



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 6, 2012

Ms. Jacqueline E. Hojem  
Public Information Coordinator  
Metropolitan Transit Authority Of Harris County  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2012-03375

Dear Ms. Hojem:

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# 447068 (MTA No. 2012-0084).

The Metropolitan Transit Authority of Harris County ("METRO") received a request for (1) the most recent advertisement for the request for qualifications or proposal for performing a job order contract ("JOC") for METRO; (2) a copy of all responses to the proposal or qualification; (3) a copy of all contracts issued in relation to the last JOC, including contracts with Kellogg, Brown, and Root, Inc. ("KBR"); (4) the coefficients and terms of the contract agreed to with each party; (5) a copy of the selection team members' summaries and/or score sheets to include any scores or bid tabulations regarding the request for proposal ("RFP"); (6) the best and final offer, if any; (7) the volume of work awarded to each JOC; and (8) a list of all purchase orders issued under the JOC from the beginning of the contract to the date of the request. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of certain third parties might be implicated. Accordingly, you state, and provide documentation showing, you notified KBR, W.A. Robbins Construction Co., Inc. ("WA Robbins"), and Centennial Contractors

Enterprises, Inc. (“Centennial”) of the request and of their right to submit arguments to this office explaining why their information should not be released. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received arguments submitted by KBR and Centennial. We have considered these arguments and reviewed the submitted information.

Initially, we note you have only submitted information that is responsive to category two of the request. Thus, to the extent any information responsive to the remainder of the request existed when METRO received the request, we assume you have released it. If you have not released any such information to the requestor, you must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

We note 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 letter, we have not received arguments from WA Robbins. Thus, WA Robbins has failed to demonstrate it has a protected proprietary interest in any of 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. Accordingly, METRO may not withhold any of the submitted information on the basis of any proprietary interest WA Robbins may have in the information.

Centennial claims its submitted bid proposals are subject to section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, Centennial has not directed our attention to any law, nor are we aware of any law, that makes the submitted proposals confidential. *See, e.g.*, Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, METRO may not withhold Centennial’s bid proposals under section 552.101 of the Government Code.

Centennial also claims portions of its submitted bid proposals are excepted under section 552.102 of the Government Code, which excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102. However, section 552.102 applies only to

information in a personnel file of a government employee. *See id.* Therefore, we find section 552.102 is not applicable to Centennial's bid proposals, and no portion of its proposals may be withheld on this basis.

Centennial asserts its bid proposals are excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (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), 522 (1989) (discretionary exceptions in general). As METRO does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Centennial's bid proposals. *See* ORD 592 (governmental body may waive section 552.104).

Section 552.110 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 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 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 single or ephemeral events 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 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the

Restatement's list of six trade secret factors.<sup>1</sup> This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990). 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).

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.*; *see also* ORD 661 at 5.

KBR and Centennial both raise section 552.110(a) of the Government Code for portions of the submitted information. Upon review, we find that neither KBR nor Centennial have not established a *prima facie* case that any of the submitted information constitutes a trade secret. Accordingly, METRO may not withhold any of the submitted information under section 552.110(a) of the Government Code.

KBR and Centennial both claim section 552.110(b) of the Government Code for portions of the submitted information. In advancing its arguments, Centennial relies, in part, 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 & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). 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 the future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*.

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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 other 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the *National Parks* test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will only consider KBR's and Centennial's interests in their information.

Upon review, we find KBR and Centennial have established that the customer information we have marked constitutes commercial or financial information, the disclosure of which would cause KBR and Centennial substantial competitive harm. We note, however, that KBR and Centennial have made some of their customer information publicly available on their websites. Because KBR and Centennial have published this information, they have failed to demonstrate how release of this information would cause substantial competitive harm under section 552.110(b). We further find that Centennial has established that the pricing information we have marked constitutes commercial or financial information, the disclosure of which would cause Centennial substantial competitive harm. Accordingly, METRO must withhold the information we have marked under section 552.110(b) of the Government Code. We note KBR was the winning bidder with respect to the JOC. The pricing information of a winning bidder 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 Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Consequently, METRO may not withhold KBR's pricing information under section 552.110(b). Upon further review, we find the third parties at issue have not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause these companies substantial competitive harm. Accordingly, METRO may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Section 552.136(b) of the Government Code provides, "[n]otwithstanding any other provision of [the Act], 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."<sup>2</sup> Gov't Code § 552.136(b); see *id.* § 552.136(a) (defining "access device"). This office has concluded insurance policy numbers constitute access device numbers for purposes of

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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. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

section 552.136. Accordingly, METRO must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.

KBR asserts its information is 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. Open Records Decision No. 180 at 3 (1977) A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, METRO must withhold the information we have marked under sections 552.110(b) and 552.136 of the Government Code. The remaining information must be released in accordance with any applicable 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](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,



Jeffrey W. Giles  
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Open Records Division

JWG/dls

Ref: ID# 447068

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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