



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 3, 2010

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR2010-13456

Dear Ms. Alexander:

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# 392734.

The Texas Department of Transportation (the "department") received three requests from the same requestor for: (1) all correspondence since June 17, 2008 between department employees and employees of four named companies, (2) all department contracts with, checks to, and invoices from the four named companies, and (3) all correspondence since June 17, 2008 between department employees and a named individual. You state you have provided some information to the requestor. You claim Exhibit C is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. Further, you state release of Exhibits B and C may implicate the proprietary interests of third parties. Accordingly, you state that you notified Bison Pro Fab ("Bison"), Durable Specialties, Inc. ("Durable"), and Paradigm Traffic Systems, Inc. ("Paradigm") of the request 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) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have received comments from Durable and Paradigm. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We assume that 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.

Initially, we note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the third party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Bison has not submitted arguments to this office explaining why any portion of the submitted information should not be released to the requestor. Therefore, we have no basis to conclude that the release of any portion of the submitted information relating to this company would implicate its proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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). Accordingly, we conclude the department may not withhold any portion of the submitted information on the basis of any proprietary interests that Bison may have in the information.

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991) (discussing statutory predecessor). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated that the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates that public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

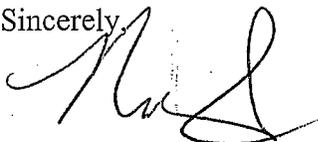
In this instance, you inform us that "[t]o maximize efficiency and save time and money, [the department] has instituted a 'prequalification' procedure that requires contractors to submit certain financial information in advance of any bid." *See* 43 T.A.C. § 9.12(b)(1) (listing requirements for prequalification). You assert that the release of Exhibit C "would adversely affect [the department's] ability to compete for contractors with entities that do not have to release private financial information" and would, in effect, reduce competition on competitive bids. Based on your representations, we find you have demonstrated that public release of Exhibit C would cause specific harm to the department's interests in particular competitive bidding situations. Therefore, the department may withhold Exhibit C from

disclosure under section 552.104 of the Government Code.² As no exceptions to disclosure of Exhibit B have been raised, it 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Nneka Kanu
Assistant Attorney General
Open Records Division

NK/em

Ref: ID# 392734

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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(w/o enclosures)

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²As our ruling is dispositive, we need not address the remaining arguments against disclosure.