



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 25, 2016

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

OR2016-11922

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# 611548.

The Texas Department of Transportation (the "department") received four requests from the same requestor for bid proposals, specified documents, and all evaluation materials related to specified requests for proposals and specified projects. We understand you released some information. You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Although you take no position as to whether the remaining information is excepted under the Act, you state release of this information may implicate the proprietary interests of LBJ Mobility Group ("LBJ"), NTE Mobility Partners ("NTE"), OHL Infrastructure ("OHL"), Blue Ridge Transportation Group ("BTG"), SH 288 Mobility Alliance ("288 Alliance"), and SH 288 Mobility Partners ("288 Partners"). Accordingly, you state, and provide documentation showing, you notified LBJ, NTE, OHL, BTG, 288 Alliance, and 288 Partners 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 LBJ, NTE, BTG, and 288 Partners. We have also

received comments from Ferrovia Agroman US Corporation and Webber, LLC (collectively, "Ferrovia Webber"). We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note NTE and LBJ argue against the release of information that was not submitted by the department. This ruling does not address information that was not submitted by the department and is limited to the information the department has submitted for our review.<sup>2</sup> *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Next, the department informs 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. 2013-02381 (2013). In Open Records Letter No. 2013-02381, we determined, the department (1) may withhold certain information under section 552.104 of the Government Code; (2) must withhold certain information under sections 552.101, 552.130, and 552.136 of the Government Code; and (3) must release the remaining information. With the exception of the information pertaining to NTE, we understand there has not been any change in the law, facts, or circumstances on which Open Records Letter No. 2013-02381 was based. Accordingly, with the exception of the information pertaining to NTE, the department must continue to rely on Open Records Letter No. 2013-02381 as a previous determination and withhold or release the identical information in accordance with that ruling. *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).

With respect to NTE's information at issue in Open Records Letter No. 2013-02381, although the department notified NTE pursuant to section 552.305 of the Government Code when the department received the previous request for information, NTE did not submit comments objecting to the release of its information in the previous ruling. Accordingly, in our previous ruling, we determined the department must release NTE's responsive information. We understand the department did so. However, NTE now argues its information is excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Although the law has changed with regard to a third party's right to

---

<sup>1</sup>We 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.

<sup>2</sup>We note LBJ exclusively seeks to withhold information the department has not submitted for our review. Thus, we do not address LBJ's arguments against disclosure of its information.

assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), 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 NTE's previously released information under section 552.104. However, because information subject to sections 552.101 and 552.110 is deemed confidential by law, we will address NTE's claims under these exceptions for its previously released 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*, 466 S.W.3d at 831. You represent the information in Exhibit B consists of scoring and evaluation criteria documents that relate to contracts that have 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 argue the disclosure of Exhibit B will undercut the department's negotiating position with respect to future procurement 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 Exhibit B would give advantage to a competitor or bidder. Therefore, we conclude the department may withhold Exhibit B under section 552.104(a) of the Government Code.<sup>3</sup>

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 not received comments from OHL or 288 Alliance explaining why the submitted information should not be released. Therefore, we have no basis to conclude OHL or 288 Alliance has 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, 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 submitted information on the basis of any

---

<sup>3</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

proprietary interest OHL or 288 Alliance may have in the information. 288 Partners states its information is excepted from disclosure under section 552.104 of the Government Code. As noted above, section 552.104(a) 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 831. 288 Partners states it has competitors. In addition, 288 Partners argues the release of some of its information at issue would give advantage to competitors or other bidders. After review of the information at issue and consideration of the arguments, we find 288 Partners 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 288 Partners has indicated under section 552.104(a) of the Government Code.<sup>4</sup>

Next, Ferrovia Webber, BTG, and NTE state portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement’s definition of trade secret as well as the

---

<sup>4</sup>As our ruling is dispositive, we need not address 288 Partners’ remaining arguments against disclosure of the information at issue.

Restatement's list of six trade secret factors.<sup>5</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. See ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; see also *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that 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, that substantial competitive injury would likely result from release of the information at issue. *Id.*; see also ORD 661 at 5.

As mentioned above, NTE's information was at issue in Open Records Letter No. 2013-02381. In the prior ruling, the department notified NTE of the request for information pursuant to section 552.305 of the Government Code. NTE did not object to the release of its information. Since the issuance of the previous ruling on February 11, 2013, NTE has not disputed this office's conclusion regarding the release of the information. In this regard, we find NTE has not taken any measures to protect its information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause NTE substantial harm. See Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; see also ORDs 661, 319 at 2, 306

---

<sup>5</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

at 2, 255 at 2. Accordingly, we conclude the department may not withhold NTE's information that was at issue in Open Records Letter No. 2013-02381 under section 552.110 of the Government Code.

Ferrovial Webber and BTG argue portions of their information consist of commercial information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Ferrovial Webber and BTG have established the release of the financial statements at issue and the information we indicated under section 552.110(b) would cause substantial competitive injury. Nevertheless, to the extent Ferrovial Webber, BTG, or any of their respective subsidiaries has published any of the financial statements at issue on their website, this information is not confidential under section 552.110. Accordingly, the department must withhold the financial statements at issue under section 552.110(b), provided Ferrovial Webber, BTG, or any of their respective subsidiaries has not published the financial statements on their websites. Further, the department must withhold the portions of BTG's information we indicated under section 552.110(b) of the Government Code. However, we find Ferrovial Webber and BTG have failed to demonstrate the release of the remaining information at issue would result in substantial harm to their competitive positions. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, the department may not withhold any the remaining information at issue under section 552.110(b).

Ferrovial Webber and BTG also assert some of their remaining information, including any remaining financial statements, constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find BTG and Ferrovial Webber have failed to demonstrate any portion of their remaining information at issue meets the definition of a trade secret. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Consequently, the department may not withhold any of the remaining information at issue under section 552.110(a) of the Government Code.

NTE also seeks to withhold portions of its remaining information under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by section 223.204 of the Transportation Code, which provides, in part, as follows:

- (a) To encourage private entities to submit proposals under this subchapter, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal

compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Sections 223.203(b)(1) and (2), unless the private entity consents to the disclosure of the information;

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement, unless the private entity consents to the disclosure of the information or material; and

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

Transp. Code § 223.204(a). NTE claims its information is exempt from disclosure under section 552.101 of the Government Code in conjunction with section 223.204 of the Transportation Code. In this instance, the department has awarded a final contract for the project at issue, and we note the applicability of section 223.204 ends once a final contract has been awarded. *See id.* Accordingly, we find the department may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with section 223.204(a) of the Transportation Code.

BTG argues portions of its information are exempt from disclosure under section 552.101 of the Government Code in conjunction with common-law privacy. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that is (1) highly intimate or embarrassing, the publication of which would be highly objectionable to a reasonable person and (2) not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. Types of information considered intimate and embarrassing by the Texas Supreme Court are delineated in *Industrial Foundation*. *Id.* at 683. This office has found personal financial information not relating to a financial transaction between an individual and a governmental body is generally highly intimate or embarrassing. *See* Open Records Decision Nos. 523 (1989) (common-law privacy protects credit reports, financial statements, and other personal financial information), 373 (1983) (sources of income not related to financial transaction between individual and governmental body protected under common-law privacy). We note, however, common-law privacy protects the interests of individuals, not those of corporate and other business entities. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human

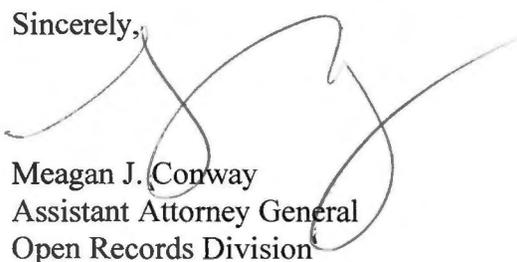
feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989) (corporation has no right to privacy (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950))), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990). Upon review, we find BTG has failed to demonstrate any portion of its remaining information is highly intimate or embarrassing and of no legitimate public interest. Thus, the department may not withhold the remaining information under section 552.101 in conjunction with common-law privacy.

In summary, with the exception of the information pertaining to NTE, the department must continue to rely on Open Records Letter No. 2013-02381 as a previous determination and withhold or release the identical information in accordance with that ruling. The department may withhold Exhibit B under section 552.104(a) of the Government Code. The department may withhold the information 288 Partners has indicated under section 552.104(a) of the Government Code. The department must withhold the financial statements contained within Ferrovial Webber's and BTG's information under section 552.110(b) of the Government Code, provided Ferrovial Webber, BTG, or any of their respective subsidiaries has not published the financial statements on their websites. Further, the department must withhold the portions of BTG's information we indicated under section 552.110(b) 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](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,



Meagan J. Conway  
Assistant Attorney General  
Open Records Division

MJC/akg

Ref: ID# 611548

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

6 Third Parties  
(w/o enclosures)