



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

November 16, 2022

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

OR2022-35802

Dear Ms. Barner:

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# 981522 (Ref. No. R016860-081022).

The Texas Department of Transportation (the "department") received a request for certain proposals submitted in response to fifty-eight specified bid solicitations.<sup>1</sup> 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 unspecified 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 the following third parties: AECOM Technical Services, Inc. ("Aecom"); Atkins North America, Inc. ("Atkins"); BGE, Inc. ("BGE"); Bowman Engineering & Consulting, Inc. ("Bowman"); Burns & McDonnell ("B&M"); CDM Smith, Inc. ("CDM"); CONSOR Engineers, LLC ("Conсор"); Freese and Nichols, Inc. ("FNI"); Garver, LLC ("Garver"); HDR Engineering, Inc. ("HDR"); Hill International, Inc. ("Hill"); HNTB Corporation ("HNTB"); Jacobs Engineering Group, Inc. ("Jacobs"); Johnson, Mirmiran &

---

<sup>1</sup> You state, and provide documentation demonstrating, the department sent the requestor a cost estimate of charges pursuant to section 552.2615 of the Government Code, and the requestor accepted the cost estimate. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the department received the required deposit on August 23, 2022. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

Thompson, Inc. (“JMT”); LJA Program Management, LLC f/k/a Ramos Consulting, LLC (“LJAPM”); Neel-Schafer, Inc. (“Neel-Schaffer”); and WSP USA, Inc. (“WSP”).<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the requested information was the subject of previous requests for rulings. We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Thus, 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.<sup>3</sup> *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 a 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 some of the third parties 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 and is limited to the information the department has submitted for our review.<sup>4</sup> *See* Gov’t Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any other third parties explaining why the information at issue should not be released. Thus, we have no basis to conclude any remaining third party has 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 any remaining third party may have in it.

B&M, Consor, FNI, Garver, HNTB, LJAPM, and Neel-Schaffer 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

---

<sup>2</sup> Although FNI also cites to sections 552.113 and 552.131 of the Government Code in its brief, FNI make no arguments to support these exceptions. Therefore, we assume FNI has withdrawn its claims that these exceptions apply to its information at issue. *See* Gov’t Code §§ 552.301, .302. Additionally, although FNI also raises section 552.301 of the Government Code, we note this is not an exception to disclosure under the Act. *See id.* § 552.301 (providing procedural requirements for requesting ruling).

<sup>3</sup> As we are able to make this determination, we need not address the arguments against disclosure of this information.

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

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 these third parties under section 552.104 of the Government Code.

Aecom, Atkins, BGE, Bowman, CDM Smith, Consor, FNI, Garver, HDR, Hill, HNTB, Jacobs, JMT, LJAPM, Neel-Schaffer, and WSP raise section 552.110 of the Government Code for some of their 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, Aecom, Atkins, BGE, Bowman, CDM Smith, Consor, FNI, Garver, HDR, Hill, HNTB, Jacobs, JMT, LJAPM, Neel-Schaffer, and WSP also raise section 552.1101 of the Government Code for some of their information at issue. Section 552.1101(a) of the Government Code provides:

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

(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 of the Government Code do not apply. *See id.* § 552.0222(b).

Upon review, we find Aecom, Atkins, Bowman, CDM Smith, Garver, HDR, Hill, HNTB, Jacobs, JMT, LJAPM, Neel-Schaffer, and WSP have demonstrated portions of their 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 have marked and indicated under section 552.110(c) of the Government Code.<sup>5</sup> We also find BGE and Consor have demonstrated the applicability of section 552.1101(a) of the Government Code to some of their information at issue. Accordingly, the department must withhold the information we have marked and indicated under section 552.1101(a) of the Government Code.<sup>6</sup> 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 either section 552.110 or section 552.1101 of the Government Code. Additionally, we find Bowman, Consor, FNI, Garver, Jacobs, LJAPM, and Neel-Schaffer 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 BGE, Bowman, Consor, FNI, Garver, Jacobs, LJAPM, and Neel-Schaffer 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. Additionally, we find

---

<sup>5</sup> As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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

BGE, Bowman, Consor, FNI, Garver, Jacobs, LJAPM, and Neel-Schaffer 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 at issue under section 552.1101(a) of the Government Code.

We note FNI generally asserts some of its 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, FNI has not 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 FNI’s information at issue under section 552.101 of the Government Code on the basis of FNI’s arguments.

Neel-Schaffer asserts section 552.153 of the Government Code for its remaining information at issue. Section 552.153 provides, in relevant part:

(a) In this section, “affected jurisdiction,” “comprehensive agreement,” “contracting person,” “interim agreement,” “qualifying project,” and “responsible governmental entity” have the meanings assigned those terms by Section 2267.001.

(b) Information in the custody of a responsible governmental entity that relates to a proposal for a qualifying project authorized under Chapter 2267 is excepted from the requirements of Section 552.021 if:

...

(2) the records are provided by a proposer to a responsible governmental entity or affected jurisdiction under Chapter 2267 and contain:

(A) trade secrets of the proposer; [or]

(B) financial records of the proposer, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or other means[.]

Gov’t Code § 552.153(a), (b)(2)(A)-(B). Section 2267.001(10) of the Government Code defines a “qualifying project” as the following:

(A) any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing care facility, recreational facility, public building, or other similar facility currently available or to be made available to a governmental entity for public use, including any structure, parking area, appurtenance, and other property required to operate the structure or facility and any technology infrastructure installed in the structure or facility that is essential to the project's purpose; or

(B) any improvements necessary or desirable to unimproved real estate owned by a governmental entity.

*Id.* § 2267.001(10). Further, section 2267.001(11) defines a “responsible governmental entity” as “a governmental entity that has the power to develop or operate an applicable qualifying project.” *Id.* § 2267.001(11). Upon review, we find Neel-Schaffer has failed to demonstrate its remaining information at issue relates to a proposal for a qualifying project authorized under chapter 2267 of the Government Code. Therefore, we find the department may not withhold any portion of the remaining information under section 552.153 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 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 have marked and indicated under section 552.110(c) of the Government Code. The department must withhold the information we have marked and indicated under section 552.1101(a) 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/pt

Ref: ID# 981522

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

c: Third Parties  
(w/o enclosures)