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ATTORNEY GENERAL OF TEXAS

March 21, 2017

Mr. Frank Garza
Counsel for Brownsville Public Utility Board
Brownsville Public Utility Board
601 Northwest Loop 410, Suite 100
San Antonio, Texas 78216-5511

OR2017-05766

Dear Mr. Garza:

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# 651136.

The Brownsville Public Utility Board (the "board"), which you represent, received a request for all responses received from vendors answering a specified request for proposals ("RFP"). You state the board will release some information. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. You also state that a portion of the submitted information may be excepted from disclosure under section 552.110 of the Government Code, but you take no position as to whether the information is excepted under this section. Accordingly, you state, and provide documentation showing, you notified EPS Engineering & Design ("EPS") of the request for information and of its 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 EPS. We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the obligations of the board under the Act. Section 552.301 of the Government Code describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the

reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e). In this instance, you state, and provide documentation demonstrating, the board received the request for information on January 5, 2017. You state the board was closed on Monday, January 16, 2017. Accordingly the board's ten-business-day deadline was January 20, 2017. However, the envelope in which the board provided a copy of the specific information requested, as required by section 552.301(b), was postmarked January 23, 2017. *See id.* § 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United states mail, common or contract carrier, or interagency mail). Accordingly, we conclude the board failed to comply with the procedural requirements mandated by section 552.301 of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless there is a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ). The board claims section 552.104 of the Government Code for the submitted information. However, we find you have failed to establish a compelling reason to address this exception. Nevertheless, because third-party interests can provide compelling reasons to overcome the presumption of openness, we will consider EPS's argument against disclosure of the information at issue.

EPS states portions of its information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets obtained from a person 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.¹ 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, 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.

EPS contends some of its information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find EPS has established a *prima facie* case its customer information at issue constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent the customer information EPS seeks to withhold, which we marked, is not publicly available on EPS's website, the board must withhold it under section 552.110(a). However, EPS has failed to establish a *prima facie*

¹The 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).

case the remaining information at issue meets the definition of a trade secret. Moreover, we find EPS has not demonstrated the necessary factors to establish a trade secret claim for the remaining information at issue. *See* ORD 402. Therefore, none of the remaining information at issue may be withheld under section 552.110(a) of the Government Code.

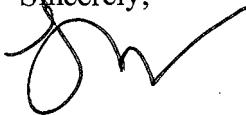
EPS argues portions of its remaining information consist of commercial information the release of which would cause EPS substantial competitive harm under section 552.110(b) of the Government Code. Upon review of EPS's arguments under section 552.110(b), we conclude EPS has established the release of its project approach would cause the company substantial competitive injury. Accordingly, the board must withhold EPS's project approach, which we marked, under section 552.110(b). However, we find EPS has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of EPS's remaining information would cause the company substantial competitive harm. *See* ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We therefore conclude the board may not withhold EPS's remaining information under section 552.110(b) of the Government Code.

In summary, to the extent the customer information EPS seeks to withhold, which we marked, is not publicly available on EPS's website, the board must withhold it under section 552.110(a) of the Government Code. The board must withhold EPS's project approach, which we marked, under section 552.110(b) 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, 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,



Jahanna Ward
Assistant Attorney General
Open Records Division

JW/eb

Ref: ID# 651136

Enc. Submitted documents

c: Requestor
(w/o enclosures)