



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2014

Mr. Robert Schell
Assistant Director of General Counsel
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75093

OR2014-16762

Dear Mr. Schell:

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# 536900 (NTTA File No. 2014-01086).

The North Texas Tollway Authority (the "authority") received a request for bidding information, proposals, and evaluations regarding a specified request for proposals. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You also notified Link America, L.L.C. ("Link") of the request for information and of its 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 considered the submitted arguments and reviewed the submitted information.

Initially, 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 Link explaining why its information should not be released. Therefore, we

have no basis to conclude Link 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 authority may not withhold any of the information at issue on the basis of any proprietary interest Link may have in it.

Section 552.101 of the Government Code exempts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. You state the submitted information is confidential under section 552.101 in conjunction with the authority’s procurement policy section 14.1, which you state provides policies for the authority’s procurement of goods and services and prohibits release of “[a]ll bids, proposals, or responses” in such a procurement until the contract is executed by the authority and its selected bidder. You seek to withhold the submitted information because it consists of the winning bid for the specified request for proposals, and the contract has not been executed between the authority and the winning bidder. You state policy section 14.1 was adopted in accordance with section 366.033(j) of the Transportation Code, which provides “[a regional tollway authority organized under chapter 366 of the Transportation Code] shall adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the authority.” Transp. Code § 366.033(j). However, we note a governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101 of the Government Code, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 3 (1991) (requiring statutory authority before governmental body may deem information confidential), 484 at 2 (1987) (governmental bodies may not by rule or contract render information confidential for purposes of Act); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976); *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). Upon review, we find section 366.033(j) does not provide the authority with specific statutory authority to promulgate a rule that makes bids, proposals, and responses maintained as part of the procurement process confidential for the purposes of the Act. Therefore, we conclude the authority may not withhold the submitted information under section 552.101 in conjunction with the authority’s procurement policy section 14.1.

Section 552.104 of the Government Code exempts from 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 a governmental body’s interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body). 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). Furthermore, section 552.104 does not apply when there is only a single individual or entity seeking a contract because there are no “competitors” for that contract. *See* Open Records Decision No. 331 (1982).

You inform us the submitted information is related to a request for proposals for radio equipment installation and maintenance. You state the authority only received a proposal from Link, and the authority has selected Link as the winning bidder. You further state the contract with Link has not been executed and if the authority fails to reach an agreement with Link, the authority “could terminate discussions with the firm, reject all proposals[,] and issue a new request for proposals.” Thus, you argue release of the submitted information prior to the execution of the contract could harm the authority’s interest in negotiating the contract or a future contract. Upon review, we find the authority has failed to demonstrate how the release of the submitted information would affect an ongoing competitive bidding situation. Therefore, the authority has failed to demonstrate the applicability of section 552.104 of the Government Code to this information; as such, the authority may not withhold it on that basis. As no other exceptions to disclosure have been raised, the authority must release the submitted 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,



Kristi L. Godden
Assistant Attorney General
Open Records Division

KLG/ds

Ref: ID# 536900

Enc. Submitted documents

c: Requestor
(w/o enclosures)