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ATTORNEY GENERAL OF TEXAS

June 18, 2015

Ms. Sarah Parker
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OR2015-12115

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# 569250.

The Texas Department of Transportation (the "department") received a request for the proposals selected for negotiations and the department's selection criteria and scoring matrix for eleven specified requests for proposals.¹ The department states it is releasing some of the requested information, including some information in accordance with Open Records Letter Nos. 2014-18316 (2014), 2014-17464 (2014), and 2014-15149 (2014). *See* Gov't Code § 552.301(a); Open Records Decision No. 673 at 6-7 (2001) (discussing criteria for first type of previous determination). Although the department takes no position as to whether the submitted information is excepted under the Act, it states release of the submitted information may implicate the proprietary interests of third parties. Accordingly, the department states, and provides documentation showing, it notified the third parties of the request for information and of their right to submit arguments to this office as to why the

¹We note the department sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing 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) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

submitted information should not be released.² 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 AIA Engineers, LTD ("AIA"); CP&Y, Inc. ("CP&Y"); Kleinfelder, Inc. ("Kleinfelder"); Rio Engineering, Inc. ("Rio"); and Structural Engineering Associates, Inc. ("SEA"). We have considered the submitted arguments and reviewed the submitted information.

The department states some of the submitted proposals are not responsive to the instant request for information because they were not selected for negotiations. This ruling does not address the public availability of non-responsive information, and the department is not required to release non-responsive information in response to this request.

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 information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why the responsive information should not be released. Therefore, we have no basis to conclude any of the remaining third parties has a protected proprietary interest in the responsive 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 responsive information on the basis of any proprietary interest the remaining third parties may have in the information.

AIA, CP&Y, Kleinfelder, Rio, and SEA claim their 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

²The department notified the following third parties: AIA Engineers, LTD; Brown & Gay Engineers; Kimley-Horn and Associates; Parsons Brickerhoff, Inc.; Burns & McDonnell Engineering Company; CP&Y, Inc.; Fugro Consultants, Inc.; Kleinfelder, Inc.; Professional Service Industries, Inc.; Terracon Consultants, Inc.; CDM Smith, Inc.; Jacobs Engineering Group; Civil Associates, Inc.; Aguirre & Fields, LP; AMD Engineers, LLC; CH2M Hill, Inc.; CP&Y, Inc.; Excelsis, Inc.; HDR Engineering, Inc.; Structural Engineering Associates, Inc.; TransSystems Corporation Consultants; URS Corporation; AECOM Technical Services, Inc.; H&H Resources, Inc.; Klotz Associates, Inc.; LIA Engineering, Inc.; Omega Engineers, Inc.; Vickrey & Associates, Inc.; Bridgefarmer & Associates; CivilCorp, LLC; HW Lochner, Inc.; Barnhart Constructors, Inc. d/b/a Barnhart Engineering; Chad Wright Engineering, LLC; Clear Span Engineering, Inc.; Linwood E. Howell, Jr. d/b/a XR Structural; LMB Engineering, Inc.; Michael Baker, Jr., Inc.; MJB Engineering; Rio Engineering, Inc.; Scientech Engineers; SEK Engineering; Reynolds, Smith & Hills, Inc.

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* 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).

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).

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* ORD 661 at 5.

AIA, CP&Y, Kleinfelder, Rio, and SEA contend their information constitutes trade secrets. Upon review, we find AIA, CP&Y, Kleinfelder, Rio, and SEA have failed to establish a *prima facie* case any of their information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, none of their information may be withheld under section 552.110(a).

AIA, CP&Y, Kleinfelder, Rio, and SEA further argue their information consists of commercial information, the release of which would cause their companies substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find AIA, CP&Y, Kleinfelder, Rio, and SEA have not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of their information would cause their companies substantial competitive harm. *See* ORD 661. Therefore, none of their information may be withheld under section 552.110(b). As no other exceptions to disclosure are raised for the remaining responsive information, the department must release it.

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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DLW/bhf

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