



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 26, 2020

Mr. Fernando C. Gomez
Vice Chancellor and General Counsel
The Texas State University System
601 Colorado Street
Austin, Texas 78701-2904

OR2020-26808

Dear Mr. Gomez:

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# 849850 (Ref. No. JAB_08052020).

The Texas State University System (the "system") received a request for certain information pertaining to a specified request for proposals.¹ You state the system will release some information to the requestor. Although you take no position regarding whether the submitted information is excepted from disclosure, you state release of the information at issue may implicate the proprietary interests of H.B. Neild & Sons, Inc. ("HBN"); O'Donnell/Snider Construction, LLC ("O'Donnell/Snider"); and SETEX Construction Corp. ("SETEX"). Accordingly, you state, and provide documentation demonstrating, the system 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 HBN and SETEX. We have considered the submitted arguments and reviewed the submitted information.

¹ You state, and provide documentation demonstrating, the system sought and received clarification of the information requested. *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).

Initially, 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 O'Donnell/Snider explaining why the information at issue should not be released. Thus, we have no basis to conclude O'Donnell/Snider has 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 system may not withhold any portion of the submitted information on the basis of any proprietary interest O'Donnell/Snider may have in it.

SETEX raises section 552.104 of the Government Code for its 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 a specific and demonstrable intent to enter into the competitive situation again in the future." *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 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 SETEX's arguments under section 552.104 of the Government Code.

HBN raises section 552.110(b) of the Government Code for its information at issue. Additionally, HBN and SETEX raise section 552.110(c) of the Government Code for their information at issue.² 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:

² Although SETEX raises former section 552.110(b) of the Government Code in its brief, we understand SETEX to raise current section 552.110(c) based on the substance of its arguments.

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). Upon review, we find HBN and SETEX have demonstrated portions of the information at issue, including their client information, constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the system must withhold the information we marked and, to the extent it is not publicly available on the company websites of HBN and SETEX, the client information we marked and indicated under section 552.110(c) of the Government Code.³ However, to the extent such information is publicly available on the company websites of HBN and SETEX, we find the system may not withhold such client information under either section 552.110(b) or section 552.110(c). Additionally, 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. Moreover, we find HBN and SETEX 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 HBN has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is a trade secret. Therefore, the system 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) . . . [I]nformation 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;

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

(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). HBN asserts disclosure of some of its information would reveal an individual approach to its work, internal operations, and processes and give advantage to a competitor. Upon review, we find HBN has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the system must withhold the information we marked under section 552.1101(a) of the Government Code.⁴ However, we find HBN has failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a) of the Government Code, and the system may not withhold it on that basis.

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 government body is confidential.” *Id.* § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision 684 (2009). HBN asserts some of its remaining information at issue is made confidential under section 552.136. Upon review, however, we find HBN has failed to demonstrate the remaining information at issue consists of access device numbers for purposes of section 552.136. Therefore, the system may not withhold any portion of the remaining information under section 552.136 of the Government Code.

In summary, the system must withhold the information we marked and, to the extent it is not publicly available on the company websites of HBN and SETEX, the client information we marked and indicated under section 552.110(c) of the Government Code. The system must withhold the information we marked under section 552.1101(a) of the Government Code. The system 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.

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

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/be

Ref: ID# 849850

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 3 Third Parties
(w/o enclosures)