



January 14, 2015

Ms. Sarah Parker
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2015-00781

Dear Ms. Parker:

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# 550203.

The Texas Department of Transportation (the "department") received a request for four categories of information related to the partnership between the department and the State Highway 130 Concession Company, L.L.C. ("SH 130 CC"), including the (1) amortization schedule for the private debt and the underlying loan documents; (2) amortization schedule for the Transportation Infrastructure Finance and Innovation Act ("TIFIA") debt and the underlying loan documents; (3) projections of revenues and operation and maintenance expenses for the project; and (4) swap agreement documentation, including all notational schedules. You state you will release some information to the requestor. Although you take no position as to whether the remaining information is excepted under the Act, you state release of the remaining information may implicate the proprietary interests of a third party. Accordingly, you state, and provide documentation showing, you notified SH 130 CC of the request for information and of its right to submit arguments to this office as to why the submitted 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 in certain circumstances).* We have received comments from attorneys representing SH 130 CC. We have considered the submitted arguments and reviewed the submitted information.

Initially, SH 130 CC contends a portion of the submitted information is not responsive to the present request for information. SH 130 CC asserts the revenue projection is not responsive because it was created by a department employee by using a limited and inaccurate set of data. SH 130 CC also argues the revenue projection consists of historical revenue data which is not responsive to category three of the request, which is for “projections of revenues and operation and maintenance expenses for the project.” A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the department has reviewed its records and determined the documents at issue are responsive to the request. Thus, we find the department has made a good-faith effort to relate the request to information within its possession or control. Accordingly, we will determine whether the department must release this information to the requestor under the Act.

The department states a portion of the requested information was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2014-09767 (2014). In that ruling, we determined the department must withhold certain information under section 552.110(b) of the Government Code, but must release the remaining information in accordance with applicable copyright law. We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we conclude the department must rely on Open Records Letter No. 2014-09767 as a previous determination and withhold or release the information that is the same in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will consider the arguments against its release.

SH 130 CC argues its information is excepted from disclosure 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. *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.¹ 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 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 section 552.110(a) is applicable 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. Open Records Decision No. 402 (1983). We note pricing 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 also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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

¹The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

SH 130 CC asserts the submitted information is excepted from disclosure under section 552.110(b) of the Government Code. SH 130 CC explains that the submitted information details not only the project financial model and processes used by the company in its global business but also its heavily negotiated financing terms developed over a number of years in conjunction with the TIFIA. SH 130 CC states the creativity with regard to the financing aspect was the most critical and differentiating factor in the process of negotiating the TIFIA agreement. SH 130 CC argues if a competitor had access to the TIFIA agreement, it would allow the competitor to replicate the company's unique and proprietary method of financing projects for use in the procurement of other transportation projects. SH 130 CC states its shareholders are currently engaged in the procurement process for such projects, which involve a small group of competitors. Upon review, we find SH 130 CC has made the specific factual or evidentiary showing required by section 552.110(b) that release of the information we have marked would cause substantial competitive harm. *See* ORD 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). Accordingly, the department must withhold the information we have marked under section 552.110(b) of the Government Code. However, we find SH 130 CC has not demonstrated the release of the remaining information would result in substantial harm to its competitive position. Therefore, none of the remaining information may be withheld under section 552.110(b) of the Government Code.

SH 130 CC also asserts its remaining information constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude SH 130 CC has failed to establish a *prima facie* case that any of its remaining information meets the definition of a trade secret, nor has the company demonstrated the necessary factors to establish a trade secret claim. *See* RESTATEMENT OF TORTS § 757 cmt. b; 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). Accordingly, the department may not withhold any of the remaining responsive information under section 552.110(a) of the Government Code.

In summary, the department 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.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,



Rustam Abedinzadeh
Assistant Attorney General
Open Records Division

RA/dls

Ref: ID# 550203

Enc. Submitted documents

c: Requestor
(w/o enclosures)

State Highway 130 Concession Company, L.L.C.
c/o Ms. Marilyn M. Montano
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)