



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 29, 2013

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas, 78701-2483

OR2013-07028

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# 485601.

The Texas Department of Transportation (the "department") received two requests for all requests for relief for bid errors and/or subsequent protests of award during specified periods of time. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified CKorp, L.L.C. ("CKorp"); Timberline Constructors, Inc. ("Timberline"); K-Bar Services, Inc. ("K-Bar"); Encino Landscape, Inc. ("Encino"); Missouri Petroleum; Texas Cutters; Brydl Contracting, Inc. ("Brydl"); Mitchell Enterprises ("Mitchell"); DeAngelo Brothers, Inc. ("DeAngelo"); Big State Maintenance, Inc. ("Big State"); Crown Civil Construction Corp. ("Crown Civil"); Satterfield and Pontikes Construction, Inc. ("S & P Construction"); F. N. Ploch Construction Co. ("F. N. Ploch"); Menendez-Donnell & Associates ("Menendez-Donnell"); Greenland Nationwide Landscaping Corp. ("Greenland"); MMR Services Co. ("MMR"); and Prater Equipment ("Prater") 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 Crown Civil. We have reviewed the submitted information and the submitted arguments.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e). The department received the first request for the information at issue on February 11, 2013. You inform us the department was closed on February 18, 2013. Accordingly, you were required to provide the information required by section 552.301(e) by March 5, 2013. Although the department timely submitted some of the responsive information on February 25, 2013, we note the department submitted additional information that is responsive to the first request on March 21, 2013, in response to the second request for information. Accordingly, we conclude the department failed to comply with the procedural requirements mandated by section 552.301 of the Government Code with respect to the additional responsive information submitted on March 21, 2013.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing the information is made confidential by another source of law or affects third party interests. *See* ORD 630. Section 552.104 is a discretionary exception that protects a governmental body's interest and may be waived. Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government). Thus, in failing to comply with the procedural requirements of section 552.301, the department has waived its claim under section 552.104 for the additional responsive information submitted on March 21, 2013. However, third party interests can provide a compelling reason to withhold information. Accordingly, we will consider any third party interests for the untimely submitted information. Additionally, we will consider your arguments under section 552.104 for the timely submitted information.

Section 552.104 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 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 and to protect a governmental body’s interests in certain other competitive situations. *See* Open Records Decision Nos. 593 (1991), 592 (1991) (construing 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 bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates 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).

This office has held a governmental body may also seek protection as a competitor in the marketplace under section 552.104 and avail itself of the “competitive advantage” aspect of this exception if it can satisfy two criteria. *See id.* First, the governmental body must demonstrate it has specific marketplace interests. *See id.* at 3. Second, the governmental body must demonstrate a specific threat of actual or potential harm to its interests in a particular competitive situation. *See id.* at 5. Thus, the question of whether the release of particular information will harm a governmental body’s legitimate interests as a competitor in a marketplace depends on the sufficiency of the governmental body’s demonstration of the prospect of specific harm to its marketplace interests in a particular competitive situation. *See id.* at 10. A general allegation of a remote possibility of harm is not sufficient. *See* Open Records Decision No. 514 at 2 (1988).

You state the department relies on “construction and maintenance contracts with private contractors to build and maintain the roads of Texas.” You state the submitted documents contain information provided by bidders for contracts that have been awarded and the contracts executed. You explain the department awards billions of dollars of new construction and maintenance contracts, and new bids are always being sought and contracts being signed. You also state the department competes with other business entities to receive bidders. You assert release of the bid components will have a negative effect on competition for both the contractor and the state. We note the submitted information consists of communications with the department and other documents regarding errors made by bidders in various prior procurement processes. Upon review, we find you have not demonstrated

the department has an ongoing competitive or marketplace interest that would be harmed by release of the information at issue. Further, you have not specified how release of the information at issue would harm the department's negotiating position in future bidding situations. Consequently, we conclude the department may not withhold any of the submitted information under section 552.104 of the Government Code.

Next, 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 CKorp, Timberline, K-Bar, Encino, Missouri Petroleum, Texas Cutters, Brydl, Mitchell, DeAngelo, Big State, S & P Construction, F. N. Ploch, Menendez-Donnell, Greenland, MMR, or Prater explaining why any portion of the submitted information should not be released. Therefore, we have no basis to conclude CKorp, Timberline, K-Bar, Encino, Missouri Petroleum, Texas Cutters, Brydl, Mitchell, DeAngelo, Big State, S & P Construction, F. N. Ploch, Menendez-Donnell, Greenland, MMR, or Prater has a protected proprietary interest in any of 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 any of the submitted information on the basis of any proprietary interest CKorp, Timberline, K-Bar, Encino, Missouri Petroleum, Texas Cutters, Brydl, Mitchell, DeAngelo, Big State, S & P Construction, F. N. Ploch, Menendez-Donnell, Greenland, MMR, or Prater may have in the information.

Crown Civil states its information is excepted from disclosure under section 552.110(b) of the Government Code. 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.

Crown Civil argues if its proprietary and financial information is released, "[Crown Civil]'s long term relationship with doing business with [the department] on an open and candid basis will be affected and reevaluated." In advancing this argument, Crown Civil appears to rely on the test pertaining to the applicability of section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association & Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also* *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975

F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). The *National Parks* test provides commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. 498 F.2d 756. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration showing the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of Gov't Code § 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Crown Civil's interest in withhold its information.

Crown Civil argues portions of the responsive information consist of proprietary and financial information from Crown Civil, the release of which could cause financial harm and a loss of competitiveness under section 552.110(b) of the Government Code. Upon review, we find Crown Civil has demonstrated release of some of its information would cause the company substantial competitive injury. Accordingly, the department must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find Crown Civil has not demonstrated how release of its remaining information at issue would cause Crown Civil substantial competitive injury. See Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136(b) of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”¹ Gov't Code § 552.136(b); see *id.* § 552.136(a) (defining “access device”). Therefore, the

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

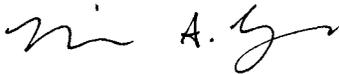
department must withhold the information we have marked pursuant to section 552.136 of the Government Code.

In summary, the department must withhold the information we have marked under section 552.110(b) of the Government Code and the information we have marked under section 552.136 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.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,



Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

Ref: ID# 485601

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

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