



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 29, 2018

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

OR2017-28412A

Dear Ms. Parker:

This office issued Open Records Letter No. 2017-28412 (2017) on December 14, 2017, which was assigned ID# 689496. We have examined our letter and determined that there was an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306 of the Government Code, and that error resulted in an incorrect decision, we will correct the previously issued letter. Consequently, this decision serves as the correct ruling and is a substitute for the letter issued on December 14, 2017. *See generally* Gov't Code 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code).

You ask whether certain information is subject to required public disclosure under the Act. Your request was assigned ID# 698401.

The Texas Department of Transportation (the "department") received a request for the top five responses to questions associated with seven specified bidding situations.¹ You 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

¹We note the requestor modified his request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

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). Although you take no position as to whether the submitted information is excepted under the Act, you state release of some of this information may implicate the proprietary interests of several third parties.² Accordingly, you state, and provide documentation demonstrating, you notified the 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 to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from AIA, LJA, Pape-Dawson, AECOM, H&H, and CP & Y. 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 department may not withhold 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). In considering whether a private third party may assert this exception, the supreme court reasoned because section 552.305(a) of the Government Code includes section 552.104 as an example of an exception that involves a third party's property interest, 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.

²The department notified the following third parties: AIA Engineers, Ltd. ("AIA"); Atkins North America, Inc.; LJA Engineering, Inc. ("LJA"); Pape-Dawson Consulting Engineers, Inc. ("Pape-Dawson"); Parsons Brinckerhoff Construction Services, Inc.; AECOM Technical Services, Inc. ("AECOM"); Civiltech Engineering, Inc.; H&H Resources, Inc. ("H&H"); Lockwood, Andrews & Newnam, Inc.; Omega Engineers, Inc.; Garver, LLC; KCI Technologies, Inc.; M&S Engineering, LLC; Pierce Goodwin Alexander & Linville, Inc.; CP & Y; Entech Civil Engineers; and Landtech, Inc.

AIA states it has competitors. In addition, AIA states release of its information at issue would expose the company to significant downside risk, including the revelation of strategic and operational trade secrets to competing firms. LJA states it has competitors. In addition, LJA states release of some of its information at issue would allow its competitors an advantage through access to LJA's approach and proprietary content in responding to similar procurements. Pape-Dawson states it has competitors. In addition, Pape-Dawson states release of some of its information at issue would reveal its unique experiences and technical expertise. H&H states it has competitors. In addition, H&H states release of its information at issue would give an advantage to its competitors. CP & Y states it has competitors. In addition, CP&Y states release of some of its information at issue would expose the company to significant downside risk, including the revelation of strategic and operational trade secrets to competing firms. Upon review, we find these third parties have established release of some of their information at issue would give advantage to a competitor or bidder. Accordingly, the department may withhold AIA's information at issue, H&H's information at issue, and the information LJA, Pape-Dawson, and CP & Y seek to withhold, which we marked, under section 552.104 of the Government Code.³

AECOM claims portions of its information are excepted 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*. 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* Open Records Decision No. 552 (1990). 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.

³As our ruling for this information is dispositive, we need not address the remaining arguments against its disclosure.

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.⁴ 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. *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 Record 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 (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).

AECOM contends some of its information is commercial or financial information, the release of which would cause substantial competitive harm to the company. Upon review, we find AECOM has established the release of some of its information at issue would cause it substantial competitive injury. Accordingly, the department must withhold the information we marked under section 552.110(b). However, we find AECOM has failed to demonstrate

⁴The 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).

that release of any of its remaining information at issue would result in substantial damage to its competitive position. Thus, the third party has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* ORD 661. Accordingly, the department may not withhold any of AECOM's remaining information under section 552.110(b) of the Government Code.

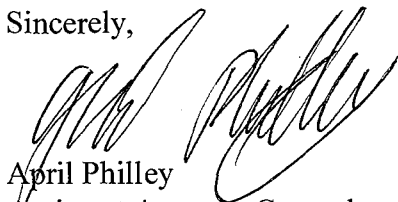
AECOM asserts portions of its remaining information at issue constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude AECOM has failed to establish a *prima facie* case that any portion of its remaining information at issue meets the definition of a trade secret. We further find AECOM has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of AECOM's remaining information may be withheld under section 552.110(a).

In summary, the department may withhold AIA's information at issue, H&H's information at issue, and the information LJA, Pape-Dawson, and CP & Y seek to withhold, which we marked, under section 552.104 of the Government Code. The department must withhold the information we marked under section 552.110(b). The department 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.

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/som

Ref: ID# 698401

Enc. Submitted documents

c: Requestor
(w/o enclosures)

17 Third Parties
(w/o enclosures)