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ATTORNEY GENERAL OF TEXAS

October 14, 2015

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

OR2015-21572

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# 583030.

The Texas Department of Transportation (the "department") received a request for information pertaining to four specific requests for proposals. The department states Exhibit C is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Further, although the department takes no position as to whether Exhibit B is excepted under the Act, the department informs us release of this information may implicate the proprietary interests of multiple third parties.¹ Accordingly, the department states it notified these third parties of the request for information and of their right 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 AIA and KBR. We have considered the submitted arguments and reviewed the submitted information.

¹The third parties at issue are Aguirre & Fields, LP; AIA Engineers, Ltd. ("AIA"); Atkins North America, Inc.; Brown and Gay Engineers, Inc.; CDM Smith Inc.; H.W. Lochner, Inc.; HDR Engineering, Inc.; HNTB Corporation; Kellogg Brown & Root Services, Inc. ("KBR"); Lockwood, Andrews & Newnam, Inc.; LJA Engineering, Inc.; and VRX Inc.

Initially, the department states some of the responsive information was the subject of previous requests for information in response to which this office issued Open Records Letter Nos. 2015-12115 (2015), 2015-16048 (2015), and 2015-19036 (2015). As we have no indication the law, facts, and circumstances on which the prior rulings were based has changed, the department must continue to rely on Open Records Letter Nos. 2015-12115, 2015-16048, and 2015-19036 as previous determinations and withhold or release the identical information in accordance with those 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 a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). For the information that is not subject to Open Records Letter Nos. 2015-12115, 2015-16048, and 2015-19036, we will consider the arguments against disclosure.

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 and KBR explaining why the submitted 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 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.

Section 552.104(a) of the Government Code excepts from 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, 2015 WL 3854264, at *9 (Tex. June 19, 2015). The department represents Exhibit C pertains to a competitive bidding situation. In addition, the department states the bidding process is ongoing, and disclosure of the information at issue would undercut the department's negotiating position with respect to future procurements. 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 C under section 552.104(a) of the Government Code.²

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

AIA and KBR claim their information is excepted from disclosure 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(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. See *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also ORD 552 at 2. 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.³ 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

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).

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).

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* ORD 661 at 5-6.

Upon review, we find AIA has failed to demonstrate its information meets the definition of a trade secret, nor has AIA demonstrated the necessary factors to establish a trade secret claim. *See* ORDs 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), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing are not ordinarily excepted under statutory predecessor to section 552.110). Therefore, the department may not withhold any of the submitted information pursuant to section 552.110(a) of the Government Code.

AIA and KBR claim their information constitutes commercial or financial information that, if released, would cause the companies substantial competitive harm. Upon review, we find AIA and KBR have failed to demonstrate the release of the information at issue 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 that 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). Consequently, the department may not withhold any of the submitted information under section 552.110(b) of the Government Code.

In summary, the department must continue to rely on Open Records Letter Nos. 2015-12115, 2015-16048, and 2015-19036 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold Exhibit C under section 552.104(a) 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.

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/som

Ref: ID# 583030

Enc. Submitted documents

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