



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 16, 2013

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

OR2013-18010

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# 502518.

The Texas Department of Transportation (the "department") received a request for all documents in the department's Tyler field office related to completed and active projects involving Odum Services, L.P. ("Odum"), including all copies of certified payroll in which a named individual is listed.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. In addition, you state release of the submitted information may implicate the proprietary interests of Odum. Accordingly, you state, and provide documentation showing, you notified Odum of the request for information and of the company's right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to raise and explain applicability of exception to disclosure under certain

¹You state the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

circumstances). We have received comments from Odum. We have considered the submitted arguments and reviewed the submitted representative sample of information.²

Section 552.101 of the Government Code excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is 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 established. *Id.* at 681–82. Prior decisions of this office have determined personal financial information not related to a transaction between an individual and a governmental body generally meets the first prong of the common-law privacy test. *See generally* Open Records Decision No. 600 (1992). However, whether financial information is subject to a legitimate public interest and, therefore, not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983).

The submitted certified payroll records, submitted as Exhibit B, pertain solely to transactions between Odum and its employees. The department informs this office federal law provides, as a requisite to the receipt of federal funding for construction projects exceeding two thousand dollars, that state transportation agencies must include certain provisions in the agencies’ contracts with contractors. In this instance, you represent one such provision requires the department to receive and retain its contractors’ payroll records so the Federal Highway Administration, the Department of Labor, the General Accounting Office, or other agencies can audit those records to ensure the contractors’ compliance with applicable federal wage regulations. *See* 23 C.F.R. § 635.118. You additionally inform this office the department has not itself used the payroll records for any public purpose, other than receiving and retaining them for review by a federal agency. Therefore, based on these facts, we conclude there is no legitimate public interest in release of the submitted certified payroll records at this time, and the department must withhold these records in their entirety under section 552.101 of the Government Code in conjunction with common-law privacy.

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

²We 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.

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 executed. *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 (1982) (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 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 the 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.

In summary, the department must withhold Exhibit B under section 552.101 of the Government Code in conjunction with common-law privacy. The department may withhold Exhibit C under section 552.104 of the Government Code.³

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

³As our ruling is dispositive, we need not address the remaining arguments against disclosure.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Ni A. Ybarra". The signature is fluid and cursive, with the first name "Ni" and last name "Ybarra" clearly distinguishable.

Nicholas A. Ybarra
Assistant Attorney General
Open Records Division

NAY/ac

Ref: ID# 502518

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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Tyler, Texas 75702
(w/o enclosures)