



January 27, 2015

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OR2015-01534

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# 551477.

The Texas Department of Transportation (the "department") received a request for "all files and documents associated with consultant responses, including all Statements of Qualifications and all attachments, along with any and all evaluation or other 'scoring' materials" created by the department regarding the following solicitation numbers: 12-4RFP1101, 36-4RFP1001, 31-4RFP5019, 88-4RFP5063, 31-4RFP5020, 31-4RFP5021, and 32-415P5075.¹ You claim the information submitted as Exhibit C is excepted from disclosure under sections 552.104 and 552.111 of the Government Code.

Although you take no position as to whether the remaining information, which you have submitted in Exhibit B, is excepted under the Act, you state release of the information may implicate the interests of numerous third parties. Accordingly, you state, and provide documentation showing, the department notified the third parties of the request for information and of their right to submit arguments to this office stating why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from AIA Engineers, Ltd. ("AIA"); Baseline Corporation ("Baseline"); Brown and Gay Engineers, Inc. ("BGE");

¹We note the requestor excluded contract documents, rates, and insurance information submitted during the negotiations phase.

CobbFendley & Associates, Inc. ("CobbFendley"); Dannenbaum Engineering ("Dannenbaum"); IEA, Inc. ("IEA"); and Lupher, L.L.C. ("Lupher"). We have considered the submitted arguments and reviewed the submitted information. We also have received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-16480 (2014). In that ruling, we concluded the department must withhold the marked information pertaining to Dannenbaum regarding solicitation numbers 31-4RFP5019 and 31-4RFP5021 under section 552.110 of the Government Code and must release the remaining submitted information, including the information of AIA, CobbFendley, and IEA in solicitation numbers 31-4RFP5019 and 31-4RFP5021. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2014-16480 was based have changed. Accordingly, we agree the department must continue to rely on Open Records Letter No. 2014-16480 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note some of the remaining information appears to have been the subject of other previous requests for information, in response to which this office issued Open Records Letter Nos. 2014-19053 (2014) and 2014-15001 (2014). In Open Records Letter No. 2014-19053, we concluded, in part, the department must release the submitted information of BGE in solicitation number 32-415P5075.² As we have no indication the law, facts, and circumstances on which that ruling was based have changed, we conclude the department must continue to rely on Open Records Letter No. 2014-19053 as a previous determination and release the identical information in accordance with that ruling. *See* ORD 673.

In Open Records Letter No. 2014-15001, this office concluded the department may withhold the scoring and evaluation criteria documents in Exhibit C under section 552.104 of the Government Code and must release the submitted information of AIA, IEA, and numerous other third parties in solicitation number 31-4RFP5020. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed with respect to the information of IEA or the other third parties, with the exception of AIA. Accordingly, the department must continue to rely on Open Records Letter No. 2014-15001 as a previous determination and (1) withhold the scoring and evaluation criteria documents in Exhibit C under section 552.104 of the Government Code and (2) release the information of IEA and

²We note AIA's proposal for solicitation number 32-415P5075 was not at issue in Open Records Letter No. 2014-19053.

the other third parties, with the exception of AIA, in accordance with that ruling. *See* ORD 673. However, in Open Records Letter No. 2014-15001, the department notified AIA pursuant to section 552.305 when the department received the previous request for information, and AIA failed to submit comments objecting to the release of its information. Accordingly, in our previous ruling, we ruled the department must release AIA's information. However, AIA now claims some of its information in solicitation number 31-4RFP5020 is excepted from disclosure under section 552.110 of the Government Code. Because the proprietary interests of a third party are at stake, we will consider AIA's claims under section 552.110 for this information.

Dannenbaum asserts Open Records Letter No. 2014-06324A (2014) is a previous determination for its information in solicitation number 36-4RFP1001. In that ruling we concluded, in part, the department may withhold some of the information at issue under section 552.104 of the Government Code. However, the department informs us circumstances have changed and the information no longer pertains to a competitive bidding situation. Therefore, the department may not rely on Open Records Letter No. 2014-06324A as a previous determination. *See id.* Accordingly, we will address the submitted third party arguments for this information.

We note AIA also seeks to withhold its information in solicitation numbers 12-4RFP1101 and 32-414P5075, which the department has not submitted for our review. This ruling does not address that information and is limited to the information submitted as responsive by the department. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

We next note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from the third parties listed above. Thus, the remaining third parties have not demonstrated they have protected proprietary interests in any of the submitted information. *See id.* § 552.110(a)-(b); 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 the submitted information on the basis of any proprietary interests the remaining third parties may have in the 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 acknowledge the scoring and evaluation criteria documents in Exhibit C relate to contracts that have been awarded and executed. However, you state the department “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” You assert the disclosure of the information in Exhibit C will undercut the department’s negotiating position with respect to future procurements for such contracts. You also state disclosure of this information would allow third-party competitors to tailor their letters of interest to specific evaluation criteria, undermining the quality of letters of interest and undermining competition among competitors. Based on your representations, we find you have demonstrated public release of the information at issue would cause specific harm to the department’s interests in particular competitive situations. Therefore, the department may withhold the submitted information in Exhibit C under section 552.104 of the Government Code.³

BGE and CobbFendley contend their information in solicitation number 36-4RFP1001 is excepted from disclosure under section 552.104 of the Government Code. Lupher makes the same claim for specified portions of its information in solicitation number 12-4RFP1101. However, as noted above, the purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* ORD 592. As the department does not argue section 552.104 is applicable to this information, we will not consider the claims of BGE, CobbFendley, or Lupher under this section. *See id.* (section 552.104 may be waived by governmental body). Therefore, the department may not withhold any of the submitted information related to BGE and CobbFendley in solicitation number 36-4RFP1001 or Lupher’s information in solicitation number 12-4RFP1101 under section 552.104 of the Government Code.

Dannenbaum contends its information in solicitation number 36-4RFP1001 is excepted from disclosure under section 552.110 of the Government Code. Lupher contends its information in solicitation number 12-4RFP1101 is excepted from disclosure under section 552.110 of the Government Code. AIA claims section 552.110 protects its information in solicitation

³As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

numbers 31-4RFP5020 and 88-4RFP5063. We understand Baseline also to raise section 552.110 for its information in solicitation numbers 36-4RFP1001 and 12-4RFP1101.

Section 552.110 of the Government Code protects (1) trade secrets, and (2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. Gov't Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person that are privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be the following:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . It may . . . relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is

⁴The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

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, substantial competitive injury would likely result from release of the information at issue. *See id.*; *see also* ORD 661 at 5 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, release of requested information would cause that party substantial competitive harm).

As mentioned above, AIA’s information in solicitation number 31-4RFP5020 was subject to Open Records Letter No. 2014-15001. In the prior ruling, the department notified AIA of the request for information pursuant to section 552.305 of the Government Code. AIA did not object to the release of its information. Since the issuance of the previous ruling on August 25, 2014, AIA has not disputed this office’s conclusion regarding the release of the information, and we presume that, in accordance with that ruling, the department has released the information. In this regard, we find AIA has not taken necessary measures to protect its information in order for this office to conclude that any portion of that information now qualifies as trade secret information. *See* Gov’t Code § 552.110, RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* ORDs 661, 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). Accordingly, we conclude the department may not withhold any of AIA’s information in solicitation number 31-4RFP5020 under section 552.110(a) of the Government Code.

AIA, Baseline, and Luper argue portions of the remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude these third parties have failed to establish a *prima facie* case that any portion of their information meets the definition of a trade secret. We further find these third parties have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, none of these third parties’ information in solicitation numbers 88-4RFP5063, 36-4RFP1001, and 12-4RFP1101 may be withheld under section 552.110(a) of the Government Code.

Dannenbaum and Luper argue some of their information consists of commercial or financial information, the release of which would cause them substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Dannenbaum and Luper have demonstrated some of the information at issue constitutes commercial or financial information, the release of which would cause the companies substantial competitive injury. Accordingly, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find these companies have not demonstrated that substantial competitive injury would result from the

release of any of the remaining information at issue. *See* ORD 661 at 5. Therefore, we conclude the department may not withhold this information under section 552.110(b).

In summary, the department must continue to rely on Open Records Letter Nos. 2014-19053 and 2014-16480 as previous determinations and withhold or release the identical information in accordance with those rulings. The department must continue to rely on Open Records Letter No. 2014-15001 as a previous determination and (1) withhold the scoring and evaluation criteria documents in Exhibit C that were subject to that ruling under section 552.104 of the Government Code and (2) release the information of IEA and the other third parties, with the exception of AIA, in accordance with that ruling. The department may withhold the submitted information in Exhibit C under section 552.104 of the Government Code. The department must withhold the information we have marked in Exhibit B under section 552.110(b) of the Government Code. The department must release the remaining 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,



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CN/som

Ref: ID# 551477

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