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ATTORNEY GENERAL OF TEXAS

September 14, 2015

Ms. Sarah Parker  
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OR2015-19036

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# 579002.

The Texas Department of Transportation (the "department") received three requests for specified solicitations. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of multiple third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of the companies' rights 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 AIA Engineers, Ltd. (AIA); CP&Y, Inc. ("CP&Y"); Kellogg Brown & Root Services, Inc. ("KBR"); Kennedy Consulting, Inc. ("KCI"); S&B Infrastructure, Ltd. ("S&BI"); Structural Engineering Associates, Inc. ("SEA"); and Surveying and Mapping, LLC. ("SAM"). We have considered the submitted arguments and reviewed the submitted information.

Initially, you indicate some of the submitted information, which you have marked, is not responsive to the instant request. This ruling does not address the public availability of any

information that is not responsive to the request and the department is not required to release such information 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 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 only received comments from AIA, CP&Y, KBR, KCI, S&BI, SEA, and SAM explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have a protected proprietary interest in the submitted 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 any of the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

S&BI raises section 552.104 of the Government Code for a portion of its information and KCI raises section 552.104 of the Government Code for the Questions and Responses portion of its information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. A private third party may invoke this exception. *Boeing Co. v. Paxton*, No. 12-1007, 2015 WL 3854264, at \*7 (Tex. June 19, 2015). 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." *Id.* at \*9. S&BI and KCI state they have competitors. In addition, S&BI and KCI state the release of their information would give advantage to their competitors or other bidders. After review of the information at issue and consideration of the arguments of S&BI and KCI, we find these third parties have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the department may withhold the information we have marked in S&BI's information and the Questions and Responses portion of KCI's information under section 552.104(a) of the Government Code.<sup>1</sup>

AIA, CP&Y, KBR, SEA, and SAM claim their submitted information is excepted under section 552.110 of the Government Code, which 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. 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

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<sup>1</sup>As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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.<sup>2</sup> 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. *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

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<sup>2</sup> The 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).

of the business.” RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Record 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 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).

AIA, CP&Y, SAM, and SEA argue some of their information constitutes trade secrets. Upon review, we find AIA, CP&Y, SAM, and SEA have not demonstrated any of their information meets the definition of a trade secret, nor have these third parties demonstrated the necessary factors to establish a trade secret claim. *See* 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, none of the remaining responsive information may be withheld under section 552.110(a) of the Government Code.

Furthermore, KBR, SAM, and SEA argue some of their information consists 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 SAM has demonstrated portions of its information constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find KBR, SAM, and SEA have failed to demonstrate the release of any of the remaining information at issue would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 661, 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). Accordingly, none of the remaining responsive information may be withheld under section 552.110(b) of the Government Code.

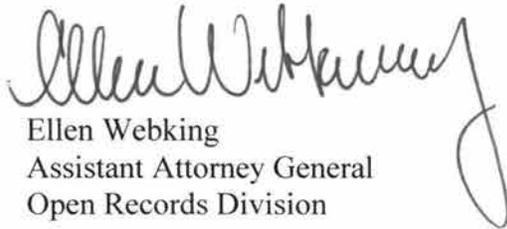
Some of the submitted information may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109(1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department may withhold S&BI's information, which we have marked, and KCI's information at issue under section 552.104(a) of the Government Code. The department must withhold the information we have marked under section 552.110(b) of the Government Code. The department must release the remaining responsive information; however, any information protected by copyright may only be released in accordance with copyright law.

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](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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EW/akg

Ref: ID# 579002

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