



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

April 25, 2022

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

OR2022-11828

Dear Ms. Welter and 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# 943019 (ORR#s R010997-020222 and R011950-030222).

The Texas Department of Transportation (the "department") received two requests from the same requestor for all proposals submitted in response to a specified request for proposals. Although you take no position as to whether the submitted information is excepted under the Act, 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 Arredondo, Zepeda & Brunz, LLC ("AZB"); Binkley & Barfield, Inc. ("BBI"); Cobb, Fendley & Associates, Inc. ("CobbFendley"); CONSOR Engineers, LLC ("Conсор"); ECM International, Inc. ("ECM"); Garver, L.L.C. ("Garver"); Half Associates, Inc. ("Half"); HDR Engineering, Inc. ("HDR"); Jacobs Engineering Group, Inc. ("Jacobs"); LJA Engineering, Inc. ("LJA"); Lonestar Program Controls Group, LLC ("Lonestar"); Raba Kistner, Inc. ("RKI"); SAM Construction Services, LLC

(“SAM”); and Vertex Engineering, Inc. (“VRX”).<sup>1</sup> 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 remaining third party 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 submitted information on the basis of any proprietary interest the remaining third parties may have in it.

AZB, Consor, ECM, Garver, and LJA raise section 552.104 of the Government Code for some of their 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 AZB, Consor, ECM, Garver, or LJA under section 552.104 of the Government Code.

Section 552.110(b) of the Government Code 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.” *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.

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<sup>1</sup> We note, although ECM also raises section 552.131 of the Government Code for its information at issue, as it provides no arguments explaining how this exception is applicable to the information at issue, we assume it no longer asserts this exception. *See* Gov’t Code §§ 552.301, .302.

*Id.* § 552.110(a). Section 552.110(c) of the Government Code states:

Except as provided by [s]ection 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). Section 552.1101 of the Government Code provides, in relevant part, as follows:

(a) Except as provided by [s]ection 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 [required disclosure] if the vendor, contractor, potential vendor, or potential contract 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). 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). BBI, Consor, ECM, Garver, HDR, Jacobs, LJA, Lonestar, and SAM argue some of their information at issue consists of trade secrets subject to section 552.110(b). Upon review, we find Consor has demonstrated some of the information at issue constitutes trade secrets. Accordingly, the department must withhold the information we marked under section 552.110(b) of the Government Code; however, to the extent Consor's customer information is made available to the public by Consor, including on its website or social media accounts,

it may not be withheld under section 552.110(b).<sup>2</sup> In addition, BBI, Consor, ECM, Garver, HDR, Jacobs, LJA, Lonestar, SAM, and VRX raise section 552.110(c) of the Government Code for some of their information at issue, asserting such information consists of commercial or financial information, the release of which would cause substantial competitive harm. Upon review, we find BBI, Consor, ECM, Garver, HDR, Jacobs, LJA, Lonestar, SAM, and VRX have demonstrated some of the information at issue, which we marked, constitutes 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 these third parties is made available to the public by the third parties at issue, including on their websites or social media accounts, it may not be withheld under section 552.110(c).<sup>3</sup> However, upon review, 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. In addition, we find BBI, Consor, ECM, Garver, Jacobs, LJA, and SAM 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, or is a trade secret. Therefore, the department may not withhold any portion of the remaining information at issue under section 552.110(b) or section 552.110(c) of the Government Code.

BBI, CobbFendley, Consor, ECM, Garver, Halff, Jacobs, LJA, RKI, and SAM raise section 552.1101(a) of the Government Code for portions of the remaining information at issue, asserting disclosure of the information at issue would reveal an individual approach to work, organizational structure, staffing, internal operations, and processes. Upon review, we find CobbFendley, Halff, and RKI have 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(a) of the Government Code; however, to the extent the customer information of these third parties is made available to the public by the third parties at issue, including on their websites or social media accounts, it may not be withheld under section 552.1101(a). We find some of the remaining information consists of information subject to section 552.0222(b), and may not be withheld on the basis of section 552.1101(a). *See id.* § 552.0222(b). In addition, we find BBI, Consor, ECM, Garver, Halff, Jacobs, LJA, and SAM have failed to provide specific factual evidence demonstrating any portion 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 at issue under section 552.1101(a) of the Government Code.

ECM and Garver also argue their remaining information at issue fits the definition of a trade secret found in section 134A.002(6) of the Civil Practice and Remedies Code of the Texas Uniform Trade Secrets Act (the “TUTSA”). Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *See id.* § 552.101. This section

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<sup>2</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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encompasses information made confidential by other statutes. Section 134A.002(6) provides:

“Trade secret” means all forms and types of information, including business, scientific, technical, economic, or engineering information, and any formula, design, prototype, pattern, plan, compilation, program device, program, code, device, method, technique, process, procedure, financial data, or list of actual or potential customers or supplies, whether tangible or intangible and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if:

(A) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

(B) 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.

Civ. Prac. & Rem. Code § 134A.002(6). We note the legislative history of TUTSA indicates it was enacted to provide a framework for litigating trade secret issues and provide injunctive relief or damages in uniformity with other states. Senate Research Center, Bill Analysis, S.B. 953, 83rd Leg., R.S. (2013) (enrolled version). Section 134.002(6)’s definition of trade secret expressly applies to chapter 134A only, not the Act, and does not expressly make any information confidential. *See* Civ. Prac. & Rem. Code § 134.002(6); *see also id.* § 134.007(d) (TUTSA does not affect disclosure of public information by governmental bodies under the Act). *See* Open Records Decision Nos. 658 at 4 (1998), 478 at 2 (1978), 465 at 4-5 (1987). Confidentiality cannot be implied from the structure of a statute or rule. *See* ORD 465 at 4-5. Accordingly, the department may not withhold any of ECM’s or Garver’s remaining information under section 552.101 of the Government Code in conjunction with section 134.002(6) of the Civil Practice and Remedies Code.

In summary, the department must withhold the information we marked under section 552.110(b) of the Government Code; however, to the extent Consor’s customer information is made available to the public by Consor, including on its website or social media accounts, it may not be withheld under section 552.110(b) of the Government Code. 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 the third parties at issue is made available to the public by the third parties at issue, including on their websites or social media accounts, it may not be withheld under section 552.110(c) of the Government Code. The department must withhold the information we marked under section 552.1101(a) of the Government Code; however, to the extent the customer information of the third parties at issue is made available to the public by the third parties at issue, including on their websites or social media accounts, it may not be withheld under section 552.1101(a) 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,

Deborah Southerland  
Assistant Attorney General  
Open Records Division

DS/mo

Ref: ID# 943019

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

14 Third Parties  
(w/o enclosures)