



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 23, 2015

Ms. Sol Cortez
Assistant City Attorney
City of El Paso
P.O. Box 1890
El Paso, Texas 79950

OR2015-24526

Dear Ms. Cortez:

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# 588121 (El Paso Ref. No. 15-1044-456).

The City of El Paso (the "city") received a request for information sent to the Attorney General's Office in response to a previous request for information related to a specified request for proposals. You state you have released some information. You claim some of the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state the release of the submitted information may implicate the interests of third parties. Accordingly, you state, and provide documentation demonstrating, you notified CMD Endeavors, Inc. ("CMD"); Martinez Bros Contractors, LLC; Danny Sunder Construction, Inc.; ZTEX Construction, Inc. ("ZTEX"); International Eagle Enterprises, Inc.; Black Stallion Contractors, Inc.; Ultimate Concrete, LLC ("Ultimate"); and Horizone Construction 1, Ltd. of the request for information and of their right to submit arguments 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 CMD, ZTEX, and Ultimate.¹ We have reviewed the arguments and the submitted information.²

Initially, we note you have not submitted some of the requested proposals. To the extent the information at issue existed when the city received the request for information, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, CMD argues the requestor is not seeking any actual documents in his request. We note a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the city has done so. Upon review, we find the requestor seeks certain "documents" the city previously submitted to our office and the city has submitted documents as responsive to the request. Therefore, the city must release the information at issue unless the information falls within an exception to public disclosure under the Act. *See* Gov't Code §§ 552.006, .021, .301, .302.

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 CMD, Ultimate, and ZTEX. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the submitted 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 city may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

¹Although ZTEX raises section 552.305 of the Government Code, we note this is not an exception to public disclosure under the Act. *See* Gov't Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *See id.*

²We note the city failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office. *See* Gov't Code § 552.301(b) (requiring governmental body to ask for ruling and state exceptions that apply within ten business days of receiving written request), (e) (requiring governmental body to submit within fifteen business days of receiving request for information comments explaining applicability of raised exceptions, copy of request for information, signed statement of date governmental body received request or evidence sufficient to establish date, and copy of information governmental body seeks to withhold or representative samples). Nonetheless, section 552.101 of the Government Code and third party interests can provide compelling reasons to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will address the arguments against disclosure of the information at issue submitted by the third parties, as well as the city's argument under section 552.101 of the Government Code.

Ultimate asserts its information is private and should not be released. Additionally, you contend some of the submitted information is protected under common-law privacy. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person, and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate or embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683.

This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally intimate or embarrassing. *See generally* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). Whether the public’s interest in obtaining personal financial information is sufficient to justify its disclosure must be determined on a case-by-case basis. *See* ORD 373. Upon review, we find the submitted information contains information that satisfies the standard articulated by the Texas Supreme Court in *Industrial Foundation*. Therefore, we conclude the city must withhold this information, which we have marked, under section 552.101 of the Government Code in conjunction with common-law privacy. However, we find you and Ultimate have failed to demonstrate the remaining information at issue is highly intimate or embarrassing and not of legitimate public concern. Therefore, the city may not withhold the information at issue under section 552.101 of the Government Code in conjunction with common-law privacy.

CMD and ZTEX assert their information is protected under section 552.104(a) of the Government Code. Section 552.104(a) excepts 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*, 466 S.W.3d 831 (Tex. 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 841. CMD and ZTEX state they have competitors. In addition, CMD states the release of its information would provide its competitors with an unfair advantage because it consists of CMD’s “precise financial model, formula, compilation methods, and devices developed, employed, and relied upon by CMD to maintain its on-going business concerns[.]” ZTEX states its information could be used by a competitor to “craft its bid, employ specific subcontractors, and thereby utilize specific knowledge to achieve an unfair competitive advantage[.]” After review of the information at issue and consideration of the arguments, we find CMD and ZTEX have established the release of their information would

give an advantage to a competitor or bidder. Thus, we conclude the city may withhold CMD's and ZTEX's submitted information under section 552.104(a).³

We note portions of the remaining information are subject to section 552.136 of the Government Code.⁴ Section 552.136 states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). Accordingly, the city must withhold the bank account and bank routing numbers in the remaining information under section 552.136.

In summary, the city (1) must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) may withhold CMD's and ZTEX's information under section 552.104 of the Government Code; and (3) must withhold the bank account and bank routing numbers in the remaining information under section 552.136 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, 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,



Mili Gosar
Assistant Attorney General
Open Records Division

MG/akg

³As our ruling is dispositive, we need not address CMD's and ZTEX's remaining arguments against disclosure of their information.

⁴The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Ref: ID# 588121

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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