



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

August 4, 2015

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

OR2015-16048

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# 573997.

The Texas Department of Transportation (the "department") received a request for the winning statements of qualification proposals and responses to the question and response template pertaining to thirty-one solicitations.<sup>1</sup> The department states it is releasing some of the requested information, including some information in accordance with Open Records Letter Nos. 2015-13055 (2015), 2015-12115 (2015), 2015-00818 (2015), 2014-18316 (2014), 2014-17464 (2014), 2014-15149 (2014), 2014-14965 (2014), and 2014-06324A (2014).<sup>2</sup> See Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). You state the department does

---

<sup>1</sup>We note the department received clarification regarding this request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>Although you state the department is releasing information in accordance with Open Records Letter No. 2014-06324, we note Open Records Letter No. 2014-06324A is the correct ruling.

not have information pertaining to one of the specified solicitations.<sup>3</sup> Although the department takes no position as to whether the submitted information is excepted under the Act, it states release of the submitted information may implicate the proprietary interests of third parties. Accordingly, the department states, and provides documentation showing, it notified the 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.<sup>4</sup> *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 Dannenbaum and MBITS. We have also received and considered comments from 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.

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 only received comments from Dannenbaum and MBITS explaining why their 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 responsive information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the department may not withhold the responsive information on the basis of any proprietary interest the remaining third parties may have in the information.

---

<sup>3</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

<sup>4</sup>The department notified the following third parties: Aecom Technical Services; AIA Engineers LTD; Atkins North America, Inc.; Binkley & Barfield, Inc.; Bontempo Structural Engineering, Inc.; Brown and Gay Engineers, Inc.; Cobb and Fendley; Dannenbaum Engineering Corporation (“Dannenbaum”); Entech Civil Engineers, Inc.; Hatch Mott MacDonald, LLC; HDR Engineering Inc.; HNTB Corporation; HW Lochner, Inc.; Jim West Engineering; Kimley-Horn and Associates; Lamb-Star Engineering; Lee Engineering, LLC; Lina T. Ramey & Associates; Maldonado-Burkett Intelligent Transportation Systems, LLP (“MBITS”); Maverick Engineering; Parsons Brinckerhoff; Rodriguez Transportation Group, Inc.; Rodriguez Engineering Bridge Inspection; RS&H, Inc.; Sam - Construction Services LLC; Stantec Consulting Services; Teague Nall and Perkins, Inc.; URS Corporation; and Yvonne Newman Engineering, Inc.

Section 552.104(a) of the Government Code exempts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at \*7 (Tex. June 19, 2015). 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.” *Id.* at \*9. MBITS indicates it has competitors. In addition, MBITS states release of the information at issue would provide a competitive advantage over MBITS, allowing its competitors to use MBITS “intellectual and proprietary property” to compete with MBITS. After review of the information at issue and consideration of MBITS arguments, we find MBITS has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold MBITS’s submitted information under section 552.104(a) of the Government Code.

Section 552.110(b) protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

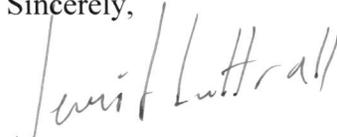
Upon review of Dannenbaum’s arguments under section 552.110(b), we find that Dannenbaum has established that some of its submitted information constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. The department must withhold the information we have marked under section 552.110(b) of the Government Code; however, to the extent the customer information at issue is publicly available on Dannenbaum’s website, it may not be withheld under section 552.110(b) of the Government Code. However, we find Dannenbaum failed to make the specific factual or evidentiary showing required by section 552.110(b) for its remaining information. Thus, Dannenbaum has not demonstrated that substantial competitive injury would result from the release of any of its remaining information at issue. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, none of Dannenbaum’s remaining information may be withheld under section 552.110(b).

In summary, the department may withhold MBITS's submitted information under section 552.104(a) of the Government Code. The department must withhold the information we have marked under section 552.110(b) of the Government Code; however, to the extent the customer information at issue is publicly available on Dannenbaum's website, it may not be withheld under section 552.110(b) of the Government Code. The remaining information must be released.

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 [http://www.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/akg

Ref: ID# 573997

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Bill Aleshire  
For Dannenbaum Engineering  
Aleshire Law  
700 Lavaca Street, Suite 1400  
Austin, Texas 78701  
(w/o enclosures)

Mr. Michael G. Lockwood  
For Maldonado-Burkett Intelligent  
Transportation Systems  
Kiestler, Lockwood & Ciccone, L.L.P.  
611 West 14<sup>th</sup> Street  
Austin, Texas 78701  
(w/o enclosures)

Mr. Kirk Fauri  
RS&H, inc.  
11011 Richmond Avenue, Suite  
900  
Houston, Texas 77042  
(w/o enclosures)

Mr. R. Brent Patterson  
Aecom Technical Services  
5444 Westheimer Road, Suite  
200  
Houston, Texas 77056  
(w/o enclosures)

Mr. William Wycoff  
Entech Civil Engineers  
16360 Park Ten Place, Suite 230  
Houston, Texas 77084  
(w/o enclosures)

Mr. Vincent Pena  
Parson Bricknerhoff  
16285 Park Ten Place, Suite 400  
Houston, Texas 77084  
(w/o enclosures)

Mr. Lewis Gamboa  
Rodriguez Transportation Group  
17510 Huffmeister Road, Ste 101  
Cypress, Texas 77429  
(w/o enclosures)

Mr. Gregory Cleveland  
Sam Construction Services  
7101 Envoy Court  
Dallas, Texas 75247  
(w/o enclosures)

Mr. Youseff Laham  
Binkley & Barfield  
1710 Seamist Drive  
Houston, Texas 77008  
(w/o enclosures)

Ms. Jessica Andrews  
Lamb-Star Engineering  
5700 West Plano Parkway, Suite 1000  
Plano, Texas 75093  
(w/o enclosures)

Mr. Joseph Murphy  
Lina T. Ramey & Associates  
1349 Empire Central, Suite 900  
Dallas, Texas 75247  
(w/o enclosures)

Mr. Bill Wimberley  
Teague Nall and Perkins  
1100 Macon Street  
Fort Worth, Texas 76102  
(w/o enclosures)

Mr. Kenneth Ozuna  
HDR Engineering  
17111 Preston Road, Suite 200  
Dallas, Texas 75248  
(w/o enclosures)

Mr. Kevin Hoppers  
Kimley-Horn & Associates  
12750 Merit Drive, Suite 1000  
Dallas, Texas 75251  
(w/o enclosures)

Mr. Joseph Short  
Lee Engineering  
3030 LBJ Freeway, Suite 1660  
Dallas, Texas 75234  
(w/o enclosures)

Mr. Clinton Jumper  
URS Corporation  
1300 Summit Avenue, Suite 600  
Fort Worth, Texas 76102  
(w/o enclosures)

Ms. Zina Schwartz  
AIA Engineering  
1501 North Mesa, Suite 100  
El Paso, Texas 79902  
(w/o enclosures)

Mr. Federico Martinez  
Brown and Gay Engineers  
7000 North Mopac, Suite 330  
Austin, Texas 78731  
(w/o enclosures)

Mr. Mark Ingram  
Cobb and Fendley  
13430 Northwest Freeway, Suite  
1100  
Houston, Texas 77040  
(w/o enclosures)

Mr. Clint Holt  
Stantec Consulting Services  
1700 Pacific Avenue, Suite 2340  
Dallas, Texas 75201  
(w/o enclosures)

Mr. Stephen Andrew Hrcir  
HNTB Corporation  
2950 North Loop West, Ste 900  
Houston, Texas 77092  
(w/o enclosures)

Mr. Robert Stone  
Atkins North America  
6504 Bridge Point Parkway,  
Suite 200  
Austin, Texas 78730  
(w/o enclosures)

Mr. Stephen Bontempo  
Bontempo Structural Engineering  
2200 Dickson Drive #201  
Austin, Texas 78729  
(w/o enclosures)

Mr. Lawrence Ley  
HW Lochner  
5767 Eagles Nest Boulevard  
Tyler, Texas 75073  
(w/o enclosures)

Mr. Bill Tankersley  
Yvonne Newman Engineering  
601 Shelley Drive, Suite 203  
Tyler, Texas 75701  
(w/o enclosures)

Mr. Patrick Charles Matussek  
Maverick Engineering  
318 East Morris  
Yoakum, Texas 77995  
(w/o enclosures)

Mr. James West  
Jim West Engineering  
4541 Everhart Road, Suite 4  
Corpus Christi, Texas 78411  
(w/o enclosures)

Mr. Andrew Rodriguez  
Rodriguez Engineering Bridge  
Inspection  
8137 Osborne Drive  
Austin, Texas 78729  
(w/o enclosures)

Mr. David Jurich  
Hatch Mott Macdonald  
3410 Far West Boulevard, Suite 210  
Austin, Texas 78731  
(w/o enclosures)