



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 4, 2012

Mr. Joe Shannon, Jr.  
Criminal District Attorney  
Tarrant County  
401 West Belknap  
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OR2012-04874

Dear Mr. Shannon:

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# 449678.

The Tarrant County Criminal District Attorney's Office (the "district attorney's office") received a request for information pertaining to request for qualifications number 2012-001, including specified architectural submittals and specified staff and commissioner reviews and comments. You state the district attorney's office does not maintain information responsive to portions of the request.<sup>1</sup> You claim portions of the submitted information are excepted from disclosure under section 552.104 of the Government Code. You also state the release of the submitted information may implicate the proprietary interests of certain third parties. Accordingly, you notified the third parties of the request and of their right to submit arguments to this office explaining why their information should not be released.<sup>2</sup> See Gov't

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<sup>1</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>The third parties notified pursuant to section 552.305 are: Burns Architecture, LLC; Fender Architects; GSBS Architects ("GSBS"); Hahnfeld Hoffer Stanford ("Hahnfeld"); Jim Wilson Architects; Komatsu Architecture; Magee Architects, LP; MULTATECH; Randall Scott Architects, Inc.; Schwarz-Hanson Architects; VAI Architects, Inc.; Elements of Architecture, Inc. ("Elements"); Weinman Architects, Inc.; Gideon Toal, Inc.; H3 Hardy Collaboration Architecture; KAI Texas; Jacobs Engineering Group, Inc.; LBL Architects, Inc.; MDM Partners, A Joint Venture; VLK Architects, Inc.; RPGA Design Group, Inc.; tma-cha Architects, Inc.

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 comments from Elements. Thus, we have considered the arguments and reviewed the submitted information.

Section 552.104 of the Government Code excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). 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) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government). 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 bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990).

You state the contract at issue has not been awarded and the Tarrant County Purchasing Department (the “department”) continues negotiations with two of the third parties, GSBS and Hahnfeld. You state the release of Exhibits C-3 and C-4, which pertain to the bids from GSBS and Hahnfeld, could harm the department’s interest in obtaining the most favorable offer during the negotiation process. You state release of this information would allow competitors to estimate and adjust product quality and/or pricing, subject Tarrant County (the “county”) to inflated submissions of subsequent information packages, and/or jeopardize the quality of the product proposed for purchase, thereby, costing the county more money. Further, you state, because the department has not had the opportunity to seek revised or clarified bids from GSBS and Hahnfeld, the release of this information could create an unfair bidding process between GSBS, Hahnfeld, and the county. Based on your representations and our review, we agree the district attorney’s office may withhold Exhibits C-3 and C-4 under section 552.104 of the Government Code until such time as a contract has been executed. *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is underway would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation).

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 mentioned above, we have received comments from Elements. However, as of the date of this letter, we have not received arguments from the remaining third parties. Thus, these parties have failed to demonstrate that they have a protected proprietary interest in any of the remaining 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, the district attorney's office may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, we address Elements arguments against disclosure of portions of its information in Exhibit C-12. 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>3</sup> This office must accept a claim that

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<sup>3</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).

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* ORD 552 at 5. 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.

Elements asserts portions of Exhibit C-12 are confidential under section 552.110(b) of the Government Code. Upon review, we find Elements has established the information we have marked constitutes commercial or financial information, the release of which would cause the company substantial competitive harm. Therefore, the district attorney’s office must withhold this information under section 552.110(b) of the Government Code. We note, however, Elements has made the remaining customer information it seeks to withhold publicly available on its website. Because Elements has published this information, it has failed to establish the release of this information would cause it substantial competitive harm. Further, we find Elements has made only conclusory allegations the release of the remaining information at issue would result in substantial damage to its competitive position. Thus, Elements has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* Open Records Decision Nos. 661, 509 at 5 (1988) (because bid specifications and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

Elements asserts portions of its remaining information in Exhibit C-12 are confidential under section 552.110(a) of the Government Code. However, because Elements has published its remaining customer information on its website, the company has failed to demonstrate this information is a trade secret. Further, Elements has failed to demonstrate any of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. *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). We note information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Huffines*, 314 S.W.2d at 776; Open

Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Thus, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

In summary, the district attorney's office may withhold Exhibits C-3 and C-4 under section 552.104 of the Government Code. The district attorney's office must withhold the information we have marked in Exhibit C-12 under section 552.110 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](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,



Michelle R. Garza  
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Open Records Division

MRG/em

Ref: ID# 449678

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