ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 21, 2013

Ms. Susana Carbajal
Assistant City Attorney
Aviation Department
City of Austin
3600 Presidential Boulevard, Suite 411
Austin, Texas 78719

OR2013-10526

Dear Ms. Carbajal:

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# 490814 (Austin PIR# 15516).

The City of Austin, Department of Aviation (the "city") received a request for the proposals submitted in response to the city's request for proposals for the development and operation of a long-term covered surface parking lot at Austin-Bergstrom International Airport, as well as the city's scoring and assessment of the submitted proposals. You claim a portion of the requested information is excepted from disclosure under section 552.104 of the Government Code. Although you take no position with respect to the remaining requested information, you state this information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified Scott Airport Property, LLC ("Scott Airport Property") and TPS Parking Management, LLC ("The Parking Spot") of the request and of their right to submit comments to this office as to why information pertaining to them should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from Scott Airport Property and The Parking Spot. We have reviewed the submitted arguments and 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). 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 information pertaining to a completed bidding process for which a contract has been executed. *See* Open Records Decision No. 541 (1990).

You contend the scoring and assessment information you have marked is excepted from disclosure under section 552.104. You state the information at issue pertains to an ongoing competition or bidding for services for which no contract has yet been awarded. You argue release of this information could undermine the selection process, to the city's detriment. Based on your representations, we conclude the city may withhold the information at issue 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 in progress 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).

Scott Airport Property raises section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Scott Airport Property has not directed our attention to any law under which any of this information is considered to be confidential for purposes of section 552.101. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality). Therefore, the city may not withhold any portion of Scott Airport Property's information under section 552.101 of the Government Code.

Scott Airport Property also raises section 552.105 of the Government Code, which excepts from disclosure information relating to:

> (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
>
> (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. We note section 552.105 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. 564 at 2 (1990) (statutory predecessor to section 552.105 designed to protect governmental body's planning and negotiating position with respect to particular transactions), 357 at 3 (1982), 310 at 2 (1982) (statutory predecessor to section 552.105 protects information relating to the location, appraisals, and purchase price of property to be purchased by governmental body for public

purpose); *see also* Open Records Decision No. 522 (1989). As the city does not raise section 552.105, we find this section does not apply to the information at issue. *See* ORD 564 (governmental body may waive statutory predecessor to section 552.105).

Section 552.110 protects the proprietary interests of private parties with respect to 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).

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 the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.[1] Open

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[1]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).

Records Decision No. 552 at 5-6 (1990). However, we cannot conclude section 552.110(a) is applicable unless the party claiming this exception has shown the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* 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.*; Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Scott Airport Property and The Parking Spot claim portions of their respective information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we find Scott Airport Property and The Parking Spot have not shown any of the information at issue meets the definition of a trade secret, or demonstrated the necessary factors to establish a trade secret claim. *See* Open Record Decision Nos. 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), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). 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; *see Huffines*, 314 S.W.2d at 776; ORD 319 at 3, 306 at 3. Therefore, none of Scott Airport Property's or The Parking Spot's information may be withheld under section 552.110(a).

Scott Airport Property and The Parking Spot also assert their information constitutes commercial or financial information, the release of which would cause substantial competitive harm. Scott Airport Property argues that release of this information would allow competitors to learn and replicate its distinctive airport parking services, to ascertain its fees and pricing methods, and to identify and unfairly target its customers. We conclude Scott Airport Property has established the release of portions of its information would cause the company substantial competitive injury. Therefore, the city must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Scott Airport Property has not demonstrated how any of its remaining information is commercial or financial information, the release of which would cause the company substantial competitive harm, and therefore, the city may not withhold this information under section 552.110(b). Additionally, we find The Parking Spot has made only conclusory allegations that release of its information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support such allegations. *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 costs, 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, the city may not withhold any of The Parking Spot's information under section 552.110(b).

We note that some of the materials at issue may be 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, the city may withhold the information it has marked under section 552.104 of the Government Code. The city must withhold the information we have marked under section 552.110(b) 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,

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Assistant Attorney General
Open Records Division

EDB/som

Ref: ID# 490814

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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