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November 17, 2009

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OR2009-16359

Dear Ms. Rangel:

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# 361722.

The Fort Bend County Purchasing Office (the "county") received two requests for the statements of qualifications submitted by candidates for the Q09-042 "Four Story Parking Garage" ("parking garage") and Q09-069 "Medic 1 Facility" ("medic facility") projects. You claim the submitted information related to the parking garage project is excepted from disclosure under section 552.104 of the Government Code. You also state release of the information pertaining to the medic facility project may implicate the proprietary interests of several third parties. Accordingly, you state, and provide documentation showing, you notified Anslow Bryant Construction, Ltd. ("Anslow Bryant"); Axiom Construction Co., Inc. ("Axiom"); Bartlett Cocke, LP; Bass Construction Co., Inc. ("Bass"); Brookstone, LP; Cadence McShane Construction Co., LLC; C.F. Jordan, LP ("C.F. Jordan"); Colorado Structures, Inc.; Crain Zamora, LLC ("Crain Zamora"); David E. Harvey Builders, Inc.; DPR Construction, Inc.; Durotech, LP; EMJ Corp. ("EMJ"); Gilbane Building Co.; Hardin Construction Co., LLC; J.E. Dunn South Central, Inc.; Manhattan Construction Co. ("Manhattan"); MAPP Construction, LLC; McAden Cumby Builders, LLC; Pepper-Lawson Construction, LP; Rosenberger Construction, LP ("Rosenberger"); SpawGlass Construction Corp.; T. Howard and Associates, Inc.; Teal Construction Co. ("Teal"); Tribble and Stephens Construction, Ltd.; and Turner Construction Co. of the county's receipt of the request for information and of each company's right to submit arguments to this office as to why its

information should not be released to the requestors. *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 considered comments submitted by Anslow Bryant, Bass, Brookstone, C.F. Jordan, Crain Zamora, EMJ, Manhattan, and Rosenberger and reviewed the submitted statements of qualifications.

Section 552.104 of the Government Code 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 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). Section 552.104 generally does not except information relating to competitive bidding after a contract has been awarded and executed. *See* Open Records Decision No. 541 (1990).

In this instance, you inform us the final contract has not been awarded for the medic facility project. You assert the information related to the medic facility project contains "information that would be advantageous to a competitor or bidder if negotiations were unsuccessful." Based on your representations and our review, we conclude the county has demonstrated how release of the statements of qualifications for the medic facility project would harm the county's interests in a competitive situation. Accordingly, the county may withhold the statements of qualifications for the medic facility project under section 552.104.

Next we address third parties' arguments against disclosure of information related to the parking garage project. 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 information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have received comments only from Anslow Bryant, Bass, Brookstone, C.F. Jordan, Crain Zamora, EMJ, Manhattan, and Rosenberger explaining why their statements of qualifications should not be released. Therefore, we have no basis to conclude any of the remaining notified companies has protected proprietary interests in their submitted information. *See id.* § 552.110; 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. Accordingly, the county may not withhold these companies' statements of qualifications on the basis of any proprietary interest they may have in them.

C.F. Jordan, Anslow Bryant, and Crain Zamora claim their statements of qualifications are excepted from disclosure under section 552.104 of the Government Code. However, section 552.104 is a discretionary exception that protects the interests of a governmental body and does not protect the interests of a third party. Therefore, C.F. Jordan's, Anslow Bryant's, and Crain Zamora's statements of qualifications may not be withheld under section 552.104. *See* ORD 592 (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).

Bass, C.F. Jordan, Crain Zamora, EMJ, and Rosenberger claim their statements of qualifications are confidential because the county informed bidders their financial information would be considered confidential. Information is not confidential under the Act simply because the party that submitted 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). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Government Code section 552.110). Therefore, unless the submitted information falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Bass and Crain Zamora also claim their financial statements are confidential under section 552.101. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. However Bass and Crain Zamora have not directed our attention to any law, nor are we aware of any law, that makes their financial statements confidential. *See, e.g.*, Open Records Decision No. 478 at 2 (1987) (statutory confidentiality). Accordingly, the county may not withhold their financial statements under section 552.101.

Manhattan asserts its logo may be trademark-protected and thus excepted from disclosure under section 552.101. Section 1127 of title 15 of the United States Code provides that a trademark consists of

any word, name, symbol, or device, or any combination thereof . . . used by a person, or . . . which a person has a bona fide intention to use in commerce . . . to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.

15 U.S.C. § 1127. Thus, a trademark pertains to the public use of information by a business enterprise to distinguish its goods or services from those of its competitors. The mere fact that information contains a trademark does not make the information confidential. Furthermore, Manhattan does not specify any particular provision of law, nor are we aware of any law, that makes its logo confidential. Accordingly, even if Manhattan's logo is trademarked, it may not be withheld from disclosure under section 552.101. *See generally* Open Records Decision Nos. 478, 465 (1987) (statute must explicitly require confidentiality; confidentiality will not be inferred).

Anslow Bryant, Bass, Brookstone, C.F. Jordan, Crain Zamora, EMJ, Manhattan, and Rosenberger claim portions of their statements of qualifications are excepted from disclosure under section 552.110 of the Government Code. This section protects the proprietary interests of private parties by excepting from disclosure 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).

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 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 that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5. However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors

have been demonstrated to establish a trade secret claim.<sup>1</sup> Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Anslow Bryant, C.F. Jordan, and Rosenberger assert release of their information could deter vendors from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing these arguments, Anslow Bryant, C.F. Jordan, and Rosenberger appear to rely 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*. The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in future. *National Parks*, 498 F.2d at 770. 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 *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. *See*

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<sup>1</sup>The 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).

ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, in making our determinations under section 552.110, we will consider only Anslow Bryant's, C.F. Jordan's, and Rosenberger's interests in their information.

Anslow Bryant and C.F. Jordan claim information regarding the way in which they submit proposals and bids is a trade secret under section 552.110. We find these companies have failed to explain, however, how any portion of the information they seek to withhold meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for the information at issue. *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). Consequently, the county may not withhold any portion of Anslow Bryant's and C.F. Jordan's statements of qualifications under section 552.110(a). Anslow Bryant and C.F. Jordan also argue that release of this information would cause them competitive harm because this information is not known outside of the company. Beyond this general assertion, however, Anslow Bryant and C.F. Jordan have not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information they seek to withhold would cause them substantial competitive harm. *See* ORD 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Therefore, the county may not withhold any portion of Anslow Bryant's and C.F. Jordan's statements of qualifications under section 552.110(b).

Manhattan claims its clients' names and contact information constitute trade secrets under section 552.110(a). We find Manhattan has established some of its customers' identifying information, which we have marked, constitutes a trade secret which must be withheld under section 552.110(a). *See* RESTATEMENT OF TORTS § 757 cmt. b (1939) ("specialized list of customers" can be trade secret); Open Records Decision No. 255 (1980) (customer lists may be withheld under predecessor to section 552.110(a)). However, we note Manhattan has made some of the customer information it seeks to withhold publicly available on its website. Because Manhattan has published this information, it has failed to demonstrate that this information is a trade secret.

Brookstone generally asserts section 552.110 excepts Tab 4, Tab 5, and Tab 7 of its statement of qualifications from disclosure because release of this information would cause it substantial competitive harm. Crain Zamora claims pages 3 through 7 and 19 through 21 of its statement of qualifications constitute trade secrets under section 552.110. However, Brookstone and Crain Zamora did not submit any arguments explaining how section 552.110 applies to the information they seek to withhold. Therefore, the county may not withhold the information Brookstone or Crain Zamora seek to withhold under section 552.110 of the Government Code.

Bass claims that if its statement of qualifications is released it will experience competitive harm because its marketing strategies could be copied and points it has made could be refuted. We find Bass's assertions to be conclusory. The company has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the information it seeks to withhold would cause it substantial competitive harm. *See id.* Therefore, the county may not withhold this information under section 552.110(b).

EMJ claims that if its financial information is released, it may be used or represented adversely by competing contractors in dealing with prospective clients, causing EMJ competitive harm. We find EMJ has made only conclusory allegations that release of the information at issue would result in substantial damage to its competitive position and has provided no specific factual or evidentiary showing to support such allegations. *See id.* Thus, the county may not withhold this information under section 552.110(b).

Rosenberger claims release of its financial information, specifically its 2007 audited financial statement, and its dollar volumes of average annual construction work performed for years 2005 through 2008, would allow competitors to undercut its bids in future business dealings. We find that Rosenberger has made only conclusory allegations that release of the information at issue would result in substantial damage to its competitive position and has provided no specific factual or evidentiary showing to support such allegations. *See id.* Therefore, the county may not withhold this information under section 552.110(b).

We note the remaining information contains insurance policy and bank account numbers. Section 552.136 of the Government Code provides:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, 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. We conclude the insurance policy and bank account numbers we have marked constitute access device numbers for purposes of section 552.136. Thus, the

county must withhold the insurance policy and bank account numbers we have marked under section 552.136 of the Government Code.

We further note Axiom's statement of qualifications contains Texas driver's license numbers. Section 552.130 of the Government Code provides information relating to a motor vehicle operator's license, driver's license, motor vehicle title, or registration issued by a Texas agency is excepted from public release.<sup>2</sup> Gov't Code § 552.130(a)(1), (2). Therefore, the county must withhold the Texas driver's license numbers we have marked under section 552.130 of the Government Code.

Finally, Manhattan asserts the photographs in its statement of qualifications are 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. 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). Accordingly, the remaining information must be released to the requestor in accordance with copyright law.

In summary, the county may withhold the statements of qualifications for the medic facility project under section 552.104 of the Government Code. The county must withhold the customers' identifying information we have marked in Manhattan's statement of qualifications under section 552.110. The county must withhold the insurance policy and bank account numbers we have marked under section 552.136. The county must withhold the Texas driver's license numbers we have marked under section 552.130. The remaining information must be released to the requestor, but any copyrighted information may only be released in accordance with copyright law.<sup>3</sup>

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.

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>We note Axiom's statement of qualifications includes social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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](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, toll free, at (888) 672-6787.

Sincerely,



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JCE/eeg

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