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December 15, 2015

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OR2015-26376

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# 590752.

The Texas Department of Transportation (the "department") received two requests from different requestors. The first requestor seeks information pertaining to all statements of qualifications submitted in response to a specified solicitation. The second requestor seeks information pertaining to certain statements of qualifications submitted in response to the same specified solicitation and six additional solicitations. You state you will release some information to the second requestor. Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of third parties.¹ Accordingly, you state you notified these third parties of the request for information and of their 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

¹We note, and you acknowledge, the department did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(b), (e). Nevertheless, because the interests of third parties can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352.

comments from CP&Y, Inc. (“CP&Y”); Dannenbaum Engineering (“Dannenbaum”); Halff Associates, Inc. (“Halff”); Kellogg Brown & Root Services, Inc. (“KBR”); Kennedy Consulting, Inc. (“KCI”); S&B Infrastructure, Ltd. (“S&BI”); and Structural Engineering Associates, Inc. (“SEA”). We have also received and considered comments from the requestor. *See* Gov’t Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, you state a portion of the submitted information is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the department need not release non-responsive information to the requestor.

Next, we note some of the responsive information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-12115 (2015), 2015-16048 (2015), 2015-19036 (2015), and 2015-22463 (2015). CP&Y and Halff now seek to withhold some of their information previously ordered released in Open Records Letter Nos. 2015-12115 and 2015-19036 under section 552.104 of the Government Code. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the 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; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although CP&Y and Halff now raise section 552.104 of the Government Code for the information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the department may not now withhold any of the previously released information under section 552.104 of the Government Code on behalf of CP&Y or Halff. Furthermore, there is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, for the responsive information that is identical to the information previously requested and ruled upon by this office, we conclude the department must continue to rely on Open Records Letter Nos. 2015-12115, 2015-16048, 2015-19036, and 2015-22463 as previous determinations and withhold or release the identical information in accordance with those rulings.² *See* Open Records Decision No. 673 (2001) (so long as law, facts, and

²As we are able to make this determination, we need not address the arguments against disclosure of this information.

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). Next, we address the arguments against the disclosure of the responsive information that is not subject to these prior rulings.

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) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from CP&Y, Dannenbaum, Halff, KBR, KCI, SB&I, and SEA explaining why the responsive information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests 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, 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 remaining responsive information on the basis of any proprietary interest the remaining third parties may have in the information.

We note KCI argues against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the department has submitted to us for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information.

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). 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. CB&Y, Halff, KCI, and SB&I state they have competitors. In addition, CB&Y, Halff, KCI, and SB&I state release of their information at issue would give advantage to their competitors or other bidders. After review of the information at issue and consideration of the arguments, we find CB&Y, Halff, KCI, and SB&I have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information indicated by CB&Y, Halff, KCI, and SB&I in

solicitation number 0000000948, which we have marked, under section 552.104(a) of the Government Code.³

Dannenbaum raises section 552.110(b) of the Government Code for some of its information. KBR raises section 552.110(b) of the Government Code for the entirety of its information. 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.

Dannenbaum and KBR contend some of the remaining responsive information is commercial or financial information, the release of which would cause substantial competitive harm. Upon review, we find Dannenbaum and KBR have failed to demonstrate the release of any of the remaining information at issue would result in substantial harm to their competitive position. *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), 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, none of the remaining responsive information may be withheld under section 552.110(b) of the Government Code.

We note some of the remaining responsive information may 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, we conclude the department must continue to rely on Open Records Letter Nos. 2015-12115, 2015-16048, 2015-19036, and 2015-22463 as previous determinations and withhold or release the identical information in accordance with those rulings. The

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

department may withhold the information indicated by CB&Y, Halff, KCI, and SB&I in solicitation number 0000000948, which we have marked, under section 552.104(a) of the Government Code. The department must release the remaining responsive information; however, any information protected by 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 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,



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