietary interests of the following third parties: Atkins North America, Inc. ("Atkins"); Cobb, Fendley & Associates, Inc. ("CobbFendley"); ECM International, Inc.; Halff Associates, Inc. ("Halff"); HDR Engineering, Inc. ("HDR"); LJA Engineering, Inc.; PAVETEX Engineering, LLC ("PAVETEX"); Sam-Construction Services, LLC ("SAM-CS"); and Vertex Engineering, Inc. ("VRX"). Accordingly, the department indicates it notified these interested third parties of the request for information and of their right to submit arguments to this office. *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 Atkins, CobbFendley, Halff, HDR, PAVETEX, SAM-CS, and VRX. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.<sup>1</sup>

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<sup>1</sup> 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.

Initially, we note VRX argues against release of information the department did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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 letter, we have only received comments from Atkins, CobbFendley, Halff, HDR, PAVETEX, SAM-CS, and VRX 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 department may not withhold the information at issue on the basis of any proprietary interest the remaining third parties may have in the information.

PAVETEX raises section 552.104 of the Government Code for 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 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). Therefore, we do not address the arguments of PAVETEX 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 particular ongoing competitive situations. Thus, we conclude the department may withhold the information it indicated under section 552.104(a) of the Government Code.<sup>2</sup>

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

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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). 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:

(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). Additionally, we note section 552.0222(b) lists certain types of information to which sections 552.110 and 552.1101 do not apply. *See id.* § 552.0222(b). HDR, PAVETEX, SAM-CS, and VRX argue some of their information consists of commercial or financial information subject to section 552.110(c). Upon review, we find HDR, SAM-CS, and VRX have demonstrated portions of their 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 under section 552.110(c) of the Government Code; however, to the extent the customer information of HDR, SAM-CS, and VRX is publicly available on their respective websites, it may not be withheld under section 552.110(c) of the Government Code.<sup>3</sup> Nevertheless, 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 HDR, PAVETEX, SAM-CS, and VRX 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).

HDR, PAVETEX, SAM-CS, and VRX argue 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 find HDR, PAVETEX, SAM-CS, 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).

Halff, HDR, SAM-CS, and VRX assert disclosure of some of the 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 Halff has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the department must withhold the information we marked under section 552.1101 of the Government Code; however, to the extent the customer information of Halff is publicly available on its website, it may not be withheld under section 552.1101 of the Government Code. Nevertheless, 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 Halff, HDR, SAM-CS, 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).

PAVETEX generally asserts its information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other

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<sup>3</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

statutes. However, PAVETEX has not directed our attention to, and we are not aware of, any law under which any of the remaining information is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, we conclude no portion of the remaining information may be withheld under section 552.101 of the Government Code.

In summary, 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 under section 552.110(c) of the Government Code; however, to the extent the customer information of HDR, SAM-CS, 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 under section 552.1101 of the Government Code; however, to the extent the customer information of Halff is publicly available on its website, it may not be withheld under section 552.1101 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 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,

James M. Graham  
Assistant Attorney General  
Open Records Division

JMG/rm

Ref: ID# 844518

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

cc: 9 Third Parties  
(w/o enclosures)