



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 18, 2016

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

OR2016-11416

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# 610712.

The Texas Department of Transportation (the "department") received a request for all letters of interest and accompanying attachments submitted to the department in response to four specified professional service contract numbers. You state you are relying on Open Records Letter Nos. 2015-19036 (2015) and 2015-24395 (2015) with respect to some of the requested information. *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). 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 Pape-Dawson Engineers Inc. ("Pape-Dawson"), Kimley-Horn and Associates, Inc., and HDR Engineering, Inc. Accordingly, you state you notified these third parties of the request for information and of their right 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 Pape-

Dawson. We have considered the submitted arguments and reviewed the submitted information, a portion of which includes a representative sample of information.¹

We note the information in Exhibit B was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2016-11133 (2016). The department now seeks to withhold Exhibit B, which was previously ordered released in Open Records Letter No. 2016-11133, 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 previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although the department now raises section 552.104 of the Government Code for Exhibit B, 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 Exhibit B under section 552.104 of the Government Code. Furthermore, there is no indication the law, facts, and circumstances on which the prior ruling was based has changed. Accordingly, we conclude the department must continue to rely on Open Records Letter No. 2016-11133 as a previous determination and withhold or release Exhibit B in accordance with this ruling.² *See* ORD 673. Next, we address the arguments against the disclosure of the remaining information.

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) 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 Pape-Dawson explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have a protected proprietary interest 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

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

²As we are able to make this determination, we need not address the arguments against disclosure of this information.

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 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). Pape-Dawson argues release of its information in Exhibit C would 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 Pape-Dawson has established the release of the information at issue would give advantage to a competitor or bidder. Thus, the department may withhold Pape-Dawson’s information in Exhibit C under section 552.104(a) of the Government Code.

In summary, the department must continue to rely on Open Records Letter No. 2016-11133 as a previous determination and release Exhibit B in accordance with this ruling. The department may withhold Pape-Dawson’s information in Exhibit C under section 552.104(a) of the Government Code. The remaining information must be released.

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,



Kavid Singh
Assistant Attorney General
Open Records Division

KVS/som

Ref: ID# 610712

Enc. Submitted documents

c: Requestor
(w/o enclosures)

3 Third Parties
(w/o enclosures)