



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 11, 2009

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR2009-12852

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# 354882.

The Texas Department of Transportation (the "department") received five requests for the following information related to requisition number 57-9RFPG001, Professional Engineering Services: (1) each of the five winning proposals, including pricing sheets; (2) the final summary scoring tables and evaluation forms for each winning bidder; and (3) the raw scoring sheet for a specified unsuccessful bidder.¹ You claim that the submitted final summary scoring tables and evaluation forms are excepted from disclosure under section 552.104 of the Government Code. Although the department takes no position on release of the remainder of the submitted information, you explain that this information may contain third parties' proprietary information subject to exception under the Act. Accordingly, you have notified the following third parties of this request for information and of their right to submit arguments to this office as to why the submitted information should not be released: Arcadis, Corrigan Consulting, Inc. ("Corrigan"), LCA Environmental ("LCA"), Terracon Consultants, Inc. ("Terracon"), and Tetra-Tech NUS, Inc. ("TtNUS"). See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor

¹You inform us that the department sought and received clarification of the information requested by one of the five requestors. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by LCA, Terracon, and TtNUS. Gov't Code § 552.305(d).

Initially, we note that the department did not submit the raw scoring sheet requested by one of the requestors. Therefore, to the extent the department maintained any information responsive to this item on the date the department received the request, we assume the department has already released such information. If the department has not released any such information, it must do so at this time. *See id.* § 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply, it must release information as soon as possible).

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 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received any correspondence from Arcadis or Corrigan. Thus, we have no basis to determine that either of these parties has a protected proprietary interest in the submitted information. *See id.* § 552.110(a)-(b); 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). Accordingly, the department may not withhold any of the submitted information on the basis of any proprietary interest Arcadis or Corrigan may have in it.

We next address the department's claim that the submitted final summary scoring tables and evaluation forms are excepted from required public disclosure by section 552.104 of the Government Code, which excepts "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 the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated that the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates that public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (suggesting that such principle will apply when

governmental body solicits bids for same or similar goods or services on recurring basis). In this instance, you inform us that the submitted final summary scoring tables and evaluation forms relate to successful bids that have resulted in contracts between the department and the involved third parties; thus, this information does not pertain to a currently competitive bidding situation. However, you claim that “[a]lthough the contracts arising from this specific competitive procurement have been awarded, [the department] plans on re-using these scoring/selection criteria for other scientific services contracts for upcoming procurements” and “[r]elease of the scoring criteria will harm [the department] because the format in preparing scoring criteria is similar with each procurement process[.]” Based on your representations and our review of the information at issue, we agree that the department may withhold the submitted final summary scoring tables and evaluation forms under section 552.104 of the Government Code.

We next consider the arguments of LCA, Terracon, and TtNUS under section 552.110 of the Government Code, which protects the proprietary interests of private parties with respect to two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision” and (2) “commercial 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(a)-(b).

The Texas Supreme Court has adopted the definition of a “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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the

exception and no one submits an argument that rebuts the claim as a matter of law.² Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

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 information at issue. *See* 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).

Upon review of the submitted arguments and the information at issue, we find that LCA, Terracon, and TtNUS have each established a *prima facie* case that information that identifies their customers is protected trade secret information. Thus, the department must withhold customer-identifying information from the proposals of LCA, Terracon, and TtNUS under section 552.110(a).³ Terracon and TtNUS argue that parts of their proposals beyond customer-identifying information are also protected trade secret information. However, we conclude that neither Terracon nor TtNUS has established a *prima facie* case that any of the remaining information at issue is a trade secret protected by section 552.110(a). *See* ORD 402.

We also find that Terracon and TtNUS have each made only conclusory allegations that release of their remaining information at issue would cause their respective companies substantial competitive injury, and have provided no specific factual or evidentiary showing to support such allegations. Furthermore, we note that Terracon and TtNUS were each a winning bidder in this instance. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records

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 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;
- (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).

³We have marked customer-identifying information in LCA's proposal as a representative sample of the types of information the department must withhold from each of these three proposals.

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 department may not withhold any of the remaining information at issue under section 552.110(b).

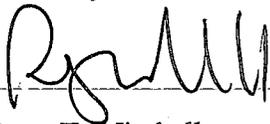
Finally, we note that some of the remaining information at issue appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information, but a custodian of public records must comply with copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). Thus, 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 copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the department: (1) may withhold the submitted final summary scoring tables and evaluation forms under section 552.104 of the Government Code; (2) must withhold customer-identifying information from the proposals of LCA, Terracon, and TtNUS under section 552.110(a) of the Government Code; and (3) must release the remainder of the submitted information, but must comply with copyright law in so doing.

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,



Ryan T. Mitchell
Assistant Attorney General
Open Records Division

RTM/tl

Ref: ID# 354882

Enc. Submitted documents

cc: Requestors (5)
(w/o enclosures)

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