



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

March 15, 2016

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

OR2016-05954

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# 601572.

The Texas Department of Transportation (the "department") received a request for information pertaining to thirty-eight requests for proposals.<sup>1</sup> You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Although you take no position as to whether the remaining submitted 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 these third parties of the request for information and of their rights 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 Cobb,

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<sup>1</sup>We note we asked the department to provide additional information pursuant to section 552.303 of the Government Code. *See* Gov't Code § 552.303(c)-(d) (if attorney general determines that information in addition to that required by section 552.301 is necessary to render decision, written notice of that fact shall be given to governmental body and requestor, and governmental body shall submit necessary additional information to attorney general not later than seventh calendar day after date of receipt of notice). We have received and considered the correspondence sent by the department pursuant to that request.

Fendley & Associates, Inc. (“Cobb”) and Halff Associates, Inc. (“Halff”). We have considered the submitted arguments and reviewed the submitted information.

Initially, the department informs us some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-04614 (2015), 2015-19036 (2015), 2015-22463 (2015), 2015-24935 (2015), 2015-26376 (2015), 2015-26573 (2015), 2016-03136 (2016), 2016-03313 (2016), and 2016-03677 (2016). We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the department must continue to rely on Open Records Letter Nos. 2015-04614, 2015-19036, 2015-22463, 2015-24935, 2015-26376, 2015-26573, 2016-03136, 2016-03313, and 2016-03677 as previous determinations and withhold or release the identical information in accordance with those rulings.<sup>2</sup> See Open Records Decision No. 673 (2001) (so long as law, facts, and 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 submitted information that is not subject to these prior rulings.

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 Cobb and Halff explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of 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, 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 information at issue on the basis of any proprietary interest the remaining third parties may have in the 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). 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. The department asserts Exhibit B pertains to a competitive bidding

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<sup>2</sup>As we are able to make this determination, we do not address the arguments to withhold this information.

situation. In addition, the department states disclosure of Exhibit B would allow third-party competitors to tailor their proposal and bids and undermine competition among competitors. After review of the information at issue and consideration of the arguments, we find the department has established the release of Exhibit B would give advantage to a competitor or bidder. Thus, the department may withhold Exhibit B under section 552.104(a) of the Government Code.

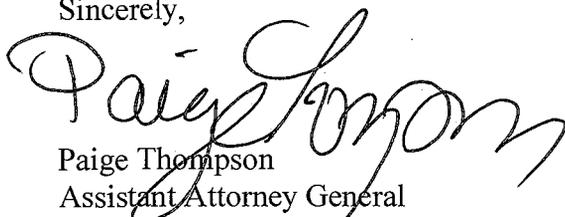
Cobb and Halff state they have competitors. Cobb and Halff assert release of their information at issue would give advantage to competitors or bidders. After review of the information at issue and consideration of the arguments, we find Cobb and Halff have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we indicated under section 552.104(a) of the Government Code.

In summary, the department must continue to rely on Open Records Letter Nos. 2015-04614, 2015-19036, 2015-22463, 2015-24935, 2015-26376, 2015-26573, 2016-03136, 2016-03313, and 2016-03677 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold Exhibit B and the information we indicated under section 552.104(a) of the Government Code. The department must release the remaining information.

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,



Paige Thompson  
Assistant Attorney General  
Open Records Division

PT/dls

Ref: ID# 601572

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Naser Abusaad, PE  
Civil Associates, Inc.  
9330 LBJ Freeway, Suite 1150  
Dallas, Texas 75243  
(w/o enclosures)

Mr. David Eubank, PE  
Elliott Bay Design Group, LLC  
400 Poydras Street, Suite 1510  
New Orleans, Louisiana 70130-3217  
(w/o enclosures)

Mr. Michael B. Smith, PE  
SAM Construction Services, LLC  
11111 Katy Freeway, Suite 200  
Houston, Texas 77079  
(w/o enclosures)

Mr. Jose Ramirez, PE  
AECOM Technical Services, Inc.  
5444 Westheimer Road, Suite 200  
Houston, Texas 77056  
(w/o enclosures)

Mr. Kenneth Stephen Bonnette, PE  
Pape-Dawson Engineers, Inc.  
2000 NW Loop 410  
San Antonio, Texas 78213  
(w/o enclosures)

Mr. Timothy J. Weight, PE  
HW Lochner, Inc.  
810 Hesters Crossing, Suite 225  
Round Rock, Texas 78681  
(w/o enclosures)

Mr. Ralph A. Browne, PE  
CP&Y, Inc.  
d/b/a Chiang, Patel & Yerby, Inc.  
142 Chula Vista Drive  
San Antonio, Texas 78232  
(w/o enclosures)

Mr. Gregory Ranft, PE  
CDM Smith  
1777 NE Loop 410, Suite 500  
San Antonio, Texas 78217  
(w/o enclosures)

Ms. Tracey Friggle Logan, PE  
HNTB Corporation  
130 East Travis Street, Suite 200  
San Antonio, Texas 78205  
(w/o enclosures)

Mr. Mark Schluter, PE  
Aguirre & Fields  
12708 Riata Vista Circle, Suite A-109  
Austin, Texas 78727  
(w/o enclosures)

Mr. Ovidio N. Alanis  
Entech Civil Engineers, Inc.  
16360 Park Ten Place, Suite 230  
Houston, Texas 77084  
(w/o enclosures)

Mr. Khurram D. Warach, PE  
Atkins North America, Inc.  
1250 Wood Branch Park Drive, Suite 300  
Houston, Texas 77079  
(w/o enclosures)

Mr. Ray Wells, PE  
AIA Engineers, Ltd.  
15310 Park Row  
Houston, Texas 77084  
(w/o enclosures)

Mr. Tony Kimmey, PE  
Burns & McDonnell Engineering  
Company, Inc.  
Suite 4260  
8911 N. Capital of Texas Highway  
Austin, Texas 78759  
(w/o enclosures)

Mr. Mario Medina, PE  
Parsons Brinckerhoff, Inc.  
Suite 595  
901 South MoPac Expressway  
Austin, Texas 78746  
(w/o enclosures)

Mr. Wesley Weir, PE  
TranSystems Corporation  
d/b/a TranSystems Corporation  
Consultants  
3030 LBJ Freeway, Suite 900  
Dallas, Texas 75234  
(w/o enclosures)

Mr. Juan Contreras III, PE  
Michael Baker International, Inc.  
1501 LBJ Freeway, Suite 650  
Dallas, Texas 75234  
(w/o enclosures)

Mr. Mike Lehmann, PE  
Brown and Gay Engineers, Inc.  
123 Altgelt Avenue  
San Antonio, Texas 78201  
(w/o enclosures)

Mr. Charles Allen Dodge, PE  
HNTB Corporation  
130 East Travis Street, Suite 200  
San Antonio, Texas 78205  
(w/o enclosures)

Mr. Thomas W. Lowe, PE  
Atkins North America, Inc.  
6504 Bridge Point Parkway, Suite 200  
Austin, Texas 78730  
(w/o enclosures)

Mr. Brian J. Leshko, PE  
HDR Engineering, Inc.  
810 Hesters Crossing, Suite 120  
Round Rock, Texas 78681  
(w/o enclosures)

Mr. Greg Kochersperger, PE  
HDR Engineering, Inc.  
17111 Preston Road, Suite 200  
Dallas, Texas 75248  
(w/o enclosures)

Mr. Bradford White, P.E.  
Infrastructure Associates, Inc.  
6117 Richmond Avenue, Suite 100  
Houston, Texas 77057  
(w/o enclosures)

Mr. Brian Hall, PE  
Atkins North America, Inc.  
6504 Bridge Point Parkway, Suite 200  
Austin, Texas 78730  
(w/o enclosures)

Mr. Christopher Mwalwanda, PE  
CDM Smith  
Suite 210  
12357-A Riata Trace Parkway  
Austin, Texas 78727  
(w/o enclosures)

Mr. David Schellinger, PE  
Stantec Consulting Services, Inc.  
50 West 23rd Street  
New York, New York 10010  
(w/o enclosures)

Mr. Christopher D. Cotter, PE  
LJA Engineering, Inc.  
2929 Briarpark Drive, Suite 600  
Houston, Texas 77042  
(w/o enclosures)

Mr. John A. McNeese, PE  
HDR Construction Control  
Corporation  
810 Hesters Crossing, Suite 120  
Round Rock, Texas 78681  
(w/o enclosures)

Mr. Dale Conger, PE  
President  
Cobb, Fendley & Associates, Inc.  
Suite 1100  
13430 Northwest Freeway  
Houston, Texas 77040  
(w/o enclosures)

Mr. Michael Crain, PE  
Surveying and Mapping, LLC  
7101 Envoy Court  
Dallas, Texas 75247  
(w/o enclosures)

Mr. Joe Sobleskie, Jr.  
Jacobs Engineering Group, Inc.  
Two Penn Plaza, Suite 603  
New York, New York 10121  
(w/o enclosures)

Mr. James Michael Heath, PE  
Alliance-Texas Engineering Company  
d/b/a Alliance Transportation  
Building M-1, Suite 150  
11500 Metric Boulevard  
Austin, Texas 78758  
(w/o enclosures)

Mr. Sandeep Patil, PE  
AIA Engineers, Ltd.  
15310 Park Row  
Houston, Texas 77084  
(w/o enclosures)

Mr. Mark Schluter, PE  
Aguirre & Fields, LP  
Suite 210  
221 West Exchange Avenue  
Fort Worth, Texas 76164  
(w/o enclosures)

Mr. Joseph Anderson, PE  
The Rios Group, Inc.  
7400 Sand Street  
Fort Worth, Texas 76118  
(w/o enclosures)

Ms. Mona R. Mayer, PE  
HDR Engineering, Inc.  
4401 Westgate Boulevard, Suite 400  
Austin, Texas 78745  
(w/o enclosures)

Mr. Travis S. Isaacson, PE  
Cardno, Inc.  
2590 Oakmont Drive, Suite 410  
Round Rock, Texas 78665  
(w/o enclosures)

Mr. Maen Hourani, PE  
Dannenbaum Engineering  
Corporation  
3100 West Alabama Street  
Houston, Texas 77098  
(w/o enclosures)

Mr. William P. Hicks, PE  
HW Lochner, Inc.  
Suite 1050  
12001 North Central Expressway  
Dallas, Texas 75243  
(w/o enclosures)

Mr. Gary Moonshower, PE  
Brown & Gay Engineers, Inc.  
700 North Pearl, Suite 2100  
Dallas, Texas 75201  
(w/o enclosures)

Mr. William Wimberley, PE  
Teague Nall and Perkins, Inc.  
1100 Macon Street  
Fort Worth, Texas 76102  
(w/o enclosures)

Mr. Scott Stockburger, PE  
KCI Technologies, Inc.  
1431 Greenway Drive  
Irving, Texas 75038  
(w/o enclosures)

Mr. R. Kyle Jones, PE  
Atkins North America, Inc.  
18383 Preston Road, Suite 500  
Dallas, Texas 75252  
(w/o enclosures)

Mr. L. Daniel Tanksley  
Vice President/General Counsel  
Halff Associates, Inc.  
1201 North Bowser Road  
Richardson, Texas 75081  
(w/o enclosures)

Mr. Juan Mendoza Sierra, PE  
Freese and Nichols, Inc.  
4055 International Plaza, Suite 200  
Fort Worth, Texas 76109  
(w/o enclosures)

Mr. James Glen Cowart, PE  
Chad Wright Engineering, Inc.  
305 South Broadway, Suite 403  
Tyler, Texas 75702  
(w/o enclosures)

Mr. Gus Nowak, Jr., PE  
Excelsis, Inc.  
2825 Wilcrest Drive, Suite 100  
Houston, Texas 77042  
(w/o enclosures)

Mr. Joel R. Colwell, PE  
Midtown Engineers, LLC  
5225 Katy Freeway, Suite 400  
Houston, Texas 77007  
(w/o enclosures)

Mr. Joseph A. Murphy, PE  
Lina T. Ramey & Associates, Inc.  
3320 Belt Line Road  
Farmers Branch, Texas 75234  
(w/o enclosures)

Mr. H. Carl Bain III, PE  
Bain Medina Bain, Inc.  
7073 San Pedro Avenue  
San Antonio, Texas 78216  
(w/o enclosures)

Mr. Ayub R. Sandhu, PE  
ARS Engineers, Inc.  
Suite 1250  
12801 North Central Expressway  
Dallas, Texas 75243  
(w/o enclosures)

Ms. Amparo Ortega, PE  
AIA Engineers, Ltd.  
6606 LBJ Freeway, Suite 150  
Dallas, Texas 75240  
(w/o enclosures)