



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2014

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

OR2014-18875

Dear Ms. Parker:

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# 540333.

The Texas Department of Transportation (the "department") received a request for six specified vendor performance forms, the Bidder's Questionnaire on file for N-Line Traffic Maintenance, and formal warnings issued and complaints on file for N-Line Traffic Maintenance. You state the department has no information responsive to a portion of the request.¹ You state you will release some of the requested information. You claim the remaining requested information is excepted from disclosure under section 552.104 of the Government Code. You also state release of the submitted information may implicate the proprietary interest of a third party. Accordingly, you inform us, and provide documentation showing, you notified N-Line Traffic Maintenance, L.P. of the request for information and of its right to submit arguments to this office as to why the requested information should not be released to the requestor. *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

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

circumstances). We have considered the exception you claim and reviewed the submitted 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 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 (1982) (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

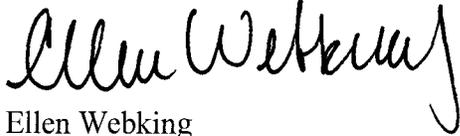
In this instance, you state, a contractor’s ability to bid on any contract is based upon the department’s qualification of the contractor. You inform us that “[t]o maximize efficiency and save time and money, [the department] has instituted a ‘prequalification’ procedure that requires contractors to submit certain financial information in advance of any bid.” *See* 43 T.A.C. § 9.12. You assert the release of Exhibit B 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 public release of Exhibit B would cause specific harm to the department’s interests in particular competitive bidding situations. Therefore, the department may withhold Exhibit B under section 552.104 of the Government Code.

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,



Ellen Webking
Assistant Attorney General
Open Records Division

EW/ac

Ref: ID# 540333

Enc. Submitted documents

c: Requestor
(w/o enclosures)

N-Line Traffic Maintenance LP
P.O. Box 4750
Bryan, Texas 77805-4750
(w/o enclosures)