



January 22, 2015

Mr. Frank L. Melton
Assistant City Attorney
Office of the City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

OR2015-01231

Dear Mr. Melton:

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# 551268 (COSA File No. W039275-110614).

The City of San Antonio (the "city") received a request for the final pricing information for a specified solicitation for job order contracts from 2011. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code.¹ Additionally, you state the proprietary interests of certain third parties might be implicated by this request. Accordingly, you notified Alpha Building Corporation; Con-Cor, Inc. ("Con-Cor"); Davila Construction, Inc.; Eaton Commercial, LP; F.A. Nunnally, Co.; Horizon Group International; Healthy Resources Enterprise, Inc.; Jamail and Smith Construction; Kellogg, Brown & Root; and the Sabinal Group ("Sabinal") of the request and of their rights to submit arguments to this office explaining why their information should not be released. *See Gov't 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

¹Although you also raise sections 552.101 through 552.103 of the Government Code, as well as sections 552.105 through 552.142 of the Government Code, you have submitted no arguments in support of these exceptions; therefore, we assume you have withdrawn your claim these sections apply to the responsive information. *See Gov't Code §§ 552.301, .302.*

circumstances). We have received comments from Con-Cor and Sabinal. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note some of the submitted information, which we have marked, is not responsive to the present request because it does not pertain to the final pricing information for the specified solicitation for job order contracts. This ruling does not address the public availability of the non-responsive information, and the city need not release it in response to this request.

Next, 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 of the date of this letter, we have only received comments from Con-Cor and Sabinal. Thus, none of the remaining third parties has demonstrated they have a protected proprietary interest in any of the responsive 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 city may not withhold the responsive information on the basis of any proprietary interests any of the remaining third parties may have in the information.

Next, we note that Sabinal seeks to withhold information the city has not submitted to this office for our review. This ruling does not address information beyond what the city has submitted to us for review. *See* Gov't Code § 552.301 (e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested). Accordingly, this ruling is limited to the information the city submitted as responsive to the request for information. *See id.*

Next, Sabinal asserts its information is excepted from disclosure under sections 552.104, 552.107, and 552.110 of the Government Code. We note sections 552.104 and 552.107 protect the interests of governmental bodies, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 676 at 10-11 (governmental body may waive attorney-client privilege under section 552.107), 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), 522 (1989) (discretionary exceptions in general). The city does not make arguments for section 552.107; consequently, we will not consider Sabinal's arguments under section 552.107, and the city may not withhold any of the responsive information on that basis. However, because the city raises section 552.104 of the Government Code, we will consider the city's arguments under that exception. Additionally, because section 552.110 protects third party interests, we will consider Sabinal's argument under section 552.110 of the Government Code.

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* ORD 592. 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). However, this office has determined in some circumstances section 552.104 may apply to information pertaining to an executed contract where the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids).

You state the city is advertising a solicitation for new job order contracts. You further state releasing the responsive information related to the specified solicitation for job order contracts may prevent the city from obtaining similar information in future bids and, “[i]t may cost the [c]ity more money if [the responsive information] is released to potential bidders.” However, you also state bidding for the specified solicitations for job order contracts from 2011 has ended and “the pricing accepted in 2011 should have no effect on the [solicitation for new job order contracts].” Thus, we conclude the responsive information relates to contracts that have already been executed. Consequently, we find you have not demonstrated how the release of the pricing information would affect an ongoing competitive bidding situation or how the information at issue pertains to the solicitation of bids for the same or similar goods or services on a recurring basis. Therefore, the city has failed to demonstrate the applicability of section 552.104 of the Government Code to the responsive information and may not withhold any of the responsive information on that basis.

Section 552.110(a) protects trade secrets 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. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); *see also* Open Records Decision No. 552 (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.² 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 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. *See* 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 result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5-6 (1999).

Con-Cor and Sabinal each argue their information is excepted from disclosure under section 552.110(b) of the Government Code. We note the responsive information consists of pricing information from winning third party bidders the city accepted in response to the specified solicitation for job order contracts. This office considers the prices charged in

²The 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).

government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *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 a cost of doing business with government). Additionally, we conclude Sabinal has not established any portion of its information constitutes trade secrets for purposes of section 552.110(a). Accordingly, none of the responsive information may be withheld under section 552.110 of the Government Code. As there have been no further exceptions to disclosure raised for the responsive information, it must be released at this time.

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,



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Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 551268

Enc. Submitted documents

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