



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 3, 2017

Ms. Jacqueline E. Hojem
Public Information Coordinator
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

OR2017-14794

Dear Ms. Hojem:

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# 664381 (MTA TPIA No. 2017-0280).

The Metropolitan Transit Authority of Harris County (the "authority") received a request for all information relating to a specified request for information. You claim the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of multiple third parties.¹ Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights 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

¹The authority notified: ACS Infrastructure Development, Inc; Ames & Gough; AECOM Technical Services, Inc.; Arcadis US, Inc.; Archer Walsh; ARUP Texas, Inc. ("Arup"); Cintra Global L.T.D.; Citigroup Global Markets, Inc.; Dannenbaum Engineering Corporation; FlatIron Constructors, Inc.; FCC Construction, Inc.; First Transit, Inc.; Golbalbia USA; Hiram Clarke/Fort Bend County Redevelopment Authority; Hatch Associates Consultants, Inc.; Hochtief PPP Solutions North America, Inc.; Goldman, Sachs & Company; Kiewit Infrastructure South Company; LTK Engineering Services; Macquarie Capital USA, Inc. ("Macquarie"); Meridiam Infrastructure North American Corporation; Parsons; Plenary Group; Sacys Concessions USA; Southwest Corridor Partners; Star America Infrastructure Partners, LLC; Sumitomo Corporation of Americas; Tubular Rail, Inc.; and Wells Fargo.

to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Arup and Macquarie. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (permitting interested third party to submit to attorney general reasons why requested information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we must address the authority's procedural obligations under section 552.301 of the Government Code when requesting a decision from this office under the Act. Pursuant to section 552.301(b), within ten business days after receiving a written request the governmental body must request a ruling from this office and state the exceptions to disclosure that apply. *Id.* § 552.301(b). You state the authority received the request for information on April 11, 2017. Accordingly, the authority's ten-business-day deadline was April 25, 2017. Although you timely requested a ruling from this office, you did not raise sections 552.104 and 552.111 of the Government Code until after the ten-business-day deadline passed. Consequently, we find the authority failed to comply with the procedural requirements of 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). By failing to timely raise sections 552.104 and 552.111 of the Government Code, we find the authority has failed to establish compelling reasons to address its claims under these sections. However, we note third party interests can provide a compelling reason to overcome the presumption of openness against disclosure of the submitted information. Accordingly, we will consider whether the submitted information must be withheld under the Act based on third-party interests.

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 the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude those 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 authority 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). 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. Macquarie states it has competitors. In addition, Macquarie states the information at issue, if released, would give a competitor an advantage in submitting future competitive bids. Macquarie also states the release of the information “could be used by competitors to duplicate Macquarie’s proprietary information relating to structure, strategy, and development of projects, thus eliminating a primary area of advantage for Macquarie.” After review of the information at issue and consideration of the arguments, we find Macquarie has established the release of its information would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold Macquarie’s information under section 552.104(a) of the Government Code.²

Section 552.110(a) of the Government Code protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. 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, 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

²As our ruling is dispositive, we need not address Macquarie’s remaining arguments against disclosure of its information.

Restatement's list of six trade secret factors.³ 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).

Arup states its information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Arup has failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret. We further find Arup has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORD 402. Consequently, the authority may not withhold Arup's information at issue under section 552.110(a) of the Government Code.

In summary, we conclude the authority may withhold Macquarie's information under section 552.104(a) of the Government Code. The authority 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.

³The 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).

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,



Jahna Ward
Attorney
Open Records Division

JW/som

Ref: ID# 664381

Enc. Submitted documents

c: Requestor
(w/o enclosures)

29 Third Parties
(w/o enclosures)