



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 8, 2016

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

OR2016-07944

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# 604925.

The Texas Department of Transportation (the "department") received a request for documents pertaining to eleven specified procurements. You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Additionally, you state release of some the submitted 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 the companies' rights to submit arguments to this office as to why the submitted information 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, Fendley & Associates, Inc. ("CobbFendley"); CP&Y, Inc. ("CP&Y"); and Structural Engineering Associates, Inc. ("SEA"). We have considered the submitted arguments and reviewed the submitted information, a portion of which is a representative sample.²

¹We note the department does not inform us which interested third parties it notified.

²We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Initially, 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. 2015-19036 (2015), 2015-26376 (2015), 2015-26573 (2015), 2016-03677 (2016), and 2016-05954 (2016). CobbFendley and CP&Y now seek to withhold some of their information previously ordered released in these rulings 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 CobbFendley and CP&Y now raise section 552.104 of the Government Code for some of 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 CobbFendley or CP&Y. Furthermore, 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. 2015-19036, 2015-26376, 2015-26573, 2016-03677, and 2016-05954 as previous determinations and withhold or release the identical information in accordance with those rulings.³ *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 requested information that is not subject to those 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) 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 received comments from only CobbFendley, CP&Y, and SEA explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the

³As we are able to make this determination, we need not address the third parties' arguments against disclosure of this information.

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 any of the submitted information 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). 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). The department represents Exhibits B and C pertain to competitive bidding situations. The department explains Exhibit B pertains to a procurement, which is still under negotiation and the related contracts have not yet been executed. The department states disclosure of Exhibit B would allow third-party competitors to tailor their negotiation strategy depending on the competition and undermine the contract negotiation process. Further, the department explains Exhibit C consists of scoring and evaluation criteria documents that relate to contracts that have been awarded and executed. However, the department states it “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” The department asserts the disclosure of Exhibit C will undercut its negotiating position with respect to future procurements for such contracts, and would allow third-party competitors to tailor their letters of interest to specific evaluation criteria, undermining the quality of letters of interest and undermining competition among competitors. After review of the information at issue and consideration of the arguments, we find the department has established the release of Exhibits B and C would give advantage to a competitor or bidder. Thus, the department may withhold Exhibits B and C under section 552.104(a) of the Government Code.⁴

Further, CP&Y states it has competitors. CP&Y argues release of portions of its information reveal proprietary information to competing firms and give such firms a competitive advantage in future procurements. After review of the information at issue and consideration of the arguments, we find CP&Y has established the release of the information at issue, which we have marked, would give advantage to a competitor or bidder. Thus, the department may withhold the information we have marked in Exhibit D under section 552.104(a) of the Government Code.

In summary, the department must continue to rely on Open Records Letter Nos. 2015-19036, 2015-26376, 2015-26573, 2016-03677, and 2016-05954 as previous determinations and withhold or release the identical information in accordance with those rulings. The

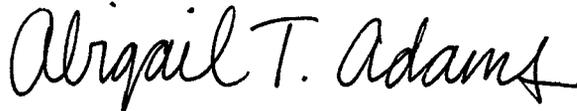
⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

department may withhold Exhibits B and C and the information we have marked in Exhibit D 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, 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,

A handwritten signature in black ink that reads "Abigail T. Adams". The signature is written in a cursive, flowing style.

Abigail T. Adams
Assistant Attorney General
Open Records Division

ATA/akg

Ref: ID# 604925

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)