



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 18, 2020

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

OR2020-28882A

Dear Ms. Parker:

This office issued Open Records Letter No. 2020-28882 (2020) on November 18, 2020. We have examined this ruling and determined we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of the Attorney General may issue a decision to maintain uniformity in application, operation, and interpretation of the Public Information Act (the "Act")). Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2020-28882. Your request was assigned ID# 854367.

The Texas Department of Transportation (the "department") received two requests from the same requestor for submitted proposals pertaining to eleven specified solicitations. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of some of the information at issue may implicate the proprietary interests of HNTB Corporation ("HNTB"); LJA Engineering, Inc. ("LJA"); and Vertex Engineering, Inc. ("VRX"). 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 id.* § 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 HNTB, LJA, and VRX. 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, you state some of the requested information was the subject of previous requests for rulings. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the department must continue to rely on the previous rulings as previous determinations and withhold or release the information at issue in accordance with those rulings. *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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

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.” Gov’t Code § 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 S.W.3d 831, 841 (Tex. 2015). 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. Accordingly, the department may withhold the information you indicated under section 552.104(a) of the Government Code.²

HNTB and LJA also 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 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 the arguments of HNTB or LJA under section 552.104 of the Government Code.

LJA and VRX assert section 552.110(b) of the Government Code for some of the remaining information at issue. Section 552.110(b) states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a

² As our ruling is dispositive, we need not address the arguments of LJA or VRX against disclosure of this information.

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). Further, HNTB, LJA, and VRX assert section 552.110(c) of the Government Code for some of the remaining information at issue. Section 552.110(c) exempts 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). Upon review, we find HNTB, LJA, and VRX 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.³ However, we find HNTB, LJA, and VRX have failed to provide specific factual evidence demonstrating any portion of the remaining information at issue constitutes commercial or financial information, the release of which would result in substantial competitive harm. Further, we find LJA and VRX have failed to provide specific factual evidence demonstrating any portion 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.

HNTB, LJA, and VRX assert section 552.1101 of the Government Code for some of the remaining information at issue. Section 552.1101 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;

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

(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 section 552.1101(a) does not apply. *See id.* § 552.0222(b). Upon review, we find some of the remaining information at issue is subject to section 552.0222(b) of the Government Code and may not be withheld on the basis of section 552.1101(a). *See id.* § 552.0222(b). Additionally, we find HNTB, LJA, 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 portion of the remaining information under section 552.1101(a) of the Government Code.

In summary, the department must continue to rely on the previous rulings as previous determinations and withhold or release the information at issue in accordance with those rulings. The department may withhold the information you 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. 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,

Blake Brennan
Assistant Attorney General
Open Records Division

BBX/eb

Ref: ID# 854367

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 3 Third Parties
(w/o enclosures)