



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 27, 2019

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

OR2019-05509

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# 752485.

The Texas Department of Transportation (the "department") received a request for all questionnaires and winning bidder materials pertaining to nineteen requests for quotations.¹ The department states it does not have information responsive to portions of the request.² The department also states it will withhold or release some of the requested information in accordance with previous determinations. Although the department takes no position regarding whether the submitted information is excepted from disclosure, the department

¹The department states, and provides documentation demonstrating, 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 that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

²The Act does not require a governmental body to create or release information that did not exist when a request for information was received. *See* *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ *dism'd*); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

states its release may implicate the proprietary interests of several third parties.³ Accordingly, the department states, and provides documentation showing, it notified the interested 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 Baseline, BGE, CobbFendley, GeoSolutions, Halff, Jones Carter, LTRA, and SAM. We have considered the submitted arguments and reviewed the submitted information.

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 Baseline, BGE, CobbFendley, GeoSolutions, Halff, Jones Carter, LTRA, and SAM explaining why the information at issue should not be released. Thus, we have no basis to conclude 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, 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. Therefore, 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). 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. Baseline, BGE, CobbFendley, Halff, Jones Carter, LTRA, and SAM state they have competitors. In addition, these third parties explain release of the information at issue would give their competitors an advantage. After review of the information at issue and consideration of the arguments, we find Baseline, BGE, CobbFendley, Halff, Jones Carter, LTRA, and SAM have established the release of the information at issue would give an advantage to a competitor or bidder. Accordingly, we conclude the department

³The department informs us it notified the following interested third parties of the request: Baseline Corporation ("Baseline"); BGE, Inc. ("BGE"); Civil Design Services, Inc. d/b/a CDS Muery; Cobb, Fendley & Associates, Inc. ("CobbFendley"); Doucet & Associates, Inc.; GeoSolutions, LLC ("GeoSolutions"); Gonzalez-De La Garza & Associates; Gorrondona & Associates, Inc.; H.A. Kuehlem Survey Company; Halff Associates, Inc. ("Halff"); Jones & Carter, Inc. ("Jones Carter"); Landtech, Inc.; Lina T. Ramey & Associates, Inc. ("LTRA"); McGray & McGray Land Surveyors, Inc.; Poznecki-Camarillo, Inc.; Rods Surveying, Inc.; Surveying And Mapping, LLC ("SAM"); Transystems Corporation d/b/a Transystems Corporation Consultants; United Engineers, Inc.; and Vickrey & Associates, Inc.

may withhold the information we marked under section 552.104(a) of the Government Code.⁴

Section 552.110 of the Government Code protects (1) trade secrets obtained from a person 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 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.⁵ 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

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

⁵The 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).

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).

We understand GeoSolutions to claim its information is excepted from disclosure under section 552.110(a) of the Government Code. Upon review, we find GeoSolutions failed to establish a *prima facie* case that any portion of its information meets the definition of a trade secret, nor has the company 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). Therefore, the department may not withhold any of the remaining information under section 552.110(a) of the Government Code.

In summary, the department may withhold the information we marked under section 552.104(a) of the Government Code. 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,



James M. Graham
Assistant Attorney General
Open Records Division

JMG/som

Ref: ID# 752485

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: 20 Third Parties
(w/o enclosures)