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ATTORNEY GENERAL OF TEXAS

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Mr. Jonathan Miles
Open Records Attorney
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711-3247

OR2019-35041

Dear Mr. Miles:

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# 801615 (Ref. Nos. 19892, 19937, and 19939).

The Texas Health and Human Services Commission (the "commission") received three requests from different requestors for certain information pertaining to a specified request for proposals. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the information at issue may implicate the proprietary interests of Deloitte Consulting, LLP ("Deloitte"); Mercer Health & Benefits, LLC ("Mercer"); and Navigant Consulting, Inc. ("Navigant"). Accordingly, you state, and provide documentation demonstrating, the commission notified these interested third parties of the request for information and of their right 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 Deloitte, Mercer, and Navigant. We have also received comments submitted by one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the three requests received by the commission differ in the types of information sought pertaining to the request for proposals specified in the request. Thus, the commission need not release information to any of the requestors that is not responsive to their respective requests.

Next, we note the submitted information contains an executed contract that is subject to section 2261.253 of the Government Code. Section 2261.253 provides, in relevant part:

(a) For each contract for the purchase of goods or services from a private vendor, each state agency shall post on its Internet website:

(1) each contract the agency enters into, including contracts entered into without inviting, advertising for, or otherwise requiring competitive bidding before selection of the contractor, until the contract expires or is completed[.]

...

(b) A state agency monthly may post contracts described by Subsection (a) that are valued less than \$15,000.

...

(e) A state agency that posts a contract on its Internet website as required under this section shall redact from the posted contract:

(1) information that is confidential under law; [and]

(2) information the attorney general determines is excepted from public disclosure under [the Act.]

...

(f) The redaction of information under Subsection (e) does not exempt the information from the requirements of Section 552.021 or 552.221.

Id. § 2261.253(a)(1), (b), (e)(1) (2), (f). The information at issue consists of an executed contract between the commission, a state agency, and Navigant, a private vendor, for the purchase of goods or services. We note the contract is valued at more than \$15,000 and has neither expired nor been completed. You raise section 552.104 of the Government Code for the contract at issue. Additionally, Navigant raises sections 552.104 and 552.110 of the Government Code for portions of the information at issue. However, the exceptions to disclosure found in the Act do not generally apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). The 85th Legislature amended section 2261.253; pursuant to the amendments, state agencies shall redact from contracts subject to section 2261.253 information that is confidential under law or information the attorney general determines is excepted from public disclosure under the Act. Gov't Code § 2261.253(e)(1)-(2); *see also id.* § 2261.253(f). We note the amendments “apply only in relation to a contract for which a state agency first advertises or otherwise solicits bids, proposals, offers, or qualifications on or after [September 1, 2017].” Act of May 29, 2017, 85th Leg., R.S., ch. 556, § 17(c). Upon review, we find the contract at issue

is subject to the amendments; therefore, we will consider the submitted arguments for the information at issue.

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, 841 (Tex. 2015). You state the information at issue pertains to an ongoing procurement situation. You also state, “[w]hile the procurement has been awarded, the time for protesting the issuance of the procurement has not yet passed[.]” You assert release of the information at issue “would weaken the [c]ommission’s position in the procurement[.]” After review of the information at issue and consideration of the arguments, we find you have established the release of most of the information at issue would give advantage to a competitor or bidder. Accordingly, with the exception of the information subject to 2261.253 of the Government Code, we conclude the commission may withhold the submitted information under section 552.104(a) of the Government Code.¹

You also seek to withhold the entirety of the contract subject to section 2261.253 of the Government Code, portions of which the commission has posted online, under section 552.104 of the Government Code. Additionally, Navigant seeks to withhold portions of the information at issue under section 552.104 of the Government Code. However, subsection 2261.253(e) states, in relevant part, “[a] state agency *that posts a contract on its Internet website as required under [section 2261.253] shall redact [information the attorney general determines is excepted from public disclosure] from the posted contract[.]*” See Gov’t Code § 2261.253(e) (emphasis added). Interpreting subsection 2261.253(e) to allow a state agency to withhold the entirety of a contract that the legislature, in the same section, expressly requires the state agency to post on its internet website is absurd and not consistent with the unambiguous language used by the legislature. Pursuant to the plain language of this subsection, a state agency may not withhold the entirety of a contract subject to section 2261.253. See *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009) (unambiguous statutory language is interpreted according to its plain language unless such an interpretation would lead to absurd results); Attorney General Opinion GA 0876 (2011); see also Sen. Comm. on Finance, Bill Analysis, Tex. S.B. 20, 84th Leg., R.S. (2015) (“The purpose of this bill is to reform state agency contracting by clarifying accountability, increasing transparency, and ensuring a fair competitive process.”). Therefore, the remainder of the contract subject to section 2261.253 may not be withheld in its entirety under section 552.104.

Navigant states it has competitors in the actuarial consulting services marketplace. Further, Navigant asserts release of portions of the remaining information would provide an unfair competitive advantage to its competitors and allow them to undercut Navigant in the market. After review of the information at issue and consideration of the arguments, we find Navigant has established the release of the information we indicated would give advantage to a competitor or bidder. Accordingly, we conclude the commission may

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

withhold the information we indicated under section 552.104(a) of the Government Code.² However, we find you and Navigant have failed to establish the release of any of the remaining information at issue would give advantage to a competitor or bidder. Therefore, we conclude the no portion of the remaining information may be withheld under section 552.104(a) of the Government Code.

Navigant asserts the remaining information at issue is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code 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 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This

² As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

³ The 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.

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).

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* Open Records Decision No. 661 at 5-6 (1999).

Navigant asserts the information at issue constitutes trade secrets under section 552.110(a) of the Government Code. However, upon review, we find Navigant has failed to demonstrate the information at issue meets the definition of a trade secret. Further, we find Navigant has not demonstrated the necessary factors to establish a trade secret claim for this information. *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. Therefore, the commission may not withhold any portion of the remaining information under section 552.110(a) of the Government Code.

Navigant also asserts the information at issue is excepted under section 552.110(b) of the Government Code. We note Navigant was the winning bidder, in this instance. The terms of a contract with a governmental body, especially pricing information of a winning bidder, are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *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). Upon review, we find Navigant has failed to demonstrate the release of any of the remaining information at issue would result in substantial harm to its competitive position. Therefore, we conclude the commission may not withhold any portion of the remaining information under section 552.110(b) of the Government Code.

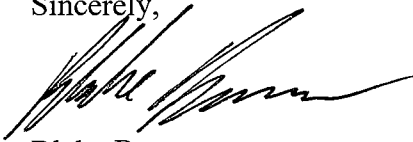
RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

In summary, with the exception of the contract subject to 2261.253 of the Government Code, which generally must be released, the commission may withhold the submitted information under section 552.104(a) of the Government Code. In releasing the contract, the commission may withhold the information we indicated under section 552.104(a) of the Government Code.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,



Blake Brennan
Assistant Attorney General
Open Records Division

BBX/be

Ref: ID# 801615

Enc. Submitted documents

c: 3 Requestors
(w/o enclosures)

c: 3 Third Parties
(w/o enclosures)