



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 23, 2015

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

OR2015-19946

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# 580248.

The Texas Department of Transportation (the "department") received a request for information pertaining to six specified competitive procurements. You claim a portion of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state release of the remaining information may implicate the proprietary interests of numerous third parties. Accordingly, you state, and provide documentation demonstrating, the department notified the third parties of the request for information and of their rights to submit arguments to this office stating why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Dannenbaum Engineering ("Dannenbaum") and Kennedy Consulting, Inc. ("KCI"). We have reviewed the submitted arguments and the submitted information, a portion of which you state is a representative sample of information.¹

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Initially, you state some of the requested information was the subject of previous requests, as a result of which this office issued Open Records Letter Nos. 2014-18316 (2014), 2015-13055 (2015), and 2015-19036 (2015). In Open Records Letter No. 2014-18316, we ruled the department must rely on Open Records Letter No. 2014-15149 (2014) as a previous determination and continue to release the identical information in accordance with that ruling and release the remaining information not subject to the prior ruling. In Open Records Letter No. 2015-13055, we determined the department must rely on Open Records Letter Nos. 2014-18316, 2014-16480 (2014), and 2014-15149 as previous determinations and continue to release the identical information in accordance with those rulings; may withhold information in Exhibit B under section 552.104 of the Government Code; and must release the remaining information. In Open Records Letter No. 2015-19036, we determined the department may withhold the information we marked and indicated under section 552.104(a) of the Government Code; must withhold the information we marked under section 552.110(b) of the Government Code; and must release the remaining information in accordance with copyright law. Except with regard to the KCI's claims under section 552.104(a), we understand there has not been any change in the law, facts, or circumstances on which Open Records Letter Nos. 2014-18316, 2015-13055, and 2015-19036 were based. Accordingly, except in regard to KCI's claims under section 552.104(a), we conclude the department must rely on Open Records Letter Nos. 2014-18316, 2015-13055, and 2015-19036 as previous determinations and withhold or release the identical information in accordance with these rulings.² *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). Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264 (Tex. June 19, 2015), section 552.007 of the Government Code states if a governmental body voluntarily releases information to any member of the public, a governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007. Section 552.104 does not prohibit the release of information or make information confidential. *See* Gov't Code § 552.104. Thus, the department may not now withhold the previously released information.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." *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*, 2015 WL 3854264, at *9. You represent a portion of the submitted information pertains to a competitive bidding situation. You state the scoring and evaluation criteria documents in Exhibit C relate to contracts that have been awarded and executed.

²As our ruling is dispositive, we need not address KCI's arguments against disclosure.

However, you state the department “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” You assert the disclosure of the information in Exhibit C will undercut the department’s negotiating position with respect to future procurements for such contracts, and would allow third-party competitors to tailor their letters of interest to specific evaluation criteria, undermining the quality of letters of interest and undermining competition among competitors. After review of the information at issue and consideration of the arguments, we find the department has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold Exhibit C under section 552.104(a).³

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 information relating to that party should not be released. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from Dannenbaum and KCI. Thus, the remaining third parties have not demonstrated they have protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)-(b); 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, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

Dannenbaum claims portions of its information are excepted under section 552.110(b) 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).

Dannenbaum contends portions of its submitted information consist of commercial or financial information, release of which would cause substantial competitive harm to the company. Upon review, we find Dannenbaum has demonstrated some of its information at issue constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold the portions of Dannenbaum’s information we have marked under section 552.110(b) of the Government Code. However, we find Dannenbaum has not made the specific factual or evidentiary

³As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

showing required by section 552.110(b) that release of any of its remaining information would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Therefore, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

In summary, the department must rely on Open Records Letter Nos. 2014-18316, 2014-16480, and 2014-15149 as previous determinations and withhold or release the identical information in accordance with these rulings. The department may withhold Exhibit C under section 552.104 of the Government Code. The department must withhold the information we have marked under section 552.110(b) 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 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,



Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 580248

Enc. Submitted documents

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