



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 23, 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

OR2009-15114

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# 359135.

The Texas Department of Transportation (the "department") received a request for the following information related to request for proposal 57-7RFP5001: completed and final scoring tables for oral interviews and pricing schedules for the ten winning engineering firms. You inform us that the department has released the requested scoring tables. Although the department takes no position on release 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 US, Inc. ("Arcadis"), Cook-Joyce, Inc. ("Cook-Joyce"), INTERA, Inc. ("INTERA"), Malcolm Pirnie, Inc. ("Malcolm Pirnie"), Separation Systems Consultants, Inc. ("Separation Systems"), Terracon Consultants, Inc. ("Terracon"), Tetra-Tech NUS, Inc. ("TtNUS"), TRC Environmental Corporation ("TRC"), URS Corporation ("URS"), and Weston Solutions, Inc. ("Weston"). See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor 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

reviewed the submitted information and have considered comments submitted by Cook-Joyce, Malcolm Pirnie, Terracon, TtNUS, and URS.

Initially, we must address the department's obligations under section 552.301 of the Government Code, which prescribes the procedures a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. A governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). Additionally, within fifteen days of receiving the request, the governmental body must submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e). You inform us that the department received the request for information on July 16, 2009; however, you did not request a ruling from this office or submit the information required by section 552.301(e) until August 19, 2009. Consequently, we find the department failed to comply with the requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released; the governmental body can overcome this presumption only by demonstrating a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *City of Dallas v. Abbott*, 279 S.W.3d 806, 811 (Tex. App.—2007, pet. granted); *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason generally exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Accordingly, we will consider whether third-party interests provide a compelling reason to withhold the submitted information from disclosure.

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, INTERA, Separation Systems, TRC, or Weston. Thus, we have no basis to determine that any 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, INTERA, Separation Systems, TRC, or Weston may have in it.

We next note that Terracon and TtNUS each argue against disclosure of information beyond that submitted by the department. This ruling does not address information beyond what the department submitted to this office for review. See Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Cook-Joyce, Malcolm Pirnie, Terracon, TtNUS, and URS have each submitted arguments 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." *Id.* § 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.¹ Open

¹The 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;

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 Cook-Joyce, Malcolm Pirnie, Terracon, TtNUS, and URS have each failed to establish a *prima facie* case that any portion of the submitted information is protected trade secret information. *See* ORD 402. We also find that each of these parties has made only conclusory allegations that release of their remaining information at issue would cause their respective companies substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Furthermore, we note that each of these parties was 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 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 information at issue under section 552.110 of the Government Code. As neither the department nor any of the notified third parties raise additional exceptions against disclosure, the department must release the submitted information.

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.

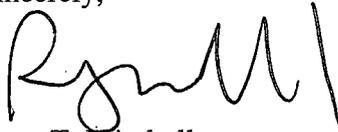
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php,

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- (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).

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/rl

Ref: ID# 359135

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

c: Mr. Brian Haney
ARCADIS US, Inc.
711 North Carancahua, Suite 1700
Corpus Christi, Texas 78475
(w/o enclosures)

Mr. Steve Cook
Cook-Joyce, Inc.
812 West 11th Street
Austin, Texas 78745
(w/o enclosures)

Mr. Marsh Lavenue
1812 Centre Creek Drive, Suite 300
Austin, Texas 78754
(w/o enclosures)

Mr. John P. Sparks
Malcolm Pirnie, Inc.
1700 West Loop South, Suite 1450
Houston, Texas 77027
(w/o enclosures)

Ms. Helen I. Hoges
Serparation Systems Consultants, Inc.
17041 El Camino Real, Suite 200
Houston, Texas 77058
(w/o enclosures)

Mr. Mark Matranga, P.G.
Tetra Tech NUS, Inc.
2901 Wilcrest Drive, Suite 405
Houston, Texas 77042-6012
(w/o enclosures)

Mr. Mark A. Robbins
TRC Environmental Corporations
505 East Huntland Drive, Suite 250
Austin, Texas 78752
(w/o enclosures)

Ms. Shannon Hoover, P.G.
URS Corporation
9400 Amberglen Boulevard
Austin, Texas 78729
(w/o enclosures)

Mr. Ashby McMullan, P.E., CAPM
Weston Solutions, Inc.
5599 San Felipe, Suite 700
Houston, Texas 77056
(w/o enclosures)