



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 25, 2017

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

OR2017-11522

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# 659306.

The Texas Department of Transportation (the "department") received 13 requests from the same requestor for information pertaining to specified solicitations.¹ You state you are releasing some information. You also state you are relying on prior rulings with respect to some of the requested information. *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). You claim a portion of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Additionally, although you take no

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

position as to whether the remaining submitted information is excepted from disclosure, you state release of this information may implicate the 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. *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, CP&Y, Entech, Garver, Halff, Kennedy, Landtech, and LJA. We have considered the submitted arguments and reviewed the submitted information, a portion of which consists of a representative sample of information.³

Initially, 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 of the date of this letter we have only received comments from Aguirre, CP&Y, Entech, Garver, Halff, Kennedy, Landtech, and LJA. Therefore, 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

²The department notified the following third parties: AECOM Technical Services, Inc.; Aguirre & Fields, L.P. ("Aguirre"); AIA Engineers, Ltd.; Arredondo, Zepeda & Brunz, LLC; Bridgefarmer & Associates, Inc.; Brown & Gay Engineers, Inc.; Civil Consulting Group, PLLC; Civil Design Services, Inc.; CivilTech Engineering, Inc.; Cobb Fendley & Associates, Inc.; CP&Y, Inc. ("CP&Y"); Entech Civil Engineers, Inc. ("Entech"); Garver, LLC ("Garver"); Freese and Nichols, Inc.; Gorrondona & Associates, Inc.; Gunda Corporation, LLC; Halff Associates, Inc. ("Halff"); Hayden Consultants, Inc.; HDR Engineering, Inc.; HNTB Corporation; IEA Inc.; Jacobs Engineering Group, Inc.; Kennedy Consulting, Inc. ("Kennedy"); Kimley-Horn and Associates, Inc.; Lamb-Star Engineering Group, Inc.; Landtech Inc. ("Landtech"); Lina T. Ramey and Associates, Inc.; LJA Engineering, Inc. ("LJA"); Lockwood, Andrews & Newnam, Inc.; Michael Baker International, Inc.; Parsons Brinckerhoff, Inc.; Parsons Transportation Group, Inc.; Stantec Consulting Services Inc.; Surveying and Mapping, LLC; Transystems Corporation; Vickrey & Associates, Inc.; and Volkert, Inc.

³We 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 that those records contain substantially different types of information than that submitted to this office.

“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). The department represents Exhibit B consists of scoring and evaluation criteria documents that relate to contracts that have been awarded and executed. However, the department states it “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” The department asserts the disclosure of the information it indicated would “undercut [the department]’s negotiating position with respect to future procurements for such contracts.” 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, the department may withhold Exhibit B under section 552.104(a) of the Government Code.⁴

Aguirre, CP&Y, Halff, Kennedy, and Landtech assert portions of their information at issue are protected under section 552.104 of the Government Code. Garver and LJA assert all of their information at issue 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.” 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, CP&Y, Garver, Halff, Kennedy, Landtech, and LJA, state they have competitors. In addition, Aguirre, CP&Y, Garver, Halff, Kennedy, Landtech, and LJA 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, CP&Y, Garver, Halff, Kennedy, Landtech, and LJA have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we indicated in Exhibit C under section 552.104(a) of the Government Code.⁵

Entech generally claims its information at issue is 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:

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

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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 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.

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).

Upon review, we conclude Entech has failed to establish a *prima facie* case any portion of its information meets the definition of a trade secret. We further find Entech has not demonstrated the necessary factors to establish a trade secret claim for its information. See ORD 402. Additionally, we find Entech has not established any of the information at issue constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. See Gov't Code § 552.110(b). Therefore, none of Entech's information may be withheld under section 552.110(a) or section 552.110(b) of the Government Code.

We note some of the remaining information 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 may withhold Exhibit B and the information we indicated in Exhibit C under section 552.104(a) 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.

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,



D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/eb

Ref: ID# 659306

Enc. Submitted documents

c: Requestor
(w/o enclosures)

39 Third Parties
(w/o enclosures)