



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 4, 2015

Mr. Robert Schell
Assistant Director General Counsel
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2015-25360

Dear Mr. Schell:

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# 589573 (NTTA File No. 2015-01574).

The North Texas Tollway Authority (the "authority") received a request for a specified study. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107(2) of the Government Code. You also state release of this information may implicate the proprietary interest of Louthan Consulting, LLC ("Louthan"). Accordingly, you state and provide documentation showing you notified Louthan of the request for information and of its right to submit arguments to this office as to why the information at issue 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 Louthan. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The authority must release this information unless it is either excepted under section 552.108 of the Government Code or is confidential under the Act or other law. Although you raise section 552.103 of the Government Code for the submitted information, this is a discretionary exception to disclosure and it does not make information confidential under the Act. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the submitted information may not be withheld under section 552.103. You also assert the submitted information is excepted from public disclosure pursuant to a court order. Section 552.107(2) of the Government Code allows a governmental body to withhold information if “a court by order has prohibited disclosure of the information.” Gov't Code § 552.107(2). However, section 552.022(b) provides a court may not order a governmental body to withhold from public inspection any category of information described by section 552.022(a) unless the category of information is expressly made confidential under the Act or other law. *Id.* § 552.022(b). Because section 552.022(b) prohibits a court from ordering the withholding of documents subject to section 552.022(a), we conclude the authority may not withhold any portion of the submitted information under section 552.107(2) of the Government Code. However, Louthan asserts the submitted information is protected under section 552.104 of the Government Code. Because information encompassed by section 552.022 may be withheld under section 552.104, we will consider the applicability of this exception to the submitted information. *See id.* § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under section 552.022(a)).

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” *Id.* § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, the court concluded 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. Louthan states it has competitors. In addition, Louthan states the submitted information, if released, would give advantage to a competitor, by enabling the competitor to replicate Louthan's cost modeling methodology. Upon review, we find Louthan has established the release of the submitted information would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold the submitted information under section 552.104(a) of the Government Code.

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,



Joseph Keeney
Assistant Attorney General
Open Records Division

JDK/dls

Ref: ID# 589573

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. T. Chase Garrett
Scheef & Stone, L.L.P.
2600 Network Boulevard, Suite 400
Frisco, Texas 75034
(w/o enclosures)