



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

January 25, 2016

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

OR2016-01804

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# 595253.

The Texas Department of Transportation (the "department") received a request for information pertaining to three scope of work requests submitted by a specified company and a named individual. You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Further, you claim the release of some of the submitted information may affect the interests of GDC Marketing & Ideation ("GDC") and Sherry Matthews Advocacy Marketing ("Sherry Matthews"). Accordingly, you inform us you have notified GDC and Sherry Matthews of the request and of their rights to submit comments to this office as to why the information at issue 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 from GDC. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

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

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<sup>1</sup>We 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.

§ 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Sherry Matthews explaining why the submitted information should not be released. Therefore, we have no basis to conclude Sherry Matthews 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the department may not withhold the submitted information on the basis of any proprietary interest Sherry Matthews may have in the information.

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). 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.” *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). The department states Exhibits B and C pertain to a competitive bidding situation. In addition, the department states the information in Exhibit B pertains to a contract or contracts that are still under negotiation and have not been executed. The department states releasing the information in Exhibit B would undermine the contract negotiation process and result in less competition because each potential competitor would have advance knowledge of the capabilities and plans of its competitors. Further, the department acknowledged 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 in Exhibits B and C would give an advantage to a competitor or bidder. Therefore, the department may withhold Exhibits B and C under section 552.104 of the Government Code.<sup>2</sup>

GDC generally raises section 552.101 of the Government Code for the submitted information. 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. However, GDC has not pointed to any other statutory confidentiality provision, nor are we aware of any, that would make any of the submitted information confidential for purposes of section 552.101. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the department

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<sup>2</sup>As our ruling is dispositive for this information, we need not address the department’s remaining argument against disclosure of this information.

may not withhold any portion of the submitted information under section 552.101 of the Government Code.

GDC states some of its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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. *See* Gov't Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and 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:

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.<sup>3</sup> 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* Open Records Decision No. 552 at 5 (1990). However, we cannot

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<sup>3</sup>The 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).

conclude section 552.110(a) is 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 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. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (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).

GDC argues some of its information constitutes trade secrets. Upon review, we find GDC has failed to establish a *prima facie* case any of its information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORD 402. Therefore, the department may not withhold any portion of Exhibit D under section 552.110(a).

GDC further argues some of its information, including its pricing information, consists of commercial information, the release of which would cause the company substantial competitive harm under section 552.110(b) of the Government Code. However, we note GDC was the winning bidder for the scope of work requests at issue. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, we find GDC has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of its remaining information would cause the company substantial competitive harm. *See* ORD 661. Upon review, we find GDC has not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Accordingly, none of GDC’s information in Exhibit D may be withheld under section 552.110(b) of the Government Code.

In summary, the department may withhold Exhibits B and C under section 552.104 of the Government Code. The remaining information must be released.

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](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,



Katelyn Blackburn-Rader  
Assistant Attorney General  
Open Records Division

KB-R/akg

Ref: ID# 595253

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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