



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 18, 2019

Ms. Frances R. Broussard
General Counsel
Spring Branch Independent School District
955 Campbell Road
Houston, Texas 77024

OR2019-07423

Dear Ms. Broussard:

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# 754180.

The Spring Branch Independent School District (the "district") received a request for information pertaining to a specified request for proposals.¹ You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Further, you state release of the remaining information may implicate the proprietary interests of Brookstone, L.P. ("Brookstone"); Cadence McShane Construction Company, LLC ("Cadence"); C.A. Walker Construction ("C.A."); Comex Corp.; Crain Group ("Crain"); DL Construction; Drymalla; Durotech; Gamma Construction;

¹We note the district 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 when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

Corp.; Crain Group (“Crain”); DL Construction; Drymalla; Durotech; Gamma Construction; Gilbane Building Co. (“Gilbane”); Linbeck; Satterfield & Pontikes Construction, Inc. (“S&P”); Sterling Structures (“Sterling”); Stewart Builders; Tellepsen Builders, L.P. (“Tellepsen”); Webber Construction; and Westfall Group (“Westfall”). Accordingly, you state, and provide documentation showing, you notified the 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 on behalf of Brookstone, Cadence, C.A., Crain, Gilbane, S&P, Sterling, Tellepsen, and Westfall. We have considered the submitted arguments and reviewed the submitted information, some of which is a representative sample of information.²

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 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 district 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). 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.” *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The district represents Exhibits B and C pertain to a competitive bidding situation for goods or services the district currently seeks. In addition, the district states release of the information would give an advantage to bidders,

²We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

compromising the district's negotiating position, and a competitor could use the information to determine what information the district would consider favorably in the procurement process. After review of the information at issue and consideration of the arguments, we find the district has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the district may withhold Exhibits B and C under section 552.104(a) of the Government Code.³

As noted above, 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). Brookstone, C.A., Gilbane, S&P, Tellepsen, and Westfall 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 Brookstone, C.A., Gilbane, S&P, Tellepsen and Westfall have established the release of the information at issue would give an advantage to a competitor or bidder. Accordingly, we conclude the district may withhold the information we marked under section 552.104(a) of the Government Code.⁴

Cadence, Crain, and Sterling claim portions of their respective information are subject to 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

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

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

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 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 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5-6.

Cadence contends portions of its information are excepted under section 552.110(b) of the Government Code pursuant to the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See* 5 U.S.C. § 552(b)(4) (exempting from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or

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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

confidential.”). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in future. *National Parks*, 498 F.2d at 765. Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Cadence’s interests in its information.

Cadence, Crain, and Sterling argue the information at issue consists of commercial and financial information, the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Cadence has demonstrated some of the information at issue consists of commercial or financial information, the disclosure of which would cause Cadence substantial competitive harm. Thus, the district must withhold the information we marked under section 552.110(b) of the Government Code.⁶ However, we find Cadence, Crain, and Sterling have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the remaining information at issue would cause the respective companies substantial competitive harm. See ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, the district may not withhold the remaining information at issue under section 552.110(b).

Cadence, Crain, and Sterling assert portions of the remaining information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Cadence, Crain, and Sterling have failed to establish a *prima facie* case that any portion of their information meets the definition of a trade secret, nor have the companies 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,

⁶As our ruling is dispositive, we need not consider the remaining arguments against disclosure of this information.

qualifications, experience, and pricing not excepted under section 552.110). Therefore, the district may not withhold any of the remaining information under section 552.110(a) of the Government Code.

Section 552.136 of the Government Code provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.”⁷ Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See* Open Records Decision No. 684 at 9 (2009). Upon review, the district must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code.

We note some of the remaining information may 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 district may withhold Exhibits B and C and the information we marked pertaining to Brookstone, C.A., Gilbane, S&P, Tellepsen, and Westfall under section 552.104(a) of the Government Code. The district must withhold the information we marked under section 552.110(b) of the Government Code. The district must withhold the insurance policy numbers in the remaining information under section 552.136 of the Government Code. The district must release the remaining information; however, any information protected by copyright may only 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/>

⁷The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

[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,

A handwritten signature in black ink, appearing to read "D. Michelle Case". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

D. Michelle Case
Assistant Attorney General
Open Records Division

DMC/mo

Ref: ID# 754180

Enc. Submitted documents

c: Requestor
(w/o enclosures)

17 Third Parties
(w/o enclosures)