



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 21, 2016

Ms. Diana Shearer
Assistant County Attorney
El Paso County
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2016-25896

Dear Ms. Shearer:

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# 635052 (El Paso File No. OP-16-291).

The El Paso County Purchasing Office (the "county") received a request for all proposals pertaining to a specified bid. You claim some of the submitted information is excepted from disclosure under section 552.136 of the Government Code. Additionally, you state release of this information may implicate the proprietary interests of Valley Services, Inc. ("Valley"); Selrico Services, Inc.; and Compass Group USA, Inc. Accordingly, you state you notified the third parties of the request for information and of their rights to submit arguments 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 Valley. We have reviewed the submitted information and considered the submitted arguments.

Initially, we note some of the submitted information was the subject of a previous request for information and some of the submitted information may have been the subject of the previous request, as a result of which this office issued Open Records Letter No. 2013-22040 (2013). In Open Records Letter No. 2013-22040, this office determined the county must withhold the information pertaining to Valley that we marked under section 552.110(b) of

the Government Code, and the county must release the remaining information. Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See Gov't Code* § 552.007. We note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, to the extent the submitted information was previously released pursuant to Open Records Letter No. 2013-22040, the county may not withhold Valley's previously released information under section 552.104. We understand the remaining law, facts, and circumstances on which Open Records Letter No. 2013-22040 was based have not changed. Accordingly, we conclude the county must continue to rely on Open Records Letter No. 2013-22040 as a previous determination and withhold or release the identical information in accordance with that ruling.¹ We will consider Valley's arguments under sections 552.104 and 552.110 of the Government Code for any submitted information that was not at issue in the previous ruling, as well as your assertion of section 552.136 of the Government Code.

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 requested information relating to it should be withheld from disclosure. *See id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from the remaining notified third parties explaining why the submitted information should not be released. Thus, we have no basis for concluding the submitted information constitutes proprietary information of these third parties. *See 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 that information is trade secret), 542 at 3.* Accordingly, the county may not withhold the submitted information on the basis of any proprietary interests the remaining notified third parties may have in it.

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). A private third party may invoke this exception. *Boeing*, 466 S.W.3d at 831. 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. Valley states it has competitors. In addition, Valley states release of the information at issue would give advantage to a competitor or bidder and seeks to withhold some of its pricing information. For many years, this office concluded the terms of a contract and especially the pricing of a

¹As we are able to make this determination, we need not consider your remaining arguments against disclosure of this information.

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 831 at 831, 839. After review of the information at issue and consideration of the arguments, we find Valley has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude, to the extent the information at issue was not previously ordered released pursuant to Open Records Letter No. 2013-22040, the county may withhold the information we have indicated under section 552.104(a).²

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. *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.

²As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that 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 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). We note pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of the business," rather than "a process or device for continuous use in the operation of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Valley asserts the information at issue is excepted from disclosure under section 552.110(b) of the Government Code. We note Valley was the winning bidder with respect to the information at issue. We also note the pricing information of a winning bidder is generally not excepted under section 552.110(b). 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* ORD 514; *see also* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not

³The 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).

ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-45 (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, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); ORD 541 at 8. Thus, Valley's pricing information may not be withheld under section 552.110(b). Upon review, we find Valley has failed to demonstrate the release of the information at issue would result in substantial harm to its competitive position. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Accordingly, the county may not withhold the information at issue under section 552.110(b).

Valley asserts the information at issue constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Valley has failed to demonstrate the information at issue meets the definition of a trade secret. Further, we find Valley has not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORDs 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim), 319 at 2. Consequently, the county may not withhold any of the information at issue under section 552.110(a).

Section 552.136 of the Government Code states, "Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see also id.* § 552.136(a) (defining "access device"). This office has determined an insurance policy number is an access device number for the purposes of section 552.136. *See* Open Records Decision No. 684 (2009). Accordingly, the county must withhold all insurance policy numbers within the remaining information under section 552.136.

In summary, the county must continue to rely on Open Records Letter No. 2013-22040 as a previous determination and withhold or release the identical information in accordance with that ruling. To the extent the information at issue was not previously ordered released pursuant to Open Records Letter No. 2013-22040, the county may withhold the information we have indicated under section 552.104(a) of the Government Code. The county must withhold all insurance policy numbers within the remaining information under

section 552.136 of the Government Code. The county 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,

A handwritten signature in black ink that reads "Cole Hutchison". The signature is written in a cursive style with a large initial "C".

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/bhf

Ref: ID# 635052

Enc. Submitted documents

c: Requestor
(w/o enclosures)