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ATTORNEY GENERAL OF TEXAS

January 12, 2016

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

OR2016-00924

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# 593776.

The Texas Department of Transportation (the "department") received a request for the top thirteen responses to RFP-57-5RFPSG001, excluding the requestor's proposal. Although the department takes no position as to whether the requested information is excepted under the Act, it states release of the requested information may implicate the proprietary interests of Aecom; Amec Foster Wheeler Environmental & Infrastructure, Inc.; CB&I Environmental & Infrastructure; Geo Strata-Intera, L.L.C. ("GSI"); InControl Technologies; Kleinfelder, Inc.; Modern Technologies; Terracon Consultants, Inc.; Tetra Tech, Inc. ("Tetra Tech"); TGE Resources ("TGE"); TRC Environmental Corporation; and Weston Solution. Accordingly, the department states, and provides documentation showing, it notified the third parties of the request for information and of their 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 GSI, Tetra Tech, and TGE. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note portions of the requested information were the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2015-25149 (2015). In Open Records Letter No. 2015-25149, we determined (1) to the extent the customer information at issue was not publicly available on Tetra Tech's website, the department must withhold the customer information we marked under section 552.110(a) of the Government Code, and (2) the department must release the remaining information. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Thus, the department must rely on Open Records Letter No. 2015-25149 as a previous determination and withhold or release the identical information in accordance with that ruling. *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 the 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). We will address the public availability of the submitted information that was not at issue in the previous ruling.

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 GSI and TGE explaining why the information at issue should not be released.¹ Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the information at issue. *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 information at issue on the basis of any proprietary interests the remaining third parties may have in the information.

GSI and TGE assert 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 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:

¹We note Tetra Tech has sent to this office the same comments that Tetra Tech sent in Open Records Letter No. 2015-25149; thus, we do not address Tetra Tech's comments in this ruling.

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.² 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).

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.

²The 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).

GSI and TGE assert section 552.110(b) for their information. Upon review, we find GSI and TGE have demonstrated the information we have marked constitutes commercial or financial information, the release of which would cause substantial competitive injury. Further, we find TGE has demonstrated its customer information constitutes commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold under section 552.110(b) of the Government Code the information we have marked and must generally withhold TGE's customer information; however, the department may not withhold TGE's customer information to the extent such information is publicly available on TGE's website.³ Further, we find GSI and TGE have not demonstrated the release of any of their remaining information would result in substantial harm to their competitive positions. Therefore, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

GSI and TGE argue their remaining information, including any customer information publicly available on TGE's website, constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find GSI and TGI have failed to establish *prima facie* cases this information meets the definition of a trade secret and have not demonstrated the necessary factors to establish a trade secret claim for this information. *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), ORD 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). Accordingly, none of the remaining information may be withheld under section 552.110(a) of the Government Code.

We note some of the remaining 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 must rely on Open Records Letter No. 2015-25149 as a previous determination and withhold or release the identical information in accordance with that ruling. The department must withhold under section 552.110(b) of the Government Code the information we have marked and must generally withhold TGE's customer information; however, the department may not withhold TGE's customer information to the extent such information is publicly available on TGE's website. The department must release the

³As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

remaining information; however, the department may release any information subject to copyright only 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, 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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 593776

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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