



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 17, 2021

Ms. Angela Hough
Assistant General Counsel
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2020-30133A

Dear Ms. Hough:

This office issued Open Records Letter No. 2020-30133 (2020) on December 3, 2020. Since that time, we have received new information that affects the fact on which that ruling was based. *See* Gov't Code §§ 552.306, .352. Thus, we hereby withdraw the prior ruling. Consequently, this decision serves as the correct ruling and is a substitute for Open Records Letter No. 2020-30133. *See generally id.* § 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")). Your request was assigned ID# 872317 (Ref. No. 2020-02039).

The North Texas Tollway Authority (the "authority") received a request for all proposals submitted in response to request for information number 19030-NTT-00-GS-TM. 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 the following third parties: IBI Group; Kapsch TrafficCom USA, Inc. ("Kapsch"); Kimley-Horn and Associates, Inc. ("Kimley-Horn"); Milestone Systems, Inc. ("Milestone"); Parsons Transportation Group, Inc. ("Parsons"); Q-Free America, Inc.; Siemens Mobility, Inc.; Southwest Research Institute; TransCore ITS, LLC ("TransCore"); Verizon Wireless; and Waycare Technologies, Inc. Accordingly, you state, and provide documentation demonstrating, the authority 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 Kapsch, Kimley-Horn, Milestone, Parsons, and TransCore. We have considered the submitted arguments and reviewed the submitted information.

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 any of the remaining third parties explaining why the information at issue should not be released. Thus, we have no basis to conclude any of the remaining 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 authority may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in it.

Kimley-Horn raises section 552.104 of the Government Code for a portion of its information. 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 Kimley-Horn's arguments under section 552.104 of the Government Code.

Kimley-Horn also asserts section 552.105 of the Government Code for some of the information at issue.¹ Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Id. § 552.105. We note section 552.105 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 564 at 2 (1990) (statutory predecessor to section 552.105 designed to protect governmental body's planning and negotiating position with respect to particular transactions), 357 at 3 (1982), 310 at 2 (1982) (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public purpose); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary

¹ Although Kimley-Horn does not cite section 552.105 of the Government Code in its brief, we understand it to raise this exception based on the substance of its arguments.

exceptions in general). As the authority does not raise section 552.105, we find this section does not apply to the information at issue. *See* ORD 564 (governmental body may waive statutory predecessor to section 552.105). Therefore, the authority may not withhold any portion of the submitted information on this basis.

Kapsch, Parsons, and TransCore raise section 552.110 of the Government Code for some of the information at issue.² 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 trade secret.” *See* Gov’t Code § 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). Upon review, we find Kapsch has demonstrated portions of its information at issue, including client information, constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the authority must withhold the information we indicated and, to the extent it is not publicly available on Kapsch’s company website, the client information pertaining to Kapsch we indicated under section 552.110(c) of the Government Code.³ Additionally, upon review, we find Parsons has demonstrated its client information, which we marked, constitutes trade secrets. Accordingly, to the extent it is not publicly available on the company website belonging to Parsons, the authority must withhold the client information we marked under section 552.110(b) of the Government Code. However, to the extent the client information we marked and indicated is publicly available on the company websites belonging to Kapsch and Parsons, we find the authority may not withhold such information under either section 552.110(b) or section 552.110(c). Further, we find TransCore has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret or constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the authority may not withhold any portion of the remaining information at issue under section 552.110 of the Government Code.

² Although Parsons raises former subsection 552.110(a) of the Government Code in its brief, we understand Parsons to raise current subsection 552.110(b) based on the substance of its arguments. Additionally, we understand TransCore to raise section 552.110 based on the substance of its arguments.

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

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;

(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). Kimley-Horn, Milestone, Parsons, and TransCore assert section 552.1101(a) for some of their information at issue. However, we find the third parties have 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 authority may not withhold any portion of it on that basis.

Section 552.130 of the Government Code excepts from public disclosure information relating to a motor vehicle operator's or driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country.⁴ *See id.* § 552.130. Accordingly, the authority must withhold all visible license plates within the remaining information under section 552.130 of the Government Code.

We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception

⁴ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the authority must withhold the information we indicated and, to the extent it is not publicly available on Kapsch's company website, the client information pertaining to Kapsch we indicated under section 552.110(c) of the Government Code. To the extent it is not publicly available on the company website belonging to Parsons, the authority must withhold the client information pertaining to Parsons we marked under section 552.110(b) of the Government Code. The authority must withhold all visible license plates within the remaining information under section 552.130 of the Government Code. The authority must release the remaining information; however, any information subject to copyright may only be released in accordance with copyright law.

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/gw

Ref: ID# 872317

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 11 Third Parties
(w/o enclosures)