



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 12, 2016

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

OR2016-10874

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# 609939.

The Texas Department of Transportation (the "department") received two requests from the same requestor for certain information pertaining to a specified competitive procurement. You state you have released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state release of the remaining information may implicate the interests of Abt SRBI, Inc. ("Abt") and ETC Institute ("ETC"). Accordingly, you state you notified these third parties of the request for information and of their rights to submit arguments stating why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from Abt. We have considered the submitted arguments and reviewed the submitted information, a portion of which constitutes a representative sample.¹

¹We 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.

You inform us 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. 2016-04290 (2016). In Open Records Letter No. 2016-04290, we determined the department may withhold the information at issue under section 552.104 of the Government Code. You inform us, and we agree, the circumstances have changed in regard to this information and the department may not rely on Open Records Letter No. 2016-04290 as a previous determination in this instance. *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 information is or is not excepted from disclosure). Accordingly, we will address the submitted arguments for the submitted 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 a competitive bidding situation. In addition, you state the information at issue consists of scoring and evaluation criteria documents that relate to a contract that has been awarded and executed. However, you state the department “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” You assert the disclosure of the information at issue will undercut the department’s 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 the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information in Exhibit B under section 552.104(a) of the Government Code.²

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) 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 not received comments from ETC explaining why its information should not be released. Therefore, we have no basis to conclude ETC has a protected proprietary interest in the remaining 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

²As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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 remaining information on the basis of any proprietary interest ETC may have in the information.

As noted above, 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 also invoke this exception, which is subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. Abt indicates it has competitors. In addition, Abt states release of portions of its information would give advantage to its competitors. After review of the information at issue and consideration of the arguments, we find Abt has 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 Abt indicated under section 552.104(a) of the Government Code.³

In summary, the department may withhold the information in Exhibit B and the information Abt 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, 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,



Kenny Moreland
Assistant Attorney General
Open Records Division

KJM/som

³As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

Ref: ID# 609939

Enc. Submitted documents

c: Requestor
(w/o enclosures)

2 Third Parties
(w/o enclosures)