



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2009

Ms. Cynthia S. Martinez
Legal/ Records Manager
Capital Metropolitan Transportation Authority
2910 East Fifth Street
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OR2009-05558

Dear Ms. Martinez:

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# 340929.

The Capital Metropolitan Transportation Authority ("Capital Metro") received a request for the awarded bids in four specified Statements of Qualifications ("SOQs"). You claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.110 of the Government Code.¹ In addition, you state the requested information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you have notified Klotz Associates, Inc. ("Klotz"), Parsons Brinckerhoff ("Parsons"), Kimley-Horn and Associates, Inc. ("Kimley-Horn"), Surveying and Mapping, Inc. ("SAM"), Associated Consulting Engineers, Inc. ("Associated"), LopezGarcia Group, Inc. ("LGG"), Doucet & Associates, Inc. ("Doucet"), McGray & McGray ("McGray"), MWM Design Group ("MWM"), Baker-Aicklen & Associates ("Baker"), SURVCON, Weston Solutions, Inc. ("Weston"), Fugro Consultants, Inc. ("Fugro"), HDR/WHM Transportation Engineering ("HDR"), URS Corporation ("URS"), and TCB of the request and of their rights to submit comments to this office as to why the requested information should not be released to the requestor. *See Gov't Code § 552.305(d);*

¹Although you also claim portions of the submitted information are excepted under section 552.305 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.305 requires a governmental body to notify third parties whose proprietary interests may be implicated by a request for information of the request and of the parties' right to submit comments to this office explaining why the requested information should be withheld from disclosure. *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 applicability of exception to disclosure under the Act in certain circumstances). You state Doucet and Weston have consented to the release of their information. We have received comments from Kimley, SURVCON, McGray, Associated, MWM, URS, LGG, HDR, and Klotz. 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, we have not received arguments from Parsons, TCB, SAM, Fugro, or Baker. We thus have no basis for concluding any portion of these companies' SOQs constitute proprietary information, and Capital Metro may not withhold any of Parsons, TCB, SAM, Fugro, or Baker's 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). On behalf of the interested third parties you assert portions of the submitted information are excepted under section 552.110 of the Government Code. However, we note section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Therefore, because we have only received arguments from Kimley, SURVCON, McGray, Associated, MWM, URS, LGG, HDR, and Klotz, none of the remaining third parties have demonstrated that any of their submitted information is confidential or proprietary for the purposes of the Act, and Capital Metro may not withhold any of their information under section 552.110. *See id.* §§ 552.101, .110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

First, we will address Klotz's assertion that the proposal is confidential because it is marked confidential. We note, however, information is not made confidential under the Act simply because the party submitting 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), cert. denied 430 U.S. 931 (1977); *see also* Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Consequently, Klotz's submitted information may not be withheld unless it falls within an exception to disclosure. Accordingly, we will address the arguments asserted by Capital Metro and Klotz under the Act.

Capital Metro and Klotz assert portions of the submitted information are excepted from disclosure under section 552.104. Section 552.104 excepts from disclosure "information

that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect a governmental body’s interests in competitive bidding situations. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government). As Klotz is not a governmental body, we do not address its contention under this section. Section 552.104 requires a showing by the governmental body of some actual or specific harm to its interests in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990), *see also* Gov’t Code § 552.301(e)(1)(A) (governmental body has the burden of proving that the requested information must be withheld under the stated exception). In this instance, Capital Metro has provided no arguments explaining how section 552.104 is applicable to the information at issue. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why claimed exceptions to disclosure apply). Thus, no portion of the submitted information may be withheld under section 552.104

McGray, URS, Associated, SURVCON, Kimley, MWM, LGG, Klotz, and HDR claim portions of their SOQs 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 it was obtained. *Id.* § 552.110. 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

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.² RESTATEMENT OF TORTS § 757 cmt. b (1939). 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 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)*. We note that 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 (1939); *see Huffines*, 314 S.W.2d at 776; *Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982)*.

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* *Open Records Decision No. 661 at 5-6 (1999)* (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

McGray, Associated, SURVCON, Kimley, and MWM each claim portions of their submitted information are protected from disclosure under section 552.110(a). McGray specifically argues its employer identification number, customer information and references, financial and pricing information, and work plan are trade secrets under section 552.110(a). Upon review, we find McGray has established portions of its customer information are trade secrets. However, we note McGray has made the identities of some of its customers, which it seeks to withhold, publicly available on its website. Thus, McGray has failed to demonstrate the information published on its website is a trade secret. Further, McGray has failed to establish how any of its remaining information at issue meets the definition of a trade secret. Additionally, Associated, SURVCON, Kimley, and MWM have also failed to establish a *prima facie* case that the claimed portions of their submitted information meet the definition of a trade secret under section 552.110(a). *See* *Open Records Decision No. 552 at 5* (party must establish *prima facie* case that information is trade secret). Accordingly,

²The 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 (1939); *see also* *Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980)*.

Capital Metro must withhold the information we have marked under section 552.110(a). Capital Metro may not withhold the remaining information at issue under section 552.110(a).

Kimley, MWM, SURVCON, HDR, URS, LGG, Klotz, McGray, and Associated each raise section 552.110(b) for portions of their submitted information. Upon review of the information at issue and the submitted arguments, we find Klotz and McGray have each demonstrated by specific factual evidence that disclosure of portions of their information at issue would cause them substantial competitive harm. Accordingly, Capital Metro must withhold the information we have marked under section 552.110(b). As noted above, McGray has published the identities of some of its customers on its website. Thus, McGray has failed to establish how release of this information would cause it substantial competitive harm. Further, Kimley, MWM, SURVCON, HDR, URS, LGG, Klotz, McGray, and Associated have made only conclusory allegations that release of the remaining information at issue would result in substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Further, we note the request only seeks the information of the winning bidders for the contracts. The pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. See Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). See generally Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, the submitted pricing information may not be withheld under section 552.110(b). McGray also argues by releasing personal information pertaining to vendors, future vendors may be reluctant to provide information. This argument relies on 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 Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). See also *CriticalMass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). 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 that *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. The ability of a governmental body to continue to obtain proposals from private parties is not a relevant consideration under section 552.110(b). *Id.* Accordingly, Capital Metro must withhold the information we have marked under section 552.110(b).

Section 552.136(b) states that “[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.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). The bank account and routing numbers we have marked in the remaining information are access device numbers for the purposes of section 552.136. Accordingly, Capital Metro must withhold these numbers under section 552.136.

Lastly, 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. 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).

In summary, Capital Metro must withhold the information we have marked under section 552.110(a) and section 552.110(b). Capital Metro must withhold the access device numbers we have marked under section 552.136. The remaining information must be released, but any copyrighted information 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.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,



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OM/eeg.

Ref: ID# 340929

Enc. Submitted documents

c: Requestor

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