



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 16, 2020

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

OR2020-28660

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# 854369.

The Texas Department of Transportation (the "department") received a request for all submitted responses pertaining to a specified solicitation. Although you take no position as to whether the submitted information is excepted from disclosure under the Act, 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 eight interested third parties.<sup>1</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information was the subject of a previous request for a ruling, as a result of which this office issued Open Records Letter No. 2020-23038 (2020). Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may

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<sup>1</sup> We have received comments from the following third parties: CH2M HILL, Inc. ("CH2M"); CONSOR Engineers, L.L.C. f/k/a AIA Engineers, L.L.C. ("CONSOR"); Entech Civil Engineers, Inc. ("Entech"); Halfff Associates, Inc. ("Halfff"); Jacobs Engineering Group, Inc. ("Jacobs"); LJA Engineering, Inc. ("LJA"); Omega Engineers, Inc. ("Omega"); and Stantec Consulting Services, Inc. ("Stantec").

not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007. LJA and Omega raise section 552.104 of the Government Code for their information; however, we note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, with respect to the information released pursuant to Open Records Letter No. 2020-23038, the department may not now withhold the previously released information under section 552.104. We also note Omega now seeks to withhold information that was previously ordered released by the prior ruling under sections 552.110 and 552.1101 of the Government Code. Because information subject to sections 552.110 and 552.1101 is deemed confidential by law, we will address the arguments under these exceptions for any previously released information. Nevertheless, as we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based, the department must continue to rely on Open Records Letter No. 2020-23038 as a previous determination with the respect to the remaining information and withhold or release the identical information in accordance with that ruling.<sup>2</sup> *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).

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* 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 remaining information should not be released. Therefore, we have no basis to conclude any of the remaining notified interested third parties has a protected proprietary interest in the remaining 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 remaining information on the basis of any proprietary interest any of the remaining notified interested third parties may have in the information.

CH2M, Entech, and Jacobs 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 a 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

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<sup>2</sup> As we are able to make this determination, we need not address the arguments against disclosure of this information.

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 CH2M's, Entech's, and Jacobs' arguments under section 552.104.

Section 552.110(b) of the Government Code states, "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 excepts from disclosure "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[.] *Id.* § 552.110(c). Section 552.1101 of the Government Code provides, in relevant part, as follows:

(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) 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). Omega argues some of its information consists of commercial or financial information subject to section 552.110(c). However, the information at issue was previously ordered released in Open Records Letter No. 2020-23038. We note Omega has not disputed this office's conclusion regarding the release of the information at issue since the issuance of the previous ruling. In this regard, we find Omega has not provided any measures to protect its information in order for this office to conclude the information now qualifies as commercial or financial information, the release of which would cause Omega substantial competitive harm. *See id.* § 552.110(c). Therefore, the department may not withhold any of Omega's information under section 552.110(c) of the Government Code. In addition, CH2M, Jacobs, and Stantec argue some of their information consists of commercial or financial information subject to section 552.110(c). Upon review, we find CH2M and Jacobs 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 under section 552.110(c) of the Government Code; however, to the extent the customer information of CH2M and Jacobs is publicly available on their respective websites, it may not be withheld under section 552.110(c). However, we find Stantec has 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.

Omega argues some of its information at issue consists of trade secrets subject to section 552.110(b). However, the information at issue was previously ordered released in Open Records Letter No. 2020-23038. We note Omega has not disputed this office's conclusion regarding the release of the information at issue since the issuance of the previous ruling. In this regard, we find Omega has not provided any measures to protect its information in order for this office to conclude the information now qualifies as a trade secret. *See id.* § 552.110(b). Therefore, the department may not withhold any of Omega's information under section 552.110(b) of the Government Code. In addition, Stantec argues some of the information at issue consists of trade secrets subject to section 552.110(b). However, we find Stantec 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 department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Omega asserts disclosure of some of its information would reveal an individual approach to internal operations and processes and give advantage to a competitor. As noted above, the information pertaining to Omega was the subject to Open Records Letter No. 2020-23038. Since the issuance of the previous ruling, Omega has not disputed this office's conclusion regarding the release of the information at issue. In this regard, we find Omega has not taken any measures to protect the information at issue in order for this office to conclude the information now qualifies as proprietary information for purposes of section 552.1101. Therefore, the department may not withhold any of Omega's information under section 552.1101 of the Government Code. In addition, Halff and Stantec 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 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. However, we find Halff and Stantec 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.

In summary, the department must continue to rely on Open Records Letter No. 2020-23038 and withhold or release the identical information in accordance with that ruling. 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 CH2M and Jacobs is publicly available on their respective websites, it may not be withheld under section 552.110(c). 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,

Kimbell Kesling  
Assistant Attorney General  
Open Records Division

KK/be

Ref: ID# 854369

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

8 Third Parties  
(w/o enclosures)