



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 1, 2009

Ms. Myrna S. Reingold
Galveston County
722 Moody, 5th Floor
Galveston, Texas 77550-2317

OR2009-05799

Dear Ms. Reingold:

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# 341593.

The Galveston County Purchasing Agent (the "county") received two requests for information pertaining to a specified request for proposals. You state you have released some information to the requestors. While you raise sections 552.101 and 552.110 of the Government Code as possible exceptions to disclosure for the submitted information, you make no arguments as to whether the submitted information is excepted from public disclosure under those sections. Instead, you state, and provide documentation showing, that you have notified the interested third parties of the requests for information and of their right to submit arguments to this office as to why the submitted proposals should not be released.¹ 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 correspondence from attorneys for Beck Disaster Recovery, Inc. ("Beck") and Camp Dresser & McKee, Inc. ("CDM"). We have considered the submitted arguments and reviewed the submitted information. We have also received comments from one of the

¹The third parties notified pursuant to section 552.305 are the following: Adjusters International, Inc.; Beck Disaster Recovery, Inc.; Camp Dresser & McKee, Inc.; Carl R. Griffith & Associates, Inc.; Deloitte Financial Advisory Services, L.L.P.; HDR Engineering, Inc.; Holliday Builders, Inc.; Horne, L.L.P.; Marlowe & Company, L.L.C.; MWH; Sunland Group, Inc.; and Van Scoyoc Associates, Inc.

requestors. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

We first note, and you acknowledge, that with respect to the first request, the county did not comply with its ten-business-day deadline under section 552.301(b) of the Government Code in requesting this decision. *See id.* § 552.301(b). The county also failed to comply with its fifteen-business-day deadline under section 552.301(e) with respect to the first request. *See id.* § 552.301(e)(1). The submitted information that is responsive to the first request is therefore presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold any of the information. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ). This statutory presumption can generally be overcome when information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982). Because the interests of third parties are at stake, we will consider whether the submitted information, including the information that was not timely submitted, is excepted from disclosure under the Act.

We next 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 it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received arguments from Beck and CDM. None of the remaining third parties have submitted to this office any reasons explaining why their information should not be released. Thus, we have no basis for concluding that any portion of the submitted information pertaining to the remaining third parties constitutes proprietary information, and the county may not withhold any portion of their 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 now address Beck's and CDM's arguments for their submitted proposals. 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 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;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this 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* ORD 232. This office must accept a claim that information subject to the Act is exempted 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. ORD 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). We note that 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 (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* ORD 661 at 5-6.

Having considered the submitted arguments and reviewed the submitted information, we conclude that Beck and CDM have not shown that any of the information at issue meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. Thus, the county may not withhold any portion of the submitted information under section 552.110(a) of the Government Code.

However, we find that Beck and CDM have established that the release of some of their proposals would cause the companies substantial competitive injury. Therefore, the county must withhold the information we have marked under section 552.110(b) of the Government Code. We find, however, that Beck and CDM have made only conclusory allegations that release of their remaining information would cause substantial competitive injury and have provided no specific factual or evidentiary showing to support such allegations. *See* Gov't Code § 552.110; *see also, e.g.*, ORD 661 at 5-6, 509 at 5 (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, market studies, experience, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note that the pricing information of a winning bidder, such as Beck is in this instance, 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 reason that disclosure of prices charged government is a cost of doing business with government). Thus, none of the remaining information may be withheld under section 552.110 of the Government Code.

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 materials that are subject to copyright protection

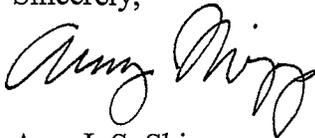
unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the county must withhold the information we have marked under section 552.110 of the Government Code. The remaining information must be released to the requestors, 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/rl

Ref: ID# 341593

Enc: Submitted documents

cc: Requestor
(w/o enclosure)

c: Chuck McLendon
President/ Chief Operating Officer
Beck Diaster Recovery, Inc.
515 North Sam Houston Parkway
East, Suite 505
Houston, Texas 77056
(w/o enclosure)

Peter Wallace, Principal
Deloitte Financial Advisory Services,
L.L.P.
Program Management, Hurricane
Restoration Projects
1700 Market Street
Philadelphia, Pennsylvania 19103
(w/o enclosure)

Carl R. Griffith, Jr.
President & CEO
Carl R. Griffith & Associates, Inc.
2901 Turtle Creek Drive, Suite 101
Port Arthur, Texas 77642
(w/o enclosure)

Sid Holliday, III, President
Holliday Builders, Inc.
1027 Tremont
Galveston, Texas 77550
(w/o enclosure)

Sid Mansour, Vice President
MWH
5100 Westheimer, Suite 580
Houston, Texas 77056-5507
(w/o enclosure)

Chris Canonico, P.E.
Camp Dresser & McKee, Inc (CDM)
3050 Post Oak boulevard, Suite 300
Houston, Texas 77056
(w/o enclosure)

Albert Girgis
Deloitte Financial Advisory Service, L.L.P.
333 Clay Street, Suite 2300
Houston, Texas 77002-4196
(w/o enclosure)

Christopher E. Claunch, P.E.
Senior Vice President, Managing Principal,
Department Manager
HDR Engineering, Inc.
HDR/ Claunch & Miller, Engineering
Consultants
4635 southwest Freeway, Suite 1000
Houston, Texas 77027-7139
(w/o enclosure)

Bryan C. McDonald, C.P.A., C.F.E.
Director
Horne CPAs & Business Advisoris
HORNE, L.L.P.
200 East Capitol Street, Suite 1400
Jackson, Mississippi 39201
(w/o enclosure)

DONALD L. SMITH, PRESIDENT
MWH AMERICAS, INC.
380 INTERLOCKEN CRESCENT, SUITE
200
BROOMFIELD, COLORADO 80021
(w/o enclosure)

Howard Marlow, President
Marlow & company, L.L.C.
1667 K Street North West, Suite 480
Washington, District of Columbia
20006
(w/o enclosure)

Gregory D. Burns,
Van Scoyoc Associates, Inc.
101 Constitution Avenue North
West, Suite 600W
Washington, District of Columbia
20001
(w/o enclosure)

Jason Makofsky
Camp Dresser & McKee, Inc.
One Cambridge Place, 50 Hampshire
Street
Cambridge, Massachusetts 02139
(w/o enclosure)

R. Carla Thompson, PMP
President & CEO
Sunland Group, Inc.
10497 Town & Country Way, Suite 550
Houston, Texas 77024
(w/o enclosure)

Ronald R. Leaders
Law Offices of Ronald Leaders
9330 South West 216 Street
Vashon, Washington 98070
(w/o enclosure)

John Marini
Vice President of Sales & Marketing
Adjusters International, Inc.
126 Business Park Drive
Utica, New York 13502
(w/o enclosure)