



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 12, 2010

Mr. Jeffrey Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081

OR2010-03595

Dear Mr. Moore:

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# 372443.

The City of Forney (the "city"), which you represent, received a request for: 1) the city's contract with Pate Transportation Partners, LP ("Pate"); 2) the bid letting document for the FM 548/US 80 Interchange; and 3) winning bid documents for the FM 548/US 80 Interchange. The city received a second request from the same requestor for the guaranteed maximum price agreement with Pate presented to and approved by the city council. You state, with the exception of the guaranteed maximum price document, the city is providing the requestor with the project development agreement with Pate. You claim the information you marked is excepted from disclosure under sections 552.104 and 552.136 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of third parties Pate and W.W. Webber, LLC ("Webber"). Accordingly, you state, and provide documentation showing, you notified Pate and Webber of the city's receipt of the requests for information and of their right to submit arguments to this office as to why their information should not be released to the requestor. 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 Pate and Webber and reviewed the submitted information.

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). However, in some situations, section 552.104 will operate to protect from disclosure bid information that is submitted by successful bidders. *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).

In this instance, you assert that although the contract has been awarded to Pate, the project at issue is a phased project and bids for some phases of the project have not yet been solicited or obtained. You state if the guaranteed maximum price document you have marked is released, potential bidders would know the guaranteed maximum pricing for the phases and could increase their bids accordingly, resulting in higher prices to the city for the project. Based on your representations and our review, we conclude you have demonstrated how release of the guaranteed maximum price document would harm the city's interests in a competitive situation. Accordingly, the city may withhold the guaranteed maximum price document under section 552.104.¹

Next, we address Webber's arguments under section 552.110 of the Government Code. Webber claims its consolidated financial statements and supplemental schedules are excepted from disclosure under section 552.110. 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

¹We note Pate does not claim a proprietary interest in the guaranteed maximum price document under section 552.110 of the Government Code. Pate instead submitted comments to this office supporting the city's claim under section 552.104 of the Government Code. *See* Gov't Code § 552.304.

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* Open Records Decision 552 at 5 (1990). 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.² 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); Open Records Decision 661 at 5-6 (1999)~~

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).

(business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Webber asserts its consolidated financial statements and supplemental schedules are trade secrets under section 552.110(a).³ As previously stated, in order to prevail on its trade secret claim, a third party must establish the information meets the definition of a trade secret. Although Webber quotes the definition of trade secret, Webber has not submitted any arguments explaining how any portion of the consolidated financial statements and supplemental schedules meets that definition. *See* ORD 552 at 5 (party must establish *prima facie* case that information is trade secret), 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, Webber has failed to establish the consolidated financial statements and supplemental schedules are trade secrets under section 552.110(a).

Webber also generally asserts that because it has competitors in the transportation-related construction services marketplace, the release of information concerning its financial condition would harm it in future competitions for transportation construction projects. Aside from this general assertion, Webber has not submitted any arguments specifically explaining how release of the submitted consolidated financial statements and supplemental schedules would result in substantial competitive harm. *See* ORD 661. Thus, after reviewing the submitted arguments and the information at issue, we find that Webber has failed to establish the consolidated financial statements and supplemental schedules are excepted under section 552.110(b) of the Government Code.

Finally, you marked the insurance policy numbers in Webber's documents. 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

³We note Webber submitted a financial condition statement indicating its bonding capacity and a Texas Department of Transportation determination of bidding capacity. These documents were not submitted by the city. By statute, this office may only rule on the public availability of information submitted by the governmental body requesting the ruling. *See* Gov't Code § 552.301(e)(1)(D). Therefore, we do not address Webber's arguments that the documents it submitted are excepted from disclosure.

(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. This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. Therefore we agree the marked insurance policy numbers must be withheld under section 552.136 of the Government Code.⁴

In summary, the city may withhold Pate's guaranteed maximum price document under section 552.104 of the Government Code. The city must withhold the marked insurance policy numbers in Webber's documents under section 552.136 of the Government Code. The remaining information must be released.

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

Sincerely,



Jessica Eales
Assistant Attorney General
Open Records Division

JCE/eeg

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an insurance policy number, under section 552.136, without the necessity of requesting an attorney general decision.

Ref: ID# 372443

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Stephan F. Morris
Naman, Howell, Smith & Lee, L.L.P.
8310 North Capital of Texas Highway, Suite 490
Austin, Texas 78731
(w/o enclosures)

Mr. C. Brain Cassidy
Locke Lord Bissell & Liddell, LLP
100 Congress Avenue
Austin, Texas 78701
(w/o enclosures)