



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 10, 2016

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

OR2016-10685

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# 609354.

The Texas Department of Transportation (the "department") received a request for the scoring sheets, submitted proposals, and the winning vendor's Statement of Qualifications for two specified projects.¹ You claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Further, you state release of some information may implicate the proprietary interests of SH 183 Mobility Partners ("SH 183"), SouthGate Mobility Partners ("SouthGate"), The Data Entry Company ("Data"), Airport Expressway Partners, Dallas Horseshoe Connection, and Northgate Horseshoe Constructors JV ("NorthGate"). Accordingly, you state you have notified the third parties 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 SH 183, Northgate, SouthGate, and Data.

¹We note the department sought and received clarification of the information requested. *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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

We reviewed the submitted arguments and the submitted representative samples of information.²

Initially, we note some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2015-09972 (2015). We have no indication the law, facts, or circumstances on which Open Records Letter No. 2015-09972 was based have changed. Accordingly, the department must continue to rely on Open Records Letter No. 2015-09972 as a previous determination and withhold or release the identical information in accordance with this ruling.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).

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 SH 183, NorthGate, SouthGate, and Data 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish prima facie case information is trade secret), 542 at 3. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest the remaining notified third parties may have in the information.

Next, we note NorthGate, SouthGate, and Data seek only to withhold information the department has not submitted to this office for review. This ruling does not address information that was not submitted by the department and is limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested). Thus, as NorthGate, SouthGate, and Data do not seek to withhold any portion of the submitted information, we will not address their arguments under section 552.104 or section 552.110 of the Government Code.

²We 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.

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

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). 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, 841 (Tex. 2015). The department states the information in Exhibits B and D pertains to a competitive bidding situation. In addition, the department states it solicits proposals for the types of services at issue in the bids at issue on a recurring basis. Further the department states release of Exhibits B and D would undercut the department’s negotiation position with respect to future contracts as competitors could tailor their letters of interest to undermine competition amongst 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 D would give advantage to a competitor or bidder. Thus, we conclude the department may withhold Exhibits B and D under section 552.104(a).⁴

SH 183 claims some of its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110(b) protects “[c]ommercial or financial information for 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* ORD 661 at 5.

SH 183 argues portions of the submitted information consist of financial or commercial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find SH 183 has demonstrated the information it has indicated constitutes commercial or financial information, the release of which would cause the company substantial competitive injury. Accordingly, the department must withhold this information under section 552.110(b) of the Government Code.⁵

In summary, the department must continue to rely on Open Records Letter No. 2015-09972 as a previous determination and withhold or release the identical information in accordance with this ruling. The department may withhold Exhibits B and D under section 552.104(a). The department must withhold the information SH 183 has indicated under section 552.110(b) of the Government Code. The remaining information must be released.

⁴As our ruling is dispositive, we need not address the department’s remaining argument against disclosure of this information.

⁵As our ruling is dispositive, we need not address SH 183’s remaining argument against disclosure of this 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,



Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/bw

Ref: ID# 609354

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties
(w/o enclosures)