



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 1, 2016

Ms. Paige Mebane
Assistant City Attorney
City of Fort Worth
1000 Throckmorton Street, Third Floor
Fort Worth, Texas 76102

OR2016-15055

Dear Ms. Mebane:

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# 616819 (PIR# W050939).

The City of Fort Worth (the "city") received a request for the winning bid for a specified request for qualifications. Although you take no position as to whether the submitted information is excepted under the Act, you state release of this information may implicate the proprietary interests of Enercon Services, Inc. ("Enercon"). Accordingly, you state you notified Enercon of the request for information and of its 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 arguments from Enercon. We have considered and reviewed the submitted arguments and information.

Enercon asserts its financial details, resumes, project examples, and sub-contractors should be protected under section 552.104 of the Government Code. 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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, the court concluded a private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 466 S.W.3d 831 (Tex. 2015). 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." *Id.* at 841. Enercon states it has competitors. In addition,

Enercon states the information at issue, if released, would lead to a loss of competitive advantage. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the submitted information and consideration of the arguments, we find Enercon has established the release of the information it has indicated would give advantage to a competitor or bidder. Thus, we conclude the city may withhold the information at issue under section 552.104(a) of the Government Code.¹ As you raise no arguments for the remaining information, the city must release it.

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,



Ashley Crutenfield
Assistant Attorney General
Open Records Division

AC/dls

¹As our ruling is dispositive, we need not address the remaining argument against disclosure.

Ref: ID# 616819

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Party
(w/o enclosures)