



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 3, 2016

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

OR2016-12694

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# 612739.

The Texas Department of Transportation (the "department") received a request for information related to construction on State Highway 130 and the Mopac Improvement Project. You state you have no information responsive to a portion of the request.¹ You further state you released some information. You claim a portion of the submitted information is excepted from disclosure pursuant to a Facility Concession Agreement entered into with SH 130 Concession Company, LLC ("SH 130"). Although you take no position as to whether the remaining submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Cintra; HDR Engineering, Inc. ("HDR"); Maunsell Australia Pty Ltd ("Maunsell"); SH 130; and Zachry American Infrastructure ("Zachry"). Accordingly, you state, and provide documentation showing, you notified Cintra, HDR, Maunsell, SH 130, and Zachry of the request for information and of their rights 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 on behalf of Maunsell and SH 130. We have also received and considered comments from the requestor's attorney. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or

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).

should not be released). We have reviewed the submitted information and the submitted arguments.

Initially, we note and the department acknowledges, some of the submitted information, which we indicated, is not responsive to the instant request for information. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release such information in response to this request.

Next, we note the department seeks to withhold a portion of the submitted responsive information based on a Facility Concession Agreement with SH 130. However, we note information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See Attorney General Opinion JM-672* (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information did not satisfy requirements of statutory predecessor to Gov’t Code § 552.110). Consequently, unless the information falls within an exception to disclosure, the department must release it, notwithstanding any expectations or agreement specifying otherwise.

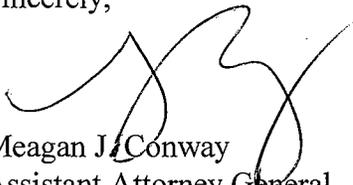
Maunsell and SH 130 assert the submitted responsive information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party’s property interest, a private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831, 839 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. Maunsell and SH 130 state they have competitors. Maunsell states release of the information at issue would provide its competitors with valuable insight into its proprietary methods of forecasting and analysis. SH 130 states release of the information at issue would provide its “competitors with a critical competitive advantage as to how [their] sponsors estimate, value and produce revenue streams and pricing.” Further, SH 130 states release of the information at issue would limit its ability to compete for similar projects in the future. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of

Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 832. After review of the information at issue and consideration of the arguments, we find Maunsell and SH 130 have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the submitted responsive information under section 552.104(a).²

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,



Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/akg

Ref: ID# 612739

Enc. Submitted documents

c: Requestor
(w/o enclosures)

5 Third Parties
(w/o enclosures)

²As our ruling is dispositive, we need not address SH 130's or Maunsell's remaining arguments against disclosure of this information.