



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2013

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla Street, Room 7DN
Dallas, Texas 75201

OR2013-06155

Dear Mr. Ernst:

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# 484139.

The City of Dallas (the "city") received two requests relating to the bids submitted for the Ethics Program Evaluation and Training Program.¹ Although you take no position on the requested information, you state it may contain proprietary information subject to exception under the Act. Accordingly, you state and provide documentation showing the city notified Afful Consulting Corporation ("Afful"), Clear Message Communication, L.L.C. ("CMC"), DeLaPorte & Associates ("DeLaPorte"), Ethics By Design ("EBD"), ICMA, Josephson Institute of Ethics ("Josephson"), Littler Mendelson, P.C. ("Littler"), NaSmith Consulting Group, L.L.C. ("NaSmith"), and Navigant Consulting, Inc. ("Navigant") of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *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

¹We note one of the requestors sought all of the bids submitted, while the other requestor sought only the bid submitted by Navigant Consulting, Inc.

in certain circumstances). We have received comments from DeLaPorte and Navigant. We have considered the submitted arguments and reviewed the submitted information.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from Afful, CMC, EBD, Josephson, Littler, or NaSmith explaining why the submitted information should not be released to the requestor. Therefore, we have no basis to conclude these third parties have a protected interest in the 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 city may not withhold any of the submitted information based upon the interests of Afful, CMC, EBD, Josephson, Littler, or NaSmith.

Next, we address DeLaPorte's arguments against disclosure of the submitted information. We understand DeLaPorte "strongly object[s]" to the disclosure of its information, and does not want its information to be "shared, copied, inspected, or used" without DeLaPorte's permission. We note information is not confidential under the Act simply because the party that submits the information anticipates or requests 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 did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). DeLaPorte has not identified any law that authorizes the city to enter into an agreement to keep any of the submitted information confidential. Therefore, the city may not withhold DeLaPorte's information unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

Navigant submits arguments against disclosure of its information under section 552.110 of the Government Code. 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. Gov't Code § 552.110. Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure information that is trade secrets obtained from a person and information that is 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides a trade secret to be as follows:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, 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) (citation omitted); *see also Huffines*, 314 S.W.2d at 776. 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.² *See* RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. 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

²There are six factors the Restatement gives as indicia of whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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.* § 552.110(b); ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

DeLaPorte and Navigant contend their information consists of trade secret information excepted under section 552.110(a). 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 also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). Upon review, we find Navigant has established a *prima facie* case that its client information constitutes trade secrets. Accordingly, the city must withhold Navigant’s client information we have marked under section 552.110(a) of the Government Code. However, we find DeLaPorte has failed to demonstrate that its information, and Navigant has failed to demonstrate that its remaining information, meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the city may not withhold any of the remaining information on the basis of section 552.110(a) of the Government Code.

Navigant also contends its information, including pricing information, is commercial or financial information, release of which would cause substantial competitive harm to Navigant. We note the pricing information of winning bidders of a government contract, such as Navigant, is generally not excepted under section 552.110(b). Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see* ORD 319 at 3 (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing is not ordinarily excepted from disclosure under statutory predecessor to section 552.110). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* ORD 514. Upon review, we conclude Navigant has established release of the information we have marked would cause it substantial competitive injury. Accordingly, the city must withhold the information we have marked under section 552.110(b). However, we find Navigant has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their remaining information would cause the company substantial competitive harm. *See* Open Records Decision Nos. 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), 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. Accordingly, we conclude the city may not withhold any of Navigant's remaining information under section 552.110(b).

We note some of the remaining information is subject to section 552.136(b) of the Government Code, which states "[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."³ Gov't Code § 552.136(b). This office has determined an insurance policy number is an access device for purposes of section 552.136. Therefore, the city must withhold the insurance policy numbers we have marked under section 552.136.

In summary, the city must withhold the information we have marked under sections 552.110 and 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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

³The 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).

Ref: ID# 484139

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Earl M. Jones, III
Littler Mendelson, P.C.
2001 Ross Avenue, Suite 1500
Dallas, Texas 75201
(w/o enclosures)

Mr. John Afful
Afful Consulting Corporation
P.O. Box 867481
Plano, Texas 75025
(w/o enclosures)

Mr. Michael Palmer
President
Ethics By Design
627 Route 30
Middlebury, Vermont 05753
(w/o enclosures)

Ms. Dee A. Parker
Chief Learning Officer
Clear Message Communication, L.L.C.
5501 LBJ Freeway, Suite 240
Dallas, Texas 75240
(w/o enclosures)

Mr. Richard J. Jarc
Executive Director
Josephson Institute of Ethics
9841 Airport Boulevard, Suite 300
Los Angeles, California 90045
(w/o enclosures)

Mr. Jason DeLaPorte
CEO
DeLaPorte & Associates, Inc.
1209 S. White Chapel Blvd., Suite 180
Southlake, Texas 76092
(w/o enclosures)

Ms. Martha L. Perego
Director Ethics
ICMA
Suite 500
777 North Capitol Street, NE
Washington, D.C. 20002-4201
(w/o enclosures)

Mr. Rahsaan Sales
Assistant General Counsel
Navigant Consulting, Inc.
30 South Wacker Drive, Suite 3550
Chicago, Illinois 60606
(w/o enclosures)

Ms. Nadine Smith
Owner
NaSmith Consulting Group, L.L.C.
2101 Torrey Pines Way
McKinney, Texas 75070
(w/o enclosures)