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June 30, 2015

Ms. Sarah Parker
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OR2015-13055

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# 569168.

The Texas Department of Transportation (the "department") received a request for information pertaining to six specified competitive procurements.¹ You claim a portion of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. You also state release of the remaining information may implicate the proprietary interests of numerous third parties. Accordingly, you state, and provide documentation demonstrating, the department notified the third parties of the request for information and of their rights to submit arguments to this office stating 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); 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 circumstances). We have received comments from AIA Engineers, Ltd. ("AIA") and CP&Y, Inc. ("CP&Y"). We have reviewed 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) (if a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

submitted arguments and the submitted information, a portion of which you state is a representative sample of information.² We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing an interested party may submit documents stating why information should or should not be released).

Initially, you state some of the requested information was the subject of previous requests, as a result of which this office issued Open Records Letter Nos. 2014-18316 (2014), 2014-16480 (2014), and 2014-15149 (2014). In Open Records Letter No. 2014-18316, we ruled the department must rely on Open Records Letter No. 2014-15149 as a previous determination and continue to release the identical information in accordance with that ruling and release the remaining information not subject to the prior ruling. In Open Records Letter No. 2014-16480, we determined the department must withhold information we marked under section 552.110(b), and must release the remaining information. In Open Records Letter No. 2014-15149, we determined the department must release the information at issue in accordance with copyright law. Except with regard to the third parties' claims under section 552.104(a), we understand there has not been any change in the law, facts, or circumstances on which Open Records Letter Nos. 2014-18316, 2014-16480, and 2014-15149 were based. Accordingly, except in regard to the third parties' claims under section 552.104(a), we conclude the department must rely on Open Records Letter Nos. 2014-18316, 2014-16480, and 2014-15149 as previous determinations and release the identical information in accordance with these rulings. *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 that information is or is not excepted from disclosure). Although the law has changed with regard to a third party's right to assert section 552.104(a), *see Boeing Co. v. Paxton*, No. 12-1007, slip op. at 17 (Tex. June 19, 2015), section 552.007 of the Government Code states if a governmental body voluntarily releases information to any member of the public, a governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007. Section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, the department may not now withhold the previously released information. 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 "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, No. 12-1007, slip op. at 17 (Tex. June 19, 2015). You represent a portion of the submitted information pertains to a competitive bidding situation. You state the scoring and evaluation criteria documents in Exhibit B relate to contracts that

²We 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 that those records contain substantially different types of information than that submitted to this office.

have been awarded and executed. However, you state the department “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” You assert the disclosure of the information in Exhibit B will undercut the department’s negotiating position with respect to future procurements for such contracts, and would allow third-party competitors to tailor their letters of interest to specific evaluation criteria, undermining the quality of letters of interest and undermining competition among competitors. After review of the information at issue and consideration of the arguments, we find the department has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold Exhibit B under section 552.104(a).³

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 arguments from the third parties listed above. Thus, the remaining third parties have not demonstrated they have protected proprietary interests in any of the submitted 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 department may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

AIA and CP&Y contend their information is excepted from disclosure under section 552.110(a) 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. Gov’t Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person that are 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 the following:

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

³As our ruling is dispositive for this information, we need not address your remaining argument against its disclosure.

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.⁴ 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).

AIA and CP&Y argue portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude each of these third parties have failed to establish a *prima facie* case that any portion of their information meets the definition of a trade secret. We further find these third parties have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, none of these third parties' information may be withheld under section 552.110(a).

In summary, the department must rely on Open Records Letter Nos. 2014-18316, 2014-16480, and 2014-15149 as previous determinations and release the identical information in accordance with these rulings. The department may withhold Exhibit B under section 552.104 of the Government Code. The department must release the remaining information.

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.

⁴The 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).

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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PL/bhf

Ref: ID# 569168

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