



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 31, 2017

Ms. Angela Hough
Assistant General Counsel
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2017-11850

Dear Ms. Hough:

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# 660241 (File# 2017-00810, 2017-00896, 2017-00918, 2017-00930, 2017-00945, 2017-00983, & 2017-01349).

The North Texas Tollway Authority (the "authority") received seven requests for information pertaining to a specified request for information by the authority. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You state release of some of this information may implicate the proprietary interests of BIT Mobility Solutions, LLC; BNY Mellon; Cubic Transportation Systems, Inc. ("Cubic"); Derex Technologies, Inflakes & P-Square Solutions Consortium; Electronic Transaction Consultants ("ETC"); Etan Industries ("Etan"); Kapsch TrafficCom IVHS, Inc. ("Kapsch"); Oracle; Sogeti USA, LLC; Spearlet; Tollplus, LLC ("Tollplus"); Transcore; and Xerox. Accordingly, you state, and provide documentation demonstrating, you notified the 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 Cubic, ETC, Etan, Kapsch, Oracle, Tollplus, Transcore, and Xerox. We have reviewed the submitted information and considered the submitted arguments.

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 not received comments from any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have 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 authority may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. You state the submitted information is confidential under section 552.101 in conjunction with the authority's procurement policy section 8.1, which states "bids, proposals, or responses shall be open for public inspection after the contract is awarded, unless indicated by the bid, proposal or response that the documents contain trade secrets, proprietary information and/or confidential information." You seek to withhold the submitted information because the contract has not yet been awarded. You state policy section 8.1 was adopted in accordance with section 366.033(j) of the Transportation Code, which provides "[a regional tollway authority organized under chapter 366 of the Transportation Code] shall adopt written procedures governing its procurement of goods and services that are consistent with general laws applicable to the authority." Transp. Code § 366.033(j). However, we note a governmental body may not promulgate a rule that designates information as being confidential, so as to bring the information within the scope of section 552.101 of the Government Code, unless the governmental body has been given specific statutory authority to do so. *See* Open Records Decision Nos. 594 at 3 (1991) (requiring statutory authority before governmental body may deem information confidential), 484 at 2 (1987) (governmental bodies may not by rule or contract render information confidential for purposes of Act); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677. (Tex. 1976); *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). Upon review, we find section 366.033(j) does not provide the authority with specific statutory authority to promulgate a rule that makes bids, proposals, and responses maintained as part of the procurement process confidential for the purposes of the Act. Therefore, we conclude the authority may not withhold the submitted information under section 552.101 in conjunction with section 8.1 of the authority's policy.

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 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. ETC, Etan, Tollplus, Transcore, and Xerox state they have competitors. ETC argues release of the information it marked would result in the information being exploited by competitors in future procurements and allow competitors to estimate ETC’s costs and margins on similar procurements. Etan argues release of its information at issue would give a competitor an unfair advantage by revealing specific elements of the processes and technical systems Etan offers. Tollplus argues release of the information it indicated would give advantage to a competitor by releasing Tollplus’ unique software, working methodology, and approach to system delivery. Transcore argues release of the information it marked would undermine Transcore’s ability to compete in the marketplace by allowing competitors to use Transcore’s system design and business pursuit strategy. Xerox argues release of its information at issue would give advantage to a competitor by allowing competitors to make use of Xerox’s information to improve their own system without expending time, money, or resources to independently develop these strategies. Upon review, we find ETC, Etan, Tollplus, Transcore, and Xerox have established release of the information at issue would give advantage to a competitor or bidder. Thus, the authority may withhold the information ETC marked, Etan’s information at issue, the information Tollplus indicated, the information Transcore marked, and Xerox’s information at issue under section 552.104(a) of the Government Code.¹

Cubic, Kapsch, Oracle, and Tollplus claim portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects two types of information: (1) trade secrets and (2) commercial 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. *See Gov’t Code* § 552.110(a)-(b).

Section 552.110(a) of the Government Code protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See Gov’t Code* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.); *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

¹As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* ORD 552 at 5-6. 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. *See* 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 5-6.

Cubic, Kapsch, Oracle, and Tollplus claim portions of their information are excepted under section 552.110(a) of the Government Code. Upon review, we find Cubic and Tollplus have

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others 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).

demonstrated the information we have marked constitutes trade secret information for purposes of section 552.110(a) of the Government Code. Accordingly, the authority must withhold the information we marked under section 552.110(a) of the Government Code. However, we find Kapsch and Oracle have failed to establish a *prima facie* case that any portion of their information meets the definition of a trade secret, nor have Kapsch and Oracle demonstrated the necessary factors to establish a trade secret claim for the information at issue. *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 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Accordingly, the authority may not withhold any of Kapsch and Oracle's information under section 552.110(a) of the Government Code, nor may the authority withhold any of Cubic and Tollplus' remaining information under section 552.110(a) of the Government Code.

Furthermore, we find Cubic, Kapsch, Oracle, and Tollplus have failed to demonstrate that release of their information would result in substantial damage to their competitive positions. Thus, Cubic, Kapsch, Oracle, and Tollplus have not demonstrated that substantial competitive injury would result from the release of any of their remaining information. *See* ORD 661. Accordingly, the authority may not withhold any of Cubic, Kapsch, Oracle, and Tollplus' information under section 552.110(b) of the Government Code.

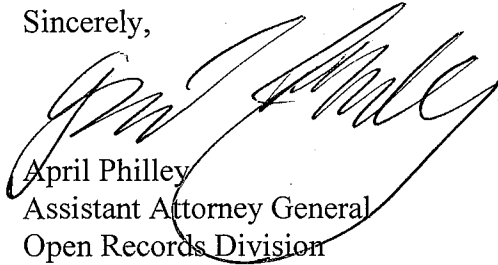
We note some of the remaining information appears to be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection 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 authority may withhold the information ETC marked, Etan's information at issue, the information Tollplus indicated, the information Transcore marked, and Xerox's information at issue under section 552.104(a) of the Government Code. The authority must withhold the portions of Cubic and Tollplus' information we marked under section 552.110(a) of the Government Code. The remaining information must 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,



April Philley
Assistant Attorney General
Open Records Division

AP/sb

Ref: ID# 660241

Enc. Submitted documents

c: 7 Requestors
(w/o enclosures)

8 Third Parties
(w/o enclosures)