



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 5, 2016

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

OR2016-26903

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# 636366.

The Texas Department of Transportation (the "department") received a request for documents submitted in response to nine specified requests for proposals.¹ Although you take no position as to whether the submitted information is excepted under the Act, you inform us release of this information may implicate the proprietary interests of 119 specified third parties. Accordingly, you state, and provide documentation showing, you notified the interested third parties of the request for information and of their right 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 Aguirre & Fields, LP ("Aguirre"); Aztec Engineering Group, Inc. ("Aztec");

¹We note the department sought and received clarification of the request. *See* Gov't Code § 552.222(b) (providing that if request for information is unclear, governmental body may ask requestor to clarify the request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Binkley & Barfield, Inc. (“BBI”); Cobb, Fendley & Associates, Inc. (“CobbFendley”); CP&Y, Inc. (“CP&Y”); Halff Associates, Inc. (“Halff”); Huitt-Zollars, Inc. (“Huitt-Zollars”); Johnson, Mirmiran & Thompson Engineering (“JMT”); Kennedy Consulting, Inc. (“KCI”); LJA Engineering, Inc. (“LJA”); Lockwood, Andrews & Newnam, Inc. (“LAN”); Maldonado-Burkett Intelligent Transportation Systems, LLP (“MBITS”); Pape-Dawson Engineers (“Pape-Dawson”); PaveTex Engineering Inc. (“PaveTex”); Raba-Kistner, Inc. (“Raba-Kistner”); Rodriguez Transportation Group (“RTG”); S&B Infrastructure, Ltd. (“S&BI”); and Walter P. Moore and Associates, Inc. (“WPM”).² We have considered the submitted arguments and reviewed the submitted information.

We note some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2016-03677 (2016), 2016-05954 (2016), 2016-07944 (2016), 2016-11133A (2016), 2016-16042 (2016), 2016-20143 (2016), 2016-25179 (2016), 2016-25808 (2016), 2016-26021 (2016), 2016-26443 (2016), and 2016-26722 (2016). We also note some of the third parties now seek to withhold some of their information which may have been previously ordered released under section 552.104 of the Government Code. Section 552.007 of the Government Code provides that, 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 under law. *See* Gov’t Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although these third parties now raise section 552.104 of the Government Code for the information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the department may not now withhold any of the previously released information under section 552.104 of the Government Code on behalf of these third parties. We also note Aztec, BBI, and WPM now seek to withhold some of their information which may have been previously ordered released in these rulings under section 552.110 of the Government Code. Because information subject to section 552.110 is deemed confidential by law, we will address the claims under section 552.110 for any previously released information. Except with regard to the claims of Aztec, BBI, and WPM under section

²We note the department did not comply with section 552.301 of the Government Code with regard to some of the submitted information. *See* Gov’t Code § 552.301(e). Nevertheless, because third party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301, we will consider the submitted arguments for the submitted information. *See id.* § 552.302; Open Records Decision No. 150 at 2 (1977).

552.110, there is no indication the law, facts, and circumstances on which most of the prior rulings were based have changed. Accordingly, except with regard to the claims of Aztec, BBI, and WPM under section 552.110, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the department may continue to rely on Open Records Letter Nos. 2016-03677, 2016-05954, 2016-07944, 2016-11133A, 2016-16042, 2016-20143, 2016-25179, 2016-25808, 2016-26021, 2016-26443, and 2016-26722 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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). With respect to any submitted information that was not at issue in the previous rulings, we will consider the submitted arguments.

Next, we note 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 § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any remaining third party explaining why the submitted information should not be released. Therefore, we have no basis to conclude any remaining third party 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, 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 remaining information on the basis of any proprietary interest any remaining third party may have in the information.

Next, we note RTG argues to withhold information related to a portion of the request which the requestor withdrew. Thus, this information is not responsive to the request for information. In addition, WPM argues against disclosure of information in their proposal submitted in response to solicitation number 601CT0000001733, which you have not submitted to this office for review. This ruling does not address information beyond what the department has submitted to us for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the department submitted as responsive to the request for information.

Aguirre, BBI, CobbFendley, CP&Y, Halff, Huitt-Zollars, JMT, KCI, LJA, LAN, MBITS, Pape-Dawson, PaveTex, Raba-Kistner, RTG, S&BI, and WPM argue section 552.104 of the

Government Code for some of the submitted information.³ Section 552.104(a) of the Government Code exempts 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 Co. v. Paxton*, 466 S.W.3d 831 (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. These third parties state they have competitors. They further state release of the information at issue would give a competitive advantage to their competitors. After review of the information at issue and consideration of the arguments, we find these third parties have 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 released, the department may withhold the information we have marked, along with the information submitted by CP&Y, LJA, MBITS, Pape-Dawson, PaveTex, and Raba-Kistner in its entirety, under section 552.104(a) of the Government Code.⁴

Aztec and WPM claim some of their information is excepted from disclosure under section 552.110 of the Government Code.⁵ In addition, to the extent its information has been released, and, thus, may not be withheld under section 552.104 of the Government Code, BBI claims 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957), *cert. denied*, 358 U.S. 898 (1958); *see also* ORD 552 at 2. Section 757 provides that a trade secret is:

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

³Although PaveTex also asserts section 552.101 of the Government Code, it makes no arguments to support this exception. Therefore, we presume PaveTex has withdrawn this argument for the information at issue. *See* Gov’t Code § 552.305.

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

⁵Although WPM also raises section 552.305 of the Government Code, we note this is not an exception to public disclosure under the Act. *See* Gov’t Code § 552.305. Rather, section 552.305 addresses the procedural requirements for notifying third parties their interests may be affected by a request for decision. *Id.*

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 Huffines*, 314 S.W.2d at 776. 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.⁶ 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 that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *See* 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, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6.

We are unable to determine whether Aztec’s, BBI’s, or WPM’s information was subject to any of the rulings discussed above. Accordingly, we must rule conditionally. If the information at issue was subject to any of the rulings discussed above, the department notified the third parties of the requests for information at issue pursuant to section 552.305 of the Government Code, the third parties did not object to the release of their information,

⁶The 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).

and we note they have not disputed this office's conclusion regarding the release of the information. In that case, we find Aztec, BBI, and WPM have not taken any measures to protect their information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause these third parties substantial harm. *See* Gov't Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, to the extent the information at issue was previously released, we conclude the department may not withhold the information at issue under section 552.110 of the Government Code.

To the extent the information at issue was not previously released, we find Aztec has established the release of the information we have marked under section 552.110(b) would cause it substantial competitive injury. Accordingly, to the extent the information at issue was not previously released, the department must withhold the information we have marked under section 552.110(b). However, we find Aztec and WPM have failed to establish release of any of the remaining information would cause them substantial competitive injury. *See* Gov't Code § 552.110(b). We also conclude WPM has not shown any of the remaining information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See id.* § 552.110(a); ORD 402 at 2-3. Therefore, the department may not withhold any of the remaining information under section 552.110.

In summary, with respect to the requested information that is identical to the information previously requested and ruled upon by this office, we conclude the department may continue to rely on Open Records Letter Nos. 2016-03677, 2016-05954, 2016-07944, 2016-11133A, 2016-16042, 2016-20143, 2016-25179, 2016-25808, 2016-26021, 2016-26443, and 2016-26722 as previous determinations and withhold or release the identical information in accordance with those rulings. To the extent the information at issue was not previously released, the department may withhold the information we have marked, along with information submitted by CP&Y, LJA, MBITS, Pape-Dawson, PaveTex, and Raba-Kistner in its entirety, under section 552.104(a) of the Government Code. To the extent the information at issue was not previously released, the department must withhold the information we have marked 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,

A handwritten signature in black ink, appearing to read "Tim Neal".

Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 636366

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Third Parties
(w/o enclosures)