



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 16, 2016

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

OR2016-13741

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# 615188.

The Texas Department of Transportation (the "department") received a request for information pertaining to three specified traffic projects and three specified toll roads. You state the department has released some information to the requestor. 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 information is excepted under the Act, you state release of this information may implicate the proprietary interests of Atkins; Baez Consulting, LLC; CDM Smith; Cintra; LBJ Infrastructure Group ("LBJ"); and NTE Mobility Partners, LLC ("NTE"). 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 a representative for Cintra, LBJ, and NTE. We have considered the submitted arguments and reviewed the submitted 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 a representative of Cintra, LBJ, and NTE. Therefore, we have no basis to conclude any of the remaining third parties 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 proprietary interest the remaining third parties may have in the information.

Next, NTE seeks to withhold information the department did not submit for our review. Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the system. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

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 (Tex. 2015). You represent the information you have marked pertains to a competitive procurement, this procurement is still pending, and no contracts have been executed as of the date the department received the instant request. 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 you have marked under section 552.104(a).

We note NTE also raises section 552.104(a) for some of its submitted information. A private third party may invoke this exception. *Id.* NTE states it has competitors. In addition, NTE states release of this information would give an advantage to a competitor or bidder because the information at issue "projects the financial model backing NTE's contract pricing with [the department] and would allow competitors not otherwise privy to this information to reverse engineer and/or enhance their bids." After review of the information at issue and consideration of the arguments, we find NTE has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude department may withhold the information at issue, which we have marked, under section 552.104(a).

In summary, the department may withhold the information you and we have marked 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,



Sean Nottingham
Assistant Attorney General
Open Records Division

SN/eb

Ref: ID# 615188

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties
(w/o enclosures)