



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 11, 2015

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

OR2015-04614

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# 556112.

The Texas Department of Transportation (the "department") received a request for information pertaining to three specified requests for proposals. The department claims a portion of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Although the department takes no position as to whether the remaining information is excepted under the Act, the department states release of this information may implicate the proprietary interests of several third parties. Accordingly, the department states, and provides documentation showing, it notified these third parties of the request for information and of their rights to submit arguments to this office as to why the information at issue 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 Baseline Corporation ("Baseline"); Cobb, Fendley & Associates, Inc. ("Cobb Fendley"); and Surveying and Mapping, LLC ("SAM"). We have considered the submitted

arguments and reviewed the submitted information, a portion of which consists of a representative sample.¹

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). However, in Open Records Decision No. 541, this office stated the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates public disclosure of the information will allow competitors to undercut future bids, and 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); *see also* Open Records Decision No. 309 (1983) (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

The department raises section 552.104 of the Government Code for Exhibit C. The department informs us the information at issue was created in connection with specific competitive procurements and that the contracts arising from that process have been awarded and executed. However, the department explains it solicits proposals of the same types of services at issue on a recurring basis and thus, disclosure of the information would undercut the department’s negotiating position with respect to future procurements on such contracts. Based on these representations and our review, we agree the department may withhold Exhibit C under section 552.104 of the Government Code.²

Next, 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) of the Government Code to submit its reasons, if any, as to why information relating to that party should be withheld from public

¹We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

²As our ruling is dispositive, we need not address the department’s remaining argument against disclosure of the information at issue.

disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have only received comments from Baseline, Cobb Fendley, and SAM. Therefore, we have no basis to conclude any of the remaining third parties have a protected proprietary interest in the remaining 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the department may not withhold the remaining information on the basis of any proprietary interest any of those third parties may have in the information.

Cobb Fendley raises section 552.104 of the Government Code, which, as previously mentioned, excepts "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). We note section 552.104 protects the interests of governmental bodies, not third parties. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Accordingly, we will not consider Cobb Fendley's claim under this section. In this instance, the department does not raise section 552.104 as an exception to disclosure of Cobb Fendley's information. Therefore, the department may not withhold any of Cobb Fendley's information under section 552.104 of the Government Code.

Baseline and SAM raise section 552.110 of the Government Code for portions of their information. 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.³ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim 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* Open Records Decision No. 552 at 5 (1990). 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).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (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).

SAM argues some of its information constitutes trade secrets. Upon review, we find SAM has established a *prima facie* case the information we have marked constitutes trade secret information for purposes of section 552.110(a). Accordingly, the department must withhold the information we have marked under section 552.110(a). However, we find SAM has failed to establish a *prima facie* case any portion of its remaining information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, none of SAM’s remaining information may be withheld under section 552.110(a).

³The 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).

Baseline and SAM argue portions of their information consist of commercial information, the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find Baseline and SAM have failed to demonstrate the release of any of their remaining information would result in substantial harm to their competitive positions. *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 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 (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), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, none of Baseline's or SAM's information may be withheld under section 552.110(b).

In summary, the department may withhold Exhibit C under section 552.104 of the Government Code. The department must withhold the information we have marked under section 552.110(a). 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,



Rahat Huq
Assistant Attorney General
Open Records Division

RSH/dls

Ref: ID# 556112

Enc. Submitted documents

c: Requestor
(w/o enclosures)

E. David Utzman, RPLS
Arrerondo, Zepeda & Brunz, LLC
11355 McCree Road
Dallas, Texas 75238
(w/o enclosures)

Edward F. Burkhart, RPLS
Bain Medina Bain, Inc.
7073 San Pedro
San Antonio, Texas 78216
(w/o enclosures)

Steven Eric Williams, RPLS
Baseline Corporation
1750 Seamist Drive, Suite 160
Houston, Texas 77008
(w/o enclosures)

Isaac Camancho, RPLS
Brock & Bustillos, Inc.
417 Executive Center Boulevard
El Paso, Texas 79902
(w/o enclosures)

Bruce Geer, RPLS
Bruce Geer, Surveyor
1101 West University Drive
McKinney, Texas 75069
(w/o enclosures)

Ben L. Galvan, PE, RPLS
CivilCorp, LLC
2825 Wilcrest Drive, Suite 460
Houston, Texas 77042
(w/o enclosures)

Roderick Clay Swetman, RPLS
Civil Design Services
dba CDS/Muery
311 Magic Drive
San Antonio, Texas 78229
(w/o enclosures)

Mickey D. Nowell, RPLS
Cobb, Fendley & Associates, Inc.
6801 Gaylord Parkway, Suite 302
Frisco, Texas 75034
(w/o enclosures)

Stephanie A. Funk, RPLS
Cobb, Fendley & Associates, Inc.
13430 Northwest Fwy, Ste. 1100
Houston, Texas 77040
(w/o enclosures)

David L. Nesbitt, RPLS
Coym, Rehmet & Gutierrez
Engineering, LP
5656 South Staples Street, Suite 230
Corpus Christi, Texas 78411
(w/o enclosures)

Colin J. Henry, PE, RPLS
Criado & Associates, Inc.
4141 Blue Lake Circle, Suite 133
Dallas, Texas 75244
(w/o enclosures)

Stewart Kling, RPLS
Don Durden, Inc. d/b/a
Civil Engineering Consultants
4101 South Texas Avenue, Suite A
Bryan, Texas 77802
(w/o enclosures)

Frank X. Spencer, PE, RPLS
Frank X. Spencer & Assoc., Inc.
1130 Montana Avenue
El Paso, Texas 79902
(w/o enclosures)

Bill Wedelich, RPLS
GeoSolutions, LLC
25211 Grogan's Mill Rd., Ste 370
Spring, Texas 77380
(w/o enclosures)

W. Truett Wilson, PE
Gorrondona & Associates, Inc.
7524 Jack Newell Blvd. South
Fort Worth, Texas 76118
(w/o enclosures)

Dan H. Clark, RPLS
Halff Associates, Inc.
4030 West Braker Lane, Suite 450
Austin, Texas 78759
(w/o enclosures)

Robert A. Christopher, RPLS
Hugo Reed & Associates, Inc.
1601 Avenue N
Lubbock, Texas 79401
(w/o enclosures)

Drew A. Mawyer, RPLS
D. A. Mawyer Land Surveying, Inc.
132 Caddell Lane
New Braunfels, Texas 78130
(w/o enclosures)

Dion P. Albertson, RPLS
Don Durden, Inc. d/b/a
Civil Engineering Consultants
11550 West Interstate 10, Suite 395
San Antonio, Texas 78230
(w/o enclosures)

Daryl R. Furman, RPLS
Furman Land Surveyors, Inc.
3501 South Georgia Street, Suite D
Amarillo, Texas 79109
(w/o enclosures)

Ayda Gonzalez, PE
Gonzalez+DeLaGarza & Associates
115 East Travis Street, Suite 1120
San Antonio, Texas 78205
(w/o enclosures)

Henry A. Kuehlem, RPLS
H. A. Kuehlem Survey Company
14350 Northbrook Drive, Suite 130
San Antonio, Texas 78232
(w/o enclosures)

Tim C. Pappas, RPLS
Halff Associates, Inc.
4500 West Illinois Avenue, Suite 301D
Midland, Texas 79703
(w/o enclosures)

Eric Yahoudy, RPLS
Huitt-Zollars, Inc.
1717 McKinney Avenue, Suite 1400
Dallas, Texas 75202
(w/o enclosures)

Stephen E. Cobb, RPLS
Huitt-Zollars
5822 Cromo Drive, Suite 210
El Paso, Texas 79912
(w/o enclosures)

Timothy Jackson, RPLS
Lamb-Star Engineering, LP
5700 West Plano Pkwy, Ste. 1000
Plano, Texas 75093
(w/o enclosures)

Larry L. Drewes, RPLS
Land-Mark Professional
Surveying, Inc.
1420 Bessemer Drive, Suite A
El Paso, Texas 79936
(w/o enclosures)

Paul Pongkin Kwan, RPLS
Landtech Consultants, Inc.
2525 North Loop West, Suite 300
Houston, Texas 77008
(w/o enclosures)

Jeremy Russell, RPLS
LJA Engineering, Inc.
2929 Briarpark Drive, Suite 600
Houston, Texas 77042
(w/o enclosures)

Chris I. Conrad, RPLS
McGray & McGray
Land Surveyors, Inc.
3301 Hancock Drive, Suite 6
Austin, Texas 78731
(w/o enclosures)

Jeff Curci, RPLS
Jacobs Engineering Group, Inc.
2705 Bee Cave Road, Suite 300
Austin, Texas 78746
(w/o enclosures)

Joseph Beavers, RPLS
Landesign Services, Inc.
1220 McNeil Road, Suite 200
Round Rock, Texas 78681
(w/o enclosures)

Scott M. Fertak, RPLS
Landtech Consultants, Inc.
2525 North Loop West, Suite 300
Houston, Texas 77008
(w/o enclosures)

Christopher R. Freeman, RPLS
Lina T. Ramey & Associates, Inc.
3320 Belt Line Road
Dallas, Texas 75234-2305
(w/o enclosures)

Patrick Charles Matussek, RPLS
Maverick Engineering, Inc.
11490 Westheimer Road, Suite 250
Houston, Texas 77077
(w/o enclosures)

Wayne J. McKittrick, RPLS
McKim & Creed, Inc.
Suite 200
9960 W. Sam Houston Parkway S.
Houston, Texas 77099
(w/o enclosures)

James T. Muller, RPLS
McKim & Creed, Inc.
Suite 138
1517 W. North Carrier Parkway
Grand Prairie, Texas 75050
(w/o enclosures)

David Michael Klein, RPLS
MDS Land Surveying Co., Inc.
8 Spencer Road, Suite 100
Boerne, Texas 78006
(w/o enclosures)

Mark A. Pacheco, PE, RPLS
Pacheco Koch Consulting
Engineers, Inc.
8350 N. Central Expy, Suite 1000
Dallas, Texas 75206
(w/o enclosures)

Adalberto Camarillo, RPLS
Poznecki-Camarillo, Inc.
5835 Callaghan Road, Suite 200
San Antonio, Texas 78228
(w/o enclosures)

Ruben A. Caleron, RPLS
RODS Surveying, Inc.
6810 Lee Road, Suite 100
Spring, Texas 77379
(w/o enclosures)

Samuel Maldonado, PE, RPLS
SAMÉS, Inc.
200 South Cage Boulevard, Ste. A
Pharr, Texas 78577
(w/o enclosures)

Ray Weger, RPLS
McKim & Creed, Inc.
4418 Centergate Street
San Antonio, Texas 78217
(w/o enclosures)

Eduardo O. Mendez, RPLS
MWM Design Group
305 East Huntland Drive, Suite 200
Austin, Texas 78752
(w/o enclosures)

David A. Casanova, RPLS
Pape-Dawson Engineers, Inc.
2000 NW Loop 410
San Antonio, Texas 78213
(w/o enclosures)

Ruben A. Caleron, RPLS
RODS Surveying, Inc.
1450 Pleasanton Road, Suite B
San Antonio, Texas 78221
(w/o enclosures)

Kurt Schumacher, RPLS
ROW Surveying Services, LLC
900 South Stewart Road, Suite 13
Mission, Texas 78572
(w/o enclosures)

David Ellis, RPLS
Sherwood Surveying & SUE, LLC
6477 FM 311
Spring Branch, Texas 78070
(w/o enclosures)

Ms. Cookie F. Munson
General Counsel/Secretary
Surveying and Mapping, LLC
(SAM)
Building 2, Suite 100
4801 Southwest Parkway
Austin, Texas 78735
(w/o enclosures)

Steve Hampton, RPLS
Teague, Nall and Perkins, Inc.
1100 Macon Street
Fort Worth, Texas 76102
(w/o enclosures)

Kenneth Erwin, RPLS
TranSystems Corp. Consultants
500 West Seventh Street, Ste. 1100
Fort Worth, Texas 76102
(w/o enclosures)

Ms. Brenda Vickrey Johnson
Vickrey & Associates, Inc.
12940 Country Parkway
San Antonio, Texas 78216
(w/o enclosures)

John W. McCown, RPLS
Survtex, LLC
600 West Whitestone Boulevard
Cedar Park, Texas 78613
(w/o enclosures)

Richard Door, RPLS
TranSystems Corp. Consultants
2777 Allen Parkway, Suite 500
Houston, Texas 77019
(w/o enclosures)

Trisha Lund, RPLS
Unintech Consulting Engineers, Inc.
2431 East Evans Road
San Antonio, Texas 78259
(w/o enclosures)

G. Dennis Qualls, RPLS
VRX, Inc.
2500 Dallas Parkway, Suite 450
Plano, Texas 75093
(w/o enclosures)