



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 15, 2022

Ms. Danielle A. Boazeman-Schick
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78207

OR2022-07678

Dear Ms. Boazeman-Schick:

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# 935989 (COSA File No.: W418866-121021).

The City of San Antonio (the "city") received a request for the bid tabulations for ten specified requests for proposals. You inform us the city will release some of the requested information in accordance with our previous ruling in Open Records Letter No. 2021-29326 (2021). *See* Open Records Decision No. 673 (2001). You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of multiple third parties. Accordingly, you state you notified these 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.¹ *See* Gov't Code § 552.305(d); *see also*

¹ You state you notified the following third parties: Alamo City Constructors, Inc.; Angel Brothers Enterprises, Ltd.; Austin Bridge & Road, LP; Cal-Tex Interiors, Inc.; Clearfield Construction, LLC; D. Plata Construction Company, LLC; D&G Energy Corporation; Davila Construction, Inc.; DBi Services, LLC; DPR McHam, LLC; FD Concrete, LLC; Garren Construction, LLC; Harper Brothers Construction, LLC; J&P Paving Co., Inc.; J3 Company, LLC; Jerdon Enterprise, L.P.; The Levy Company, Inc.; Longhorn Tejas Property Builders, LLC; MARC III General Contractors, LLC; Myers Concrete Construction; Pronto Sandblasting & Coating & Oil-Field Services Co., Inc.; Rucoba & Maya Construction, LLC; S&B General

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 Sundt. 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) 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 only received comments from Sundt explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have a protected proprietary interest in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Accordingly, the city may not withhold the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

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." *Id.* § 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 city has established the release of the information at issue would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation. Thus, we conclude the city may withhold the information it marked under section 552.104(a) of the Government Code.

Sundt also raises section 552.104 of the Government Code. As previously stated, 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*, 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

Contractor; LLC; San Antonio Constructors, Ltd.; Sundt Construction, Inc. ("Sundt"); Texas Sterling Construction Co.; and Triun, LLC.

limits the protections of section 552.104 to governmental bodies. Gov't Code § 552.104(a). Therefore, we do not address Sundt's arguments under section 552.104.

Sundt raises section 552.110 of the Government Code for its information at issue. 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:

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 Sundt has demonstrated portions of its information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the city must withhold the information we have marked under section 552.110(c) of the Government Code.² However, we find the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110(b) or section 552.110(c) of the Government Code. Therefore, the city may not withhold any portion of the remaining information at issue under section 552.110.

In summary, the city may withhold the information it marked under section 552.104(a) of the Government Code. The city must withhold the information we have marked under section 552.110(c) of the Government Code. The city 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.

² 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,

Erin Groff
Assistant Attorney General
Open Records Division

EMG/eb

Ref: ID# 935989

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)