



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 28, 2014

Mr. Allan Meeseey
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2014-15149

Dear Mr. Meeseey:

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# 534841.

The Texas Department of Transportation (the "department") received a request for the winning statement of qualification proposals for twenty-four specified department solicitations.¹ The department does not take a position as to whether the submitted information is excepted from disclosure under the Act. However, the department states it notified the interested third parties of the department's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested

¹The department sought and received clarification of the information requested. See Gov't Code § 552.222 (if request for information is unclear, governmental body may ask requestor to clarify request); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (if governmental entity, acting in good faith, requests clarification of unclear or over-broad request, ten-day period to request attorney general ruling is measured from date request is clarified).

information should not be released.² *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 received correspondence from AIA, AZB, Dannenbaum, Entech, IEA, KBR, and Stantec objecting to the release of some of the information at issue. We have reviewed the submitted arguments and information.³ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

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, only AIA, AZB, Dannenbaum, Entech, IEA, KBR, and Stantec have submitted to this office any reasons explaining why the requested information should not be released. Thus, we have no basis for concluding any portion of the submitted information constitutes proprietary information of the remaining third parties, and the department may not withhold any portion of the submitted information on that basis. *See* 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, 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.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or

²You indicate the interested third parties consist of AECOM Technical Services, Inc.; Aguirre & Fields, Inc.; AIA Engineers, Ltd. ("AIA"); APM & Associates, Inc.; Arredondo, Zepeda & Brunz, LLC ("AZB"); Atkins North America, Inc.; Bain Medina Bain, Inc.; Binkley & Barfield, Inc.; Bridgefarmer & Associates, LLC; Brown & Gay Engineers, Inc.; Burns & McDonnell Engineering Company, Inc.; CDM Smith, Inc.; CH2M Hill, Inc.; Costello, Inc.; CP & Y, Inc. DBA Chiang, Patel & Yerby, Inc.; Criado & Associates, Inc.; Dannenbaum Engineering ("Dannenbaum"); Don Durden Inc., dba Civil Engineering Consultants; EJES Inc.; Entech Civil Engineers, Inc. ("Entech"); Excelsis, Inc.; H. W. Lochner, Inc.; Halff Associates, Inc.; Hayden Consultants, Inc.; HDR Engineering, Inc.; HNTB Corp.; Huitt-Zollars, Inc.; I.S. Engineers, LLC; IEA, Inc. ("IEA"); Infrastructure Associates; Jacobs Engineering Group Inc.; K Friese & Associates, Inc.; Kellogg Brown & Root Services, Inc. ("KBR"); Kennedy Consulting, Ltd.; Kimley-Horn and Associates, Inc.; Klotz Associates, Inc.; Lamb-Star Engineering, LP; Lina T. Ramey and Associates, Inc.; LJA Engineering, Inc.; Lockwood, Andrews & Newman, Inc.; Michael Baker Jr., Inc.; Parsons Brinckerhoff, Inc.; PGAL Pierce Goodwin Alexander & Linville; RJ Rivera Associates, Inc.; Rodriguez Transportation Group, Inc.; SAM-Construction Services, Inc.; Stantec Consulting Services Inc. ("Stantec"); TBE Group, Inc. DBA Cardno TBE; Teague Nall & Perkins, Inc.; and URS Corp.

³We note the department did not comply with the requirements of section 552.301(e) of the Government Code in providing some of the information at issue. *See* Gov't Code § 552.301(e). Nonetheless, third-party interests can provide a compelling reason to overcome the presumption of openness caused by a failure to comply with section 552.301. *See id.* §§ 552.007, .302. Thus, we will consider the arguments of the interested third parties to withhold the information at issue.

financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

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 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person’s claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary

⁴The following are the six factors that the Restatement gives 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

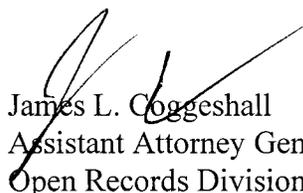
Upon review, we find AIA, AZB, Entech, IEA, KBR, and Stantec have not shown any of the submitted information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov't Code § 552.110(a). We also find AIA, AZB, Dannenbaum, Entech, KBR, and Stantec have failed to establish release of the information at issue would cause them substantial competitive injury. *See id.* § 552.110(b). Therefore, the department may not withhold any of the information pursuant to section 552.110.

We note 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. Thus, the department must release the submitted information, but may only release any copyrighted information in accordance with 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/eb

Ref: ID# 534841

Enc. Submitted documents

c: Requestor
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