



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 22, 2009

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

OR2009-00888

Dear Ms. Alexander:

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# 334283.

The Texas Department of Transportation (the "department") received a request for a copy of the "client reference pages" from each consulting company that bid for solicitation B 44 2008 040620000 pertaining to asbestos services. Although you take no position as to the disclosure of the requested information, you state its release may implicate the proprietary interests of third parties. You also state, and provide documentation showing, you have notified these third parties of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor.¹ See Gov't Code § 552.305(d); *see also* 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 the applicability of exception to disclose under Act in certain

¹We understand the following third parties were notified: Alpha Testing ("Alpha"), Argus Environmental Consultants, L.L.C. ("Argus"), Arias & Associates, Inc. ("Arias"), ATC Associates, Inc. ("ATC"), Benchmark Environmental Consultants ("Benchmark"), Burcham Environmental Services, L.L.C. ("Burcham"), Clean Environments, Inc. ("Clean"), Dios Dado Environmental ("Dios Dado"), EFI Global, Inc. ("EFI"), Environmental Consultants, Inc. ("Environmental"), Garner & Associates, Inc. ("Garner"), MACTEC Engineering & Consulting, Inc. ("MACTEC"), Merit Environmental ("Merit"), Naismith Engineering, Inc. ("Naismith"), North American Analytical Labs, Inc. ("North American"), Rimkus Consulting Group, Inc. ("Rimkus"), Sun City Analytical, Inc. ("Sun City"), and Terracon Consultants, Inc. ("Terracon").

circumstances). Arias, Benchmark, Burcham, Clean, EFI, Garner, and a representative of Argus have submitted comments to our office. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Alpha, ATC, Environmental, Dios Dado, MACTEC, Merit, Naismith, North American, Rimkus, Sun City, and Terracon have not submitted to this office any reasons explaining why the requested information should not be released. We thus have no basis for concluding any portion of the submitted information constitutes proprietary information of these companies, and the department 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).

Garner asserts its clients' project and financial information is confidential. Section 552.101 of the Government Code provides that "information is excepted from [required public disclosure] if it is 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) (common-law privacy), 600 at 4 (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). However, Garner has not directed our attention to any law under which its clients' project and financial information is considered to be confidential for purposes of section 552.101; therefore, we conclude the department may not withhold any of Garner's information under this provision.²

Argus, Arias, Benchmark, Burcham, Clean, and EFI all argue their client references are protected from disclosure under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.1958); *see also* ORD 552 at 2. Section 757 provides that a trade secret is:

²We note information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976).

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 Huffines*, 314 S.W.2d at 776. 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. The following are the six factors that the Restatement gives 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 others 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; and
- (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 Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980). This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

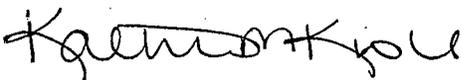
Section 552.110(b) excepts from disclosure “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Upon review, we conclude Argus’s, Arias’s, Benchmark’s, Burcham’s, Clean’s, and EFI’s client information constitutes trade secrets. Further, we find release of these companies’ client information would cause these companies substantial competitive harm. Therefore, the department must withhold these companies’ client information, which we have marked, pursuant to section 552.110 of the Government Code. The remaining submitted information must be released to the requestor.

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 334283

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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