



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 14, 2020

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

OR2020-25862

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# 848679.

The Texas Department of Transportation (the "department") received a request for certain information pertaining to four specified bid solicitations. You state the department will release some information to the requestor. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the information at issue may implicate the proprietary interests of certain unspecified third parties. Accordingly, you state the department notified these interested third parties of the request for information and of their 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 1519 Surveying, LLC ("1519"); Baseline Corp., d/b/a Baseline Surveyors ("Baseline"); BGE, Inc. ("BGE"); Cobb, Fendley & Associates, Inc. ("CobbFendley"); CP&Y, Inc. ("CP&Y"); Halff Associates, Inc. ("Halff"); Jacobs Engineering Group, Inc. ("Jacobs"); Lina T. Ramey & Associates, Inc. ("LTRA"); McKim & Creed, Inc. ("M&C"); Surveying and Mapping, LLC ("SAM"); and WGI, Inc. ("WGI"). We have considered the submitted arguments and reviewed the submitted information, some of which consists of a representative sample.¹

¹ 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note 1519, LTRA, M&C, SAM, and WGI argue against the release of information the department has not submitted to this office for our review. 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.² *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 some of the submitted information may have been the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2020-12905 (2020). We have no indication the law, facts, and circumstances on which Open Records Letter No. 2020-12905 was based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the department must continue to rely on Open Records Letter No. 2020-12905 as a previous determination and withhold or release the identical information in accordance with that ruling.³ *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 submitted information is not encompassed by the previous ruling, we will consider whether the submitted information is excepted from disclosure.

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) 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 only received comments from 1519, Baseline, BGE, CobbFendley, CP&Y, Halff, Jacobs, LTRA, M&C, SAM, and WGI. Thus, we have no basis to conclude any of the remaining interested 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 any portion of the information at issue on the basis of any proprietary interest the remaining third parties may have in it.

Section 552.104(a) of the Government Code excepts from disclosure information that a governmental body demonstrates, if released, 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). 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 Co. v. Paxton*, 466

² As we are able to make this determination, we need not address the third parties' arguments against disclosure of this information.

³ In that instance, as we are able to make this determination, we need not address the arguments against disclosure of this information.

S.W.3d 831, 841 (Tex. 2015). After review of the information at issue and consideration of the arguments, we find you have 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. Accordingly, the department may withhold the information you indicated under section 552.104(a) of the Government Code.⁴

1519, Baseline, BGE, Jacobs, LTRA, and M&C raise section 552.104 of the Government Code for some of the remaining information at issue. As noted above, 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*, 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 the arguments of 1519, Baseline, BGE, Jacobs, LTRA, and M&C under section 552.104 of the Government Code.

1519, Baseline, Jacobs, LTRA, M&C, SAM, and WGI raise section 552.110 of the Government Code for some of the remaining information at issue.⁵ 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.” 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 states:

Except as provided by Section 552.0222, commercial or financial information for which it is demonstrated based on specific factual evidence

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

⁵ Although LTRA does not cite to section 552.110 of the Government Code, we understand LTRA to raise this exception based on the substance of its arguments. Additionally, although Baseline cites former subsections 552.110(a) and 552.110(b) of the Government Code, we understand Baseline to raise current subsections 552.110(b) and 552.110(c) of the Government Code based on the substance of its arguments.

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). Upon review, we find 1519, Baseline, Jacobs, SAM, and WGI 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.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 of the Government Code. Additionally, we find 1519, Baseline, Jacobs, LTRA, M&C, SAM, and WGI have failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Further, we find 1519, Baseline, Jacobs, LTRA, M&C, SAM, and WGI 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 portion of the remaining information at issue under section 552.110 of the Government Code.

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

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

(2) give advantage to a competitor.

Id. § 552.1101(a). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.1101(a) does not apply. *See id.* § 552.0222(b). Baseline, CobbFendley, CP&Y, Halff, SAM, and WGI assert some of the remaining information at issue is subject to section 552.1101(a). Upon review, we find CobbFendley and Halff 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 under section 552.1101(a) of the Government Code. 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 552.1101(a). *See id.* § 552.0222(b). Additionally, we find Baseline, CP&Y, Halff, SAM, and WGI 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 portion of the remaining information at issue under section 552.1101(a) of the Government Code.

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the department must continue to rely on Open Records Letter No. 2020-12905 as a previous determination and withhold or release the identical information in accordance with that ruling. The department: (1) may withhold the information you indicated under section 552.104(a) of the Government Code; (2) must withhold the information we marked under section 552.110(c) of the Government Code; (3) must withhold the information we marked under section 552.110(a) of the Government Code; and (4) 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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/jm

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Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 11 Third Partys
(w/o enclosures)