



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 9, 2016

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

OR2016-10545

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# 609163.

The Texas Department of Transportation (the "department") received a request for all information related to specified requests for proposals. You claim a portion of the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of sixty third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their right 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 Baseline Corporation ("Baseline"), Cobb, Fendley & Associates, Inc. ("Cobb"), CP&Y, Inc. ("CP&Y"), Halff Associates, Inc. ("Halff"), and Landtech, Inc. d/b/a Landtech Consultants, Inc. ("Landtech"). We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample.¹

¹We 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 understand you to claim some of the submitted information, which you have marked, is not responsive to the instant request because it consists of proposals that were disqualified by the department. Furthermore, Halff argues some of its information is not responsive to the instant request because the project at issue was cancelled after Halff's submission was made. However, we find this information was submitted in response to two of the specified requests for proposals. Because the request for information seeks all information related to the specified requests for proposals, this information is responsive to the present request. Accordingly, we will consider whether this information is excepted from disclosure.

Next, we note 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), 2015-22463 (2015), 2016-00373 (2016), 2016-02008 (2016), 2016-03136 (2016), 2016-05048 (2016), and 2016-05954 (2016). In Open Records Letter No. 2016-00373, we determined the department may withhold certain information under section 552.104 of the Government Code and must release the remaining information, including information related to CP&Y. In Open Records Letter No. 2016-03136, we determined the department may withhold certain information under section 552.104 of the Government Code and must release the remaining information, including information related to Landtech. We understand the department has released this information. However, CP&Y and Landtech now argue their information is excepted from disclosure under section 552.104 of the Government Code. Although, the department notified CP&Y and Landtech pursuant to section 552.305 of the Government Code when the department received the previous requests for information, these third parties did not submit comments objecting to the release of its information in the previous rulings. Accordingly, in our previous rulings, we determined the department must release CP&Y's and Landtech's responsive information. Section 552.007 of the Government Code provides, 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 by law. *See* Gov't Code § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, the department may not withhold CP&Y's and Landtech's previously released information under section 552.104. 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, 2015-22463, 2016-00373, 2016-02008, 2016-03136, 2016-05048, and 2016-05954 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 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). We will address

²As we are able to make this determination, we do not address Baseline's, Cobb's, and Landtech's arguments to withhold this information.

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 Baseline, Cobb, CP&Y, Halff, and Landtech 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). 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 B pertains to solicitation numbers 601CT0000001739 and 000000657, which are both ongoing competitive procurements. You state the contracts at issue are still under negotiation, have not yet been executed, and releasing this information would give an advantage to other proposers and undermine the contract negotiation process. After review of the information at issue and consideration of the arguments, we find you have established the release of the information in Exhibit B would give advantage to a competitor or bidder. Therefore, we conclude the department may withhold Exhibit B in its entirety under section 552.104(a) of the Government Code.³

We note a third party may invoke section 552.104. *Id.* CP&Y and Halff state they have competitors. CP&Y states release of a portion of its information would reveal "strategic and operational trade secrets" and provide an unfair competitive advantage to its competitors. Halff states release of a portion of its information would allow competitors to duplicate Halff's "successful formatting, explanations, and responses," also placing Halff at a competitive disadvantage. After review of the information at issue and consideration of the arguments, we find CP&Y and Halff have established the release of the information at issue in solicitation number 000000654, which we have marked, would give advantage to a competitor or bidder. Thus, the department may withhold the information we have marked in Exhibit C under section 552.104(a) of the Government Code.

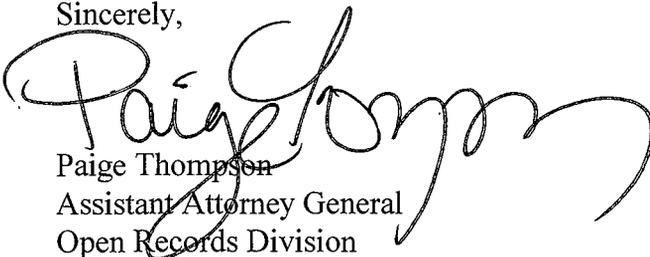
³As we are able to make this determination, we do not address the remaining arguments to withhold this information.

In summary, the department must continue to rely on Open Records Letter Nos. 2015-04614, 2015-22463, 2016-00373, 2016-02008, 2016-03136, 2016-05048, and 2016-05954 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold Exhibit B in its entirety and the information we have marked in Exhibit C under section 52.104(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,



Paige Thompson
Assistant Attorney General
Open Records Division

PT/bw

Ref: ID# 609163

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties
(w/o enclosures)