ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2007

Ms. Nicole B. Webster
Assistant City Attorney
City of Waco
P.O. Box 2570
Waco, Texas 76702-2570

OR2007-00531

Dear Ms. Webster:

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# 268946.

The City of Waco (the "city") received a request for all company responses to RFP# 2006-013 pertaining to on-line auctions for surplus items. Although you claim no exceptions to disclosure, you assert that release of the submitted information may implicate the proprietary interests of third parties. Pursuant to section 552.305 of the Government Code, you notified Shattuck & Associates Auctioneers ("Shattuck & Associates"), René Bates Auctioneers, Inc. ("René Bates"), and Lone Star Auctioneers, Inc. ("Lone Star") of the request and of their opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have reviewed the submitted information and considered the submitted arguments.

We note that 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) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Shattuck & Associates has not submitted to this office any reasons explaining why its submitted information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information of Shattuck & Associates, and the city may not withhold

any portion of the submitted information on that basis. *See* 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 (1990).

We next address the submitted arguments. René Bates argues that its information is confidential pursuant to section 552.101 of the Government Code. 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; *see also* Open Records Decision Nos. 611 at 1 (1992) (relating to common-law privacy), 600 at 4 (1992) (relating to constitutional privacy), 478 at 2 (1987) (relating to statutory confidentiality). However, René Bates does not cite to any specific law, and we are not aware of any law, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Accordingly, the city may not withhold any portion of the submitted information under section 552.101 of the Government Code.

Next, Lone Star claims that portions of its information are excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, section 552.102 only protects information in a personnel file of a governmental body, not a private third party. The personnel information submitted to us for review concerns employees of a private third party. Accordingly, the city may not withhold any portion of the information from disclosure pursuant to section 552.102 of the Government Code.

Next, both Lone Star and René Bates claim exception to 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 id.* § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

> may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or

> device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

> (1) the extent to which the information is known outside of [the company's] business;
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> (2) the extent to which it is known by employees and others involved in [the company's] business;
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> (3) the extent of measures taken by [the company] to guard the secrecy of the information;
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> (4) the value of the information to [the company] and to [its] competitors;
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> (5) the amount of effort or money expended by [the company] in developing this information; and
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> (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552. However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that 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.* § 552.110(b); *see also*

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661.

Lone Star seeks to withhold portions of its proposal, including customer lists, organizational structure, and processes information under sections 552.110(a) and 552.110(b). René Bates claims that its client list, buyers list, and website traffic information is excepted from disclosure under sections 552.110(a) and 552.110(b). With respect to the customer information at issue, we note that both Lone Star and René Bates publish the identities of their current and past clients and the details of projects that the companies undertake for their clients on their respective internet websites. In light of Lone Star and René Bates' own publication of such information, we cannot conclude that the identities of these companies' clients and the details of their projects qualify as trade secrets of each company. Likewise, we are not persuaded that the release of such information under the Act would be likely to cause either company any substantial competitive harm. We therefore conclude that the city must withhold only the current and past client names that have not been published on either Lone Star or René Bates' website. The city must release the names of Lone Star and René Bates' current and past clients whose names have been released on the respective company's website.

Further, we find that Lone Star and René Bates have established that some of their information, which we have marked, constitutes trade secret or commercial and financial information, the release of which would cause the companies substantial competitive harm. The city must withhold the information we have marked under section 552.110. However, we determine that neither Lone Star nor René Bates has demonstrated that any portion of the remaining information constitutes trade secret information or commercial or financial information, the release of which would cause them substantial competitive harm. *See* Open Records Decision Nos. 552 at 5-6, 661 (must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 319 at 3 (1982) (information relating to organization, personnel, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110); *see also* RESTATEMENT OF TORTS § 757 cmt. b (1939) (information is generally not trade secret if 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"). Accordingly, pursuant to section 552.110, the city must withhold only those portions of the submitted information that we have marked under that section, as well as client names that have not been published on either Lone Star or René Bates' website.

Next, section 552.130 of the Government Code provides in relevant part:

> (a) Information is excepted from the requirement of Section 552.021 if the information relates to:
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> > (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

> (2) a motor vehicle title or registration issued by an agency of this state; or
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> (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(1)-(3). Accordingly, the city must withhold the Texas license plate numbers and vehicle identification numbers in the submitted documents under section 552.130 of the Government Code.

Next, René Bates claims that portions of its submitted information are excepted from disclosure under section 552.136 of the Government Code. This section states that "[n]otwithstanding any other provision of this chapter, 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." *Id.* § 552.136. Thus, the city must withhold the marked account numbers in René Bates' information, as well as the insurance policy we have marked in Lone Star's information, under section 552.136 of the Government Code.

We understand both Lone Star and René Bates to claim that their proposals contain e-mail addresses. Section 552.137 of the Government Code provides in relevant part the following:

> (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
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> . . .
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> (c) Subsection (a) does not apply to an e-mail address:
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> . . .
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> (3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract . . . [.]

Gov't Code § 552.137(a), (c)(3). The e-mail addresses at issue were provided to the city by Lone Star and René Bates in response to a request for bids or proposals. *See id.* § 552.137(c)(3). Thus, none of the e-mail addresses in the submitted information is excepted under section 552.137. *See id.* § 552.137(c).

Finally, we note that some of the submitted 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. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* 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. *See* Open Records Decision No. 550 (1990). Thus, the remaining submitted information must be released to the requestor, but any information protected by copyright must be released in accordance with copyright law.

In summary, the city must withhold the information we have marked, as well as the names of any clients that have not been published on either Lone Star or René Bates' website, under section 552.110 of the Government Code. The city must withhold the Texas license plate numbers and vehicle identification numbers in the submitted documents under section 552.130 of the Government Code. Finally, the city must withhold the marked account numbers and insurance policy numbers under section 552.136 of the Government Code. The remaining submitted information must be released to the requestor, but any information protected by copyright must be released in accordance with copyright law.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

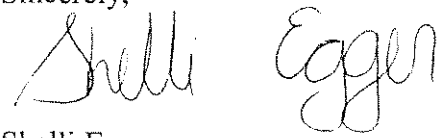
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Shelli Egger
Assistant Attorney General
Open Records Division

SE/sdk

Ref: ID# 268946

Enc. Submitted documents

c: Mr. Landon Thalman
Public Surplus
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