



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 22, 2017

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

OR2017-03918

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# 646658.

The Texas Department of Transportation (the "department") received a request for the final question and responses of respondents to fourteen specified solicitations and the final statements of qualification submitted in response to eight specified requests for qualifications ("RFQ"). You state the department has released some of the requested information. Additionally, you state the department has no responsive information pertaining to one of the specified RFQ's.¹ You claim the information submitted as Exhibit B is excepted from disclosure under section 552.104 of the Government Code. Although you take no position as to whether the remaining submitted information, which you have submitted as Exhibit C, is excepted from disclosure, you state release of this information may implicate the

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).

proprietary interests of third parties.² Accordingly, you state you notified these third parties of the request for information and of each company's right to submit arguments to this office as to why the submitted information should not be released.³ *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 Act in certain circumstances). We have received comments from Aguirre, CCG, CP&Y, CSE, Halff, Huitt-Zollars, Garver, LJA, Pape, and S&B. We have considered

²We note, and you acknowledge, the department failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting a decision from this office with regard to the remaining submitted information. *See* Gov't Code § 552.301(e). Nonetheless, third party interests can provide a compelling reason to overcome the presumption of openness caused by failure to comply with section 552.301. *See id.* §§ 552.007, .302; Open Records Decision No. 150 at 2 (1977). Thus, we will consider whether the remaining submitted information is exempted from disclosure under the Act, notwithstanding the department's violation of section 552.301 in requesting this decision.

³The department notified the following third parties: AECOM Technical Services, Inc.; Ace American Structurepoint Group, Inc.; Aguirre & Fileds, L.P. ("Aguirre"); AIA Engineers, Ltd.; Alliance Transportation Group, Inc.; AMD Engineering, LLC; APM & Associates, Inc.; Arcadis U.S., Inc.; Arredondo, Zepeda & Brunz, LLC; Atkins North America, Inc.; Bain Medina Bain, Inc.; Barnhart Engineering; Binkley & Barfield, Inc.; Bridgefarmer & Associates, Inc.; Brown & Gay Engineers, Inc.; Burns & McDonnell Engineering Company, Inc.; CH2M Hill, Inc.; Camacho Hernandez & Associates, LLC; CDM Smith, Inc.; CDS Muery; Chad Wright Engineering, LLC; Chica & Associates, Inc.; Civil Associates, Inc.; Civil Consulting Group, PLLC ("CCG"); Civil Engineering Consultants; Civil Systems Engineering, Inc. ("CSE"); CivilCorp, LLC; CivilTech Engineering, Inc.; Cobb, Fendley & Associates, Inc.; Costello, Inc.; CP&Y, Inc. ("CP&Y"); Dannenbaum Engineering Corporation; Decon LLC; EJES Incorporated; Encotech Engineering Consultants, Inc.; Entech Civil Engineers, Inc.; Excelsis, Inc.; Freese and Nichols, Inc.; Garver, LLC ("Garver"); Gonzales-De La Garza & Associates; Gunda Corporation, LLC; H.W. Lochner; Halff Associates, Inc. ("Halff"); Hayden Consultants, Inc.; HDR Engineering, Inc.; HNTB Corporation; HR Green, Inc.; Huitt-Zollars, Inc. ("Huitt-Zollars"); H.W. Lochner, Inc.; IDCUS, Inc.; IEA Inc.; Infrastructure Associates, Inc.; IS Engineers, L.L.C.; Jacobs Engineering Group, Inc.; Jones & Carter, Inc.; K Friese & Associates, Inc.; Kellogg Brown & Root Services, Inc.; Kennedy Consulting, Inc.; K.C. Engineering, Inc.; Kimley-Horn and Associates, Inc.; Klotz Associates, Inc.; Kysu Group, PLLC; L&G Consulting Engineers, Inc.; Lamb-Star Engineering L.P.; Landtech Consultants; Lina T. Ramey and Associates, Inc.; LJA Engineering, Inc. ("LJA"); LNV Engineering; Lockwood, Andrews & Newnam, Inc.; Maestas & Associates, Inc.; MBCO Engineering, LLC; Michael Baker International, Inc.; Moreno Cardenas Inc.; Nathan D. Maier Consulting Engineers, Inc.; Neel-Schaffer, Inc.; O'Brien Engineering Services, LLC; Omega Engineers, Inc.; Othon, Inc.; Parkhill, Smith & Cooper, Inc.; Panheco Koch Consulting Engineers, Inc.; Pape Dawson Engineers, Inc. ("Pape"); Parsons Bickerhoff, Inc.; Parsons Transportation Group, Inc.; Pierce, Goodwin, Alexander & Linville, Inc.; Poznecki-Camarillo, Inc.; R.G. Miller Engineers, Inc.; RJ Rivera Associates, Inc.; Rodriguez Transportation Group, Inc.; RS&H, Inc.; RVE, Inc.; S & B Infrastructure, Ltd. ("S&B"); Sanchez-Salazar & Associates, LLC; Seiler/Lankes Group, LLC; Stantec Consulting Services Inc.; Teague Nall and Perkins, Inc.; TEDSI Infrastructure Group, Inc.; TranSystems Corporation; TSC Engineering Co.; Unintech Consulting Engineers, Inc.; URS Corporation; Vickrey & Associates, Inc.; Volkert, Inc.; Walter P. Moore and Associates, Inc.; Wilson & Company, Inc.; and Zarinkelk Engineering Services, Inc.

the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample of information.⁴

Initially, you state some of the requested information was the subject of previous requests for information, and that the department is relying on prior rulings with respect to the requested information previously ruled upon by this office. *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 a 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, as a result of these prior requests for information, this office issued Open Records Letter Nos. 2014-04286A (2014), 2014-16480 (2014), 2014-19053 (2014), 2015-01534 (2015), 2015-12115 (2015), 2015-16048 (2015), 2015-19036 (2015), 2015-26376 (2015), 2016-05048 (2016), and 2016-15635 (2016). Further, you state Exhibit C consists of the responsive information for which the department has not received a previous determination. However, we note some of the submitted information may have been previously released. Thus, we understand some of the third parties now seek to withhold some of their information previously ordered released under section 552.104 of the Government Code. 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 any of the submitted information was previously released pursuant to the prior rulings, the department may not now withhold the third parties' previously released information under section 552.104. We also note some third parties now seek to withhold some of their information which may have been previously ordered released in the prior 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. Furthermore, except with regard to the third parties' claims under section 552.110, there is no indication the law, facts, and circumstances on which the prior rulings were based have changed. Accordingly, except with regard to the third parties' claims 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

⁴We assume that 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 that those records contain substantially different types of information than that submitted to this office.

Letter Nos. 2014-04286A, 2014-16480, 2014-19053, 2015-01534, 2015-12115, 2015-16048, 2015-19036, 2015-26376, 2016-05048, and 2016-15635 as previous determinations and withhold or release the identical information in accordance with those rulings. *See* ORD 673. However, we will address the third parties' arguments against disclosure of the information not subject to the prior rulings.

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) of the Government Code 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 noted above, as of the date of this letter we have only received comments from Aguirre, CCG, CP&Y, CSE, Halff, Huitt-Zollars, Garver, LJA, Pape, and S&B. However, we have no basis to conclude any of the remaining third parties have protected proprietary interests 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 any portion of the submitted information on the basis of any proprietary interest the remaining third parties 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 (Tex. 2015). You represent Exhibit B pertains to a competitive bidding situation. In addition, you state Exhibit B pertains to procurements that are still under negotiation and that no contracts have been awarded. Further, you state the release of the information in Exhibit B would provide an advantage to proposers and undermine the contract negotiation process. After review of the information at issue and consideration of the arguments, we find the department has established the release of Exhibit B would give advantage to a competitor or bidder. Thus, to the extent the information at issue was not subject to the prior rulings, we conclude the department may withhold Exhibit B under section 552.104(a).⁵

Aguirre, CCG, CP&Y, CSE, Halff, LJA, and S&B assert portions of their information at issue in Exhibit C are protected under section 552.104 of the Government Code. Huitt-Zollars and Pape assert all of their information at issue in Exhibit C is protected under section 552.104 of the Government Code. As noted above, section 552.104(a) excepts from disclosure "information that, if released, would give advantage to a competitor or bidder."

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

Gov't Code § 552.104(a). A private third party may also invoke this exception, which is subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. Aguirre, CCG, CP&Y, CSE, Halff, Huitt-Zollars, LJA, Pape, and S&B state they have competitors. In addition, Aguirre, CCG, CP&Y, CSE, Halff, Huitt-Zollars, LJA, Pape, and S&B state the information at issue, if released, would give competitors an advantage in future competitive bidding situations. After review of the information at issue and consideration of the arguments, we find Aguirre, CCG, CP&Y, CSE, Halff, Huitt-Zollars, LJA, Pape, and S&B have established the release of the information at issue in Exhibit C would give advantage to a competitor or bidder. Thus, to the extent the information at issue was not subject to the prior rulings, we conclude the department may withhold the information we marked in Exhibit C under section 552.104(a) of the Government Code.⁶

S&B also claims portions of its remaining information at issue are excepted from disclosure under section 552.110 of the Government Code, which 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); *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 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

⁶As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

secret factors.⁷ 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* Open Records Decision No. 661 at 5-6 (1999).

Upon review, we find S&B has failed to demonstrate the information at issue meets the definition of a trade secret, and has not demonstrated the necessary factors to establish a trade secret claim. *See* ORD 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). Therefore, the department may not withhold any of S&B’s remaining information pursuant to section 552.110(a) of the Government Code.

S&B claims portions of its remaining information constitute commercial or financial information, the disclosure of which would cause the company substantial competitive harm. Upon review, we find S&B has failed to demonstrate the release of any of its remaining information would cause it substantial competitive injury. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5

⁷The 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).

(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 (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). Accordingly, none of S&B's remaining information at issue may be withheld under section 552.110(b) of the Government Code.

Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title or registration, or personal identification document issued by an agency of this state or another state or country is excepted from public release.⁸ See Gov't Code § 552.130. Accordingly, the department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code.

We note some of the remaining information at issue appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must continue to rely on the prior rulings with respect to the requested information previously ruled upon by this office as previous determinations and withhold or release the identical information in accordance with those rulings. To the extent the information at issue was not subject to the prior rulings, the department may withhold Exhibit B and the information we marked in Exhibit C under section 552.104(a) of the Government Code. The department must withhold the motor vehicle record information we have marked under section 552.130 of the Government Code. The department must release the remaining information at issue; however, any information subject to copyright may only be released in accordance with copyright law.

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.

⁸The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Kieran Hillis
Assistant Attorney General
Open Records Division

KH/sb

Ref: ID# 646658

Enc. Submitted documents

c: Requestor
(w/o enclosures)

10 Third Parties
(w/o enclosures)