



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 15, 2016

Ms. Lori Fixley Winland  
Counsel for the Camino Real Regional Mobility Authority  
Locke Lord, LLP  
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OR2016-03695A

Dear Ms. Winland:

This office issued Open Records Letter No. 2016-03695 (2016) on February 16, 2016. We have examined this ruling and determined that an error was made in its issuance. When this office determines an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued ruling. Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on February 16, 2016. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). This ruling was assigned ID# 607519.

The Camino Real Regional Mobility Authority (the "authority"), which you represent, received two requests from two different requestors for the statements of qualifications and bid proposals submitted for a specified request for proposals. Although you take no position as to whether the requested information is excepted under the Act, you state release of this information may implicate the proprietary interests of third parties. Accordingly, you state you notified Sundt Herzog ("Sundt"), Balfour Beatty Infrastructure, Inc. ("Balfour"), Isolux Corsan, LLC, Stacy and Witbeck, Inc., Paso Del Norte Trackworks, and Jordan Foster Construction, L.L.C. of the requests for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See id.* § 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 Sundt

and Balfour. We have also received comments from the first requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, 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) 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 Sundt and Balfour explaining why the responsive information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest 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, 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 authority may not withhold any of the submitted information on the basis of any proprietary interest the remaining third parties may have in it.

Next, we note Sundt argues against the release of information that was not submitted by the authority. This ruling does not address information that was not submitted by the authority and is limited to the information the authority has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

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, 839 (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. Balfour states it has competitors. In addition, Balfour states the release of some of its information would give an advantage to competitors. After review of the information at issue and consideration of the arguments, we find Balfour has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold the information at issue, which we have marked, under section 552.104(a).<sup>1</sup>

Sundt argues its information is excepted from disclosure under section 552.110(b) of the Government Code. Section 552.110(b) protects "[c]ommercial or financial information for

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<sup>1</sup> As our ruling is dispositive, we need not address the Balfour's remaining argument against disclosure.

which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; see also Open Records Decision No. 661 at 5-6 (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).

In advancing its arguments, we understand Sundt to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interest of Sundt in the information at issue.

Upon review, we find Sundt has demonstrated portions of its pricing information, which we have marked, constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the authority must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Sundt has not made the specific factual or evidentiary 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 Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence 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 (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) (résumés cannot be said to fall within any

exception to the Act). Accordingly, none of Sundt's remaining information may be withheld under section 552.110(b).

In summary, the authority may withhold the information we have marked under section 552.104(a) ) of the Government Code and must withhold the information we have marked under section 552.110(b) 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](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,



Katelyn Blackburn-Rader  
Assistant Attorney General  
Open Records Division

KB-R/bw

Ref: ID# 607519

Enc. Submitted documents

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(w/o enclosures)

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