



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2020

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

OR2020-31713

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# 855799.

The Texas Department of Transportation (the "department") received a request for certain information pertaining to four specified statements of qualifications.¹ 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 certain third parties. 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* 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 AECOM Technical Services, Inc. ("AECOM"); Browne Engineering Partners ("BEP"); BGE, Inc. ("BGE"); Burns & McDonnell ("B&M"); CONSOR Engineers, LLC ("Conсор"); Freese and Nichols, Inc. ("F&N"); HNTB Corporation ("HNTB"); Jacobs Engineering Group, Inc. ("Jacobs"); Johnson, Mirman & Thompson, Inc. ("JMT"); LJA Engineering, Inc. ("LJA"); PAVETEX Engineering, LLC d/b/a PAVETEX ("Pavetex"); and Vertex Engineering, Inc.

¹ You state, and provide documentation demonstrating, the department 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).

(“VRX”).² We have also received comments submitted by the requestor. *See* Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

We note some of the submitted information, which we marked, was the subject of a previous request for a ruling, in response to which this office issued Open Records Letter No. 2020-28882A (2020). In that ruling, we determined, in relevant part, the department must withhold certain information under section 552.110(c) of the Government Code and must release the remaining information at issue. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, the department must continue to rely on Open Records Letter No. 2020-28882A as a previous determination and withhold or release the information we marked in accordance with that ruling.³ *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) 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 department may not withhold any portion of the remaining information on the basis of any proprietary interest the remaining third parties may have in it.

Next, we note BEP, BGE, Consor, Jacobs, JMT, LJA, and VRX argue against the release of information the department has not submitted to this office for our review. This ruling does not address information that was not submitted by the department. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Therefore, this ruling is limited to the information the department has submitted for our review.⁴ *See id.*

² Although F&N also raises section 552.021 of the Government Code, we note this section is not an exception to disclosure. *See* Gov’t Code § 552.021 (providing for the availability of public information).

³ As we are able to make this determination, we need not address the arguments of HNTB, LJA, or VRX against disclosure of this information.

⁴ As we are able to make this determination, we need not address the arguments against disclosure of this information.

AECOM, BEP, BGE, B&M, Consor, F&N, Jacobs, JMT, LJA, and Pavetex 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.” *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 the arguments of the third parties under section 552.104 of the Government Code.

Next, we note B&M and Pavetex generally assert some of the remaining information at issue is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. However, neither B&M nor Pavetex has directed our attention to, and we are not aware of, any law under which any of the information at issue is considered to be confidential for the purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, we conclude the department may not withhold any portion of the information at issue under section 552.101 of the Government Code based on the arguments of B&M and Pavetex.

AECOM, Consor, F&N, Jacobs, LJA, Pavetex, and VRX assert section 552.110(b) of the Government Code for some of the remaining information at issue.⁵ 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 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.

⁵ Although Consor does not cite to section 552.110(b) of the Government Code in its briefing, we understand Consor to raise this exception based on the substance of its arguments.

Id. § 552.110(a). Further, AECOM, F&N, Jacobs, LJA, Pavetex, and VRX assert section 552.110(c) of the Government Code for some of the remaining information at issue. Section 552.110(c) 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). 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 AECOM, Jacobs, 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 and indicated under section 552.110(c) of the Government Code.⁶ 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 AECOM, F&N, Jacobs, LJA, Pavetex, and VRX 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 AECOM, Consor, F&N, Jacobs, LJA, Pavetex, and VRX have 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 portion of the remaining information at issue under section 552.110 of the Government Code.

AECOM, F&N, LJA, Jacobs, 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;
- (C) staffing;
- (D) internal operations;
- (E) processes; or

⁶ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(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 AECOM, F&N, LJA, Jacobs, 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.

F&N states its information at issue is 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 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 department must continue to rely on Open Records Letter No. 2020-28882A as a previous determination and withhold or release the information we marked in accordance with that ruling. The department must withhold the information we marked and indicated under section 552.110(c) of the Government Code. The department 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/be

Ref: ID# 855799

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 12 Third Parties
(w/o enclosures)