



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 27, 2016

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

OR2016-02008

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# 593734.

The Texas Department of Transportation (the "department") received thirteen requests from the same requestor for specified information pertaining to certain statements of qualification submitted in response to specified solicitations.<sup>1</sup> You state you will release some information in accordance with Open Records Letter Nos. 2014-15149 (2014), 2015-01534 (2015), 2015-04614 (2015), 2015-12115 (2015), 2015-16048 (2015), 2015-19036 (2015), 2015-19446 (2015), and 2015-21572 (2015). *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 claim portions of the submitted information are 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 interests of third parties.<sup>2</sup> Accordingly, you state

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<sup>1</sup>We note the department sought and received clarification of one of the requests. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

<sup>2</sup>We note the department did not comply with the requirements of section 552.301 of the Government Code in regards to some of the submitted information. *See* Gov't Code § 552.301(e). Nevertheless, because third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302.

you notified these third parties of the request for information and of their rights 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 Cobb, Fendley, & Associates, Inc. ("Cobb Fendley"); CP&Y, Inc. ("CP&Y"); and Kennedy Consulting, Inc. ("KCI"). We have considered the submitted arguments and reviewed the submitted information, a portion of which constitutes a representative sample.<sup>3</sup>

Initially, we note some of the requested information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-22463 (2015), 2015-26376 (2015), and 2015-26573 (2015). There is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, for the requested 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. 2015-22463, 2015-26376, and 2015-26573 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* ORD 673. However, to the extent the submitted information was not at issue in the prior rulings, we will address the submitted arguments against disclosure of that information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 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 Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). You represent the information in Exhibit C pertains to a competitive bidding situation. In addition, you state, although the information at issue relates to contracts that have been awarded and executed, the department solicits proposals for these types of services on a recurring basis and disclosure of the information at issue will provide an advantage to third-party 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 the information in Exhibit C under section 552.104(a) of the Government Code.<sup>4</sup>

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<sup>3</sup>We 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 those records contain substantially different types of information than that submitted to this office.

<sup>4</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 Cobb Fendley, CP&Y, and KCI explaining why their information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the remaining 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 information on the basis of any proprietary interest the remaining third parties may have in the information.

Cobb Fendley, CP&Y, and KCI argue 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.

As noted above, 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 also invoke this exception, which is subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. Cobb Fendley states it has competitors. In addition, Cobb Fendley states release of its information at issue would give advantage to its competitors. After review of the information at issue and consideration of the arguments, we find Cobb Fendley has 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 we have marked under section 552.104(a) of the Government Code.

We note some of the remaining 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, the department must continue to rely on Open Records Letter Nos. 2015-22463, 2015-26376, and 2015-26573 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold the information in Exhibit C and the information we have marked under section 552.104(a) of

the Government Code. The department must release the remaining 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](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,



Kenny Moreland  
Assistant Attorney General  
Open Records Division

KJM/som

Ref: ID# 593734

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Dale Conger, P.E.  
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Ms. Hilda S. Obregon Lease, PE  
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Ms. Brenda Vickery Johnson  
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Bridgefarmer & Associates, Inc.  
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Mr. Chris I. Conrad  
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Mr. Steve Knodell, RPLS  
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