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ATTORNEY GENERAL OF TEXAS

October 15, 2020

Mr. David F. Brown
Counsel for the Port of Houston Authority
Ewell, Brown, Blanke & Knight, LLP
111 Congress Avenue, 28th Floor
Austin, Texas 78701

OR2020-26027

Dear Mr. Brown:

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# 848197.

The Port of Houston Authority (the "authority"), which you represent, received a request for nine categories of information pertaining to a specified project. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.136, and 552.137 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of Angel Brothers Enterprises, Ltd.; Harper Brothers Construction, LLC ("Harper"); McCarthy Building Companies, Inc. ("McCarthy"); Ragnar Benson, LLC; Reytec Construction Resources, Inc.; and Total Contracting Limited. Accordingly, you state, and provide documentation showing, you 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 Harper and McCarthy. We have considered the submitted arguments and reviewed the submitted information.

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

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See id.* § 552.305(d)(2)(B). As of the date of this ruling, we have only received comments from Harper and McCarthy. Thus, we have no basis to conclude any of the remaining interested third parties 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). Accordingly, the authority may not withhold any of the submitted information on the basis of any proprietary interest any of the remaining interested third parties may have in the information.

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. Section 552.101 encompasses section 6103(a) of title 26 of the United States Code, which renders tax information confidential. *See* Attorney General Opinion H-1274 (tax returns); Open Records Decision No. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as encompassing a taxpayer's identity, the nature, source, or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Treasury] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax . . . penalty . . . or offense[.]" *See* 26 U.S.C. § 6103(b)(2)(A). Federal courts have constructed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolack*, 721 F.Supp. 748, 754 (M.D.N.C. 1989), *aff'd in part*, 993 F.2d 1111 (4th Cir. 1993). Upon review, we find the authority has failed to demonstrate the applicability of section 6103(a) of title 26 of the United States Code to any of the submitted information. Therefore, the authority may not withhold any of the submitted information under section 552.101 of the Government Code on that basis.

Section 552.110(c) of the Government Code states:

(c) 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].

Gov't Code § 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). Harper and McCarthy argue some of their information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Harper and McCarthy have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, to the extent any of the customer information Harper seeks to withhold has not been published on the company's website, the authority must withhold the information we have marked under section 552.110(c) of the Government Code.¹ 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 Harper and McCarthy 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. Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(c) of the Government Code.

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.” *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). 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). Harper and McCarthy argue some of their remaining information consists of trade secrets subject to section 552.110(b). Upon review, 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(b). Additionally, we find Harper and McCarthy have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade

¹ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

secret. Therefore, the authority may not withhold any of the remaining information at issue under section 552.110(b) 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

(2) give advantage to a competitor.

(b) The exception to disclosure provided by Subsection (a) does not apply to:

(1) information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body; or

(2) communications and other information sent between a governmental body and a vendor or contractor related to the performance of a final contract with the governmental body or work performed on behalf of the governmental body.

Id. § 552.1101(a), (b). 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). Harper asserts disclosure of some of its remaining information would reveal an individual approach

to its internal operations, organizational structure, pricing, and staffing and give advantage to a competitor. McCarthy asserts disclosure of some of its remaining information would reveal an individual approach to its internal operations, organizational structure, pricing, processes, staffing, and work and give advantage to a competitor. Upon review, we find McCarthy has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, to the extent any of the customer information McCarthy seeks to withhold has not been published on the company's website, the authority must withhold the information we have marked under section 552.1101(a). 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) (listing certain types of information not excepted under section 552.1101). Additionally, we find Harper and McCarthy 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 authority may not withhold any of the remaining information at issue under section 552.1101(a).

Section 552.136(b) of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has concluded insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the authority must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. However, we find you have not demonstrated the remaining information at issue consists of a credit card, debit card, or charge card number, or is an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find you have failed to demonstrate the applicability of section 552.136 of the Government Code to the information you have marked and the authority may not withhold it on this ground.

Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). We note the e-mail addresses in the remaining information are excluded by subsection 552.137(c). *See id.* § 552.137(c) (Subsection (a) does not apply to an e-mail address contained in a response to a request for bids or proposals or contained in a response to similar invitations soliciting offers). Accordingly, the authority may not withhold any of the remaining information under section 552.137 of the Government Code.

In summary, to the extent any of the customer information Harper seeks to withhold has not been published on the company's website, the authority must withhold the information we have marked under section 552.110(c) of the Government Code. To the extent any of the customer information McCarthy seeks to withhold has not been published on the

company's website, the authority must withhold the information we have marked under section 552.1101(a) of the Government Code. The authority must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The authority 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,

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/gw

Ref: ID# 848197

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Parties
(w/o enclosures)