



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 29, 2022

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

OR2022-18902

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# 956670 (Ref. No. R013062-040722).

The Texas Department of Transportation (the "department") received a request for all submissions in response to nine specified requests for proposals. You state the department does not maintain information responsive to a portion of the request.¹ Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of AECOM Technical Services; Aguirre & Fields; Atkins North; Bridgefarmer & Associates, Inc.; Brown & Gay Engineers; CivilTech Engineering; Cobb, Fendley & Associates, Inc.; Consor Engineering, LLC ("Consor"); CP & Y Inc.; Dannenbaum Engineering; Entec Civil Engineers; Gonzalez-De La Garza & Associates; Half Associates, Inc. ("Half"); HDR Engineering; HR Green Inc.; Huitt-Zollars, Inc.; IDCUS Inc.; IEA, Inc.; Jacobs Engineering Group ("Jacobs"); K Friese & Associates; Kimley-Horn & Associates; Landtech; Pape-Dawson Engineers; Parsons Brinckeroff; Pierce Goodwin Alexander & Linville; Poznecki-Camarillo, Inc.; RG Miller Engineers; Stantec Consulting Services Inc. ("Stantec"); TranSystems Corporation dba TranSystems Corporation Consultants; Volkert; and Walter P. Moore ("Walter"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right to

¹ The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

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 Consor, Halff, Jacobs, Stantec, and Walter. We have considered the submitted arguments and reviewed the submitted information.

Initially, you state, some of the requested information was the subject of previous requests for information, as a result of which this office issued rulings. We understand there has been no change in the law, facts, or circumstances on which the previous rulings were based. 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 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 to submit its reasons, if any, as to why info relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, we have not received comments from any of the remaining third parties. Thus, 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 department may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we note Consor, Jacobs, Stantec, and Walter argue against information not submitted to this office for our review. This ruling does not address information beyond what the department has submitted to us for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information.

Consor 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 Consor's arguments 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.

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). 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 sections 552.110 and 552.1101(a) do not apply. *See id.* § 552.0222(b). Consor, Jacobs, and Walter 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 Consor, Jacobs, and Walter 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).² Consor, Jacobs, Stantec, and Walter argue some of their information at issue consists of trade secrets subject to section 552.110(b). 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 Consor, Jacobs, Stantec, and Walter 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.

Consor, Halff, Jacobs, Stantec, and Walter 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 Halff and Stantec have demonstrated the applicability of section 552.1101(a) to some of their information. 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 either third party at issue, including on its 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 Consor, Halff, Jacobs, Stantec, and Walter 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.

Halff asserts some of the materials at issue may 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

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

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 the previous rulings as previous determinations and withhold or release the information at issue in accordance with those rulings. 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). 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 this third party is made available to the public by the third party at issue, including on its websites or social media accounts, it may not be withheld under section 552.1101(a). The department must release the remaining information; however, any information protected by 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,

Chase D. Young
Assistant Attorney General
Open Records Division

CDY/be

Ref: ID# 956670

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)