



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 18, 2019

Ms. Kristen Lee
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002

OR2019-01709

Dear Ms. Lee:

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# 746786 (Ref. No. 18PIA0879).

The Harris County Purchasing Department (the "department") received a request for submitted proposals, bid tabulations, and the awarded contract pertaining to a specified bid solicitation. Although you take no position as to whether the submitted information is excepted from disclosure under the Act, you state release of this information may implicate the proprietary interests of Clark/Horizon CC, A Joint Venture ("CHCC"); Durotech Construction, Inc. ("Durotech"); Teal Construction Company ("Teal"); and J.T. Vaughn Construction, LLC ("Vaughn"). 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 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 the Act in certain circumstances). We have received comments from CHCC, Durotech, Teal, and Vaughn. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note you have not submitted information responsive to the portions of the request seeking evaluative documents and the awarded contract. To the extent any information responsive to these portions of the request existed on the date the department

received the present request for information, we assume it has been released. If the department has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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. Teal and Vaughn claim portions of their information at issue are excepted from disclosure under section 552.104 of the Government Code. Teal and Vaughn state they have competitors, and release of the information they indicated would provide an unfair advantage to their competitors. After review of the information at issue and consideration of the arguments, we find Teal and Vaughn have established the release of the information at issue, which we have marked and indicated, would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we marked and indicated under section 552.104(a) of the Government Code.¹

CHCC and Vaughn claim portions of their information at issue are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 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, 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

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

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.² 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).

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.

CHCC and Vaughn assert portions of their information at issue constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude CHCC and Vaughn have established a *prima facie* case that portions of their respective customer information, which we have marked, constitute trade secret information. Accordingly, to the extent the information at issue is not publicly available on either third party’s website, the department

²The 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).

must withhold the information we marked under section 552.110(a) of the Government Code.³

CHCC and Vaughn assert section 552.110(b) of the Government Code for portions of their remaining information. We note this office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). You do not inform our office who the winning bidder was in the bid solicitation at issue.⁴ Consequently, we must rule conditionally. To the extent neither CHCC nor Vaughn was the winning bidder in the bid solicitation at issue, we conclude their respective pricing information, which we have marked, consists of commercial or financial information disclosure of which would cause the company substantial competitive harm and thus must be withheld under section 552.110(b) of the Government Code. To the extent either CHCC or Vaughn was the winning bidder in the bid solicitation at issue, the department must release the winning bidder's pricing information. However, we find CHCC and Vaughn have not demonstrated the release of any of the remaining information at issue would result in substantial harm to their respective competitive positions. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (information relating to organization and personnel, professional references, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Thus, the department may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Durotech and Vaughn assert portions of their information at issue are confidential under section 552.101 of the Government Code in conjunction with section 262.030(c) of the Local Government Code.⁵ Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information made confidential by other statutes.

³As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

⁴We note we contacted the Harris County Attorney's Office for the identity of the winning bidder but received no response.

⁵Although Durotech and Vaughn do not explicitly raise section 552.101 of the Government Code, we understand them to raise this exception based on the substance of their arguments.

Section 262.030(c) of the Local Government Code provides a competitive proposal procedure for the purchase of high technology items by a county, and states, in pertinent part:

If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such.

Local Gov't Code § 262.030(c). In general, section 552.101 only excepts information from disclosure where the express language of a statute makes certain information confidential or states that information shall not be released to the public. Open Records Decision No. 478 (1987). The plain language of section 262.030(c) does not expressly make bid proposals confidential. Accordingly, we determine the information at issue is not confidential pursuant to section 262.030(c). Thus, the department may not withhold any portion of the remaining information at issue pursuant to section 552.101 of the Government Code in conjunction with section 262.030 of the Local 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 the information we marked and indicated under section 552.104(a) of the Government Code. To the extent the information at issue is not publicly available on either CHCC's or Vaughn's website, the department must withhold the information we marked under section 552.110(a) of the Government Code. To the extent neither CHCC nor Vaughn was the winning bidder in the bid solicitation at issue, the department must withhold their respective information we marked under section 552.110(b). To the extent CHCC or Vaughn was the winning bidder in the solicitation at issue, the department must release the winning bidder's pricing information. The department must release the remaining information; however, any information that is subject to copyright may be released only 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,



Blake Brennan
Attorney
Open Records Division

BB/eb

Ref: ID# 746786

Enc. Submitted documents

c: Requestor
(w/o enclosures)

4 Third Parties
(w/o enclosures)