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ATTORNEY GENERAL OF TEXAS

February 9, 2016

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

OR2016-03136

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# 597605.

The Texas Department of Transportation (the "department") received a request for the scoring matrices, winning submittals, and contracts for five specified solicitations. You state you have released some information to the requestor. You claim portions of the submitted information are excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of third parties.¹ Accordingly, you notified the third parties of the request for information and of their right to submit arguments to this office as to why

¹The third parties notified pursuant to section 552.305 are: Arredondo, Zepeda & Brunz, L.L.C.; Baseline Corp.; CP&Y, Inc.; Gorrondona & Associates, Inc.; Halff Associates, Inc. ("Halff"); Lamb-Star Engineering, L.P.; Lina T. Ramey and Associates, Inc.; Surveying and Mapping; TranSystem Corp. ("TranSystem"); Collins Surveying and Mapping, L.L.C.; Landtech Consultants, Inc.; Sanderson Surveying, Inc. ("Sanderson"); Summit Surveying, Inc.; Underwood Drafting & Surveying, Inc. ("Underwood"); Pacheco Koch Consulting Engineers, Inc.; Baseline Corporation; DAL-TECH Engineering, Inc.; Cobb, Fendley & Associates, Inc.; Vickrey & Associates, Inc.; Huitt-Zollars, Inc.; Teague Nall and Perkins, Inc.; Jacobs Engineering Group, Inc.; H.A. Kuehlem Survey Company; Brown & Gay Engineers, Inc.; White Hawk Engineering & Design, L.L.C.; Landesign Services, Inc.; SURVTEX, L.L.C.; ARS Engineers, Inc.; Geomatics Surveying and Mapping, Inc.; Dunaway Associates, L.P.; Civil Design Services, Inc.; Westwood Professional Services, Inc.; Hayden Consultants, Inc.; Nathan D. Maier Consulting Engineers, Inc.; Frank X. Spencer & Associates, Inc.; Criado & Associates, Inc.

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 Halff, TranSystem, Underwood, and Sanderson. We have considered the submitted arguments and reviewed the submitted information.

Initially, the department informs us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-04614 (2015) and 2016-00373 (2016). We have no indication the law, facts, or circumstances on which Open Records Letter No. 2015-04614 was based have changed. With the exception of the information pertaining to TranSystem, we understand there has not been any change in the law, facts, or circumstances on which Open Records Letter No. 2016-00373 was based. Accordingly, with the exception of the information pertaining to TranSystem, the department must continue to rely on Open Records Letter Nos. 2015-04614 and 2016-00373 as previous determinations and withhold or release the identical information in accordance with those rulings.² *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).

In Open Records Letter No. 2016-00373, we determined, the department may withhold certain information under section 552.104 of the Government Code and must release the remaining information, including information related to TranSystem. We understand the department did so. However, TranSystem now argues its information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code.³ Although, the department notified TranSystem pursuant to section 552.305 of the Government Code when the department received the previous request for information, TranSystem did not submit comments objecting to the release of its information in the previous ruling. Accordingly, in our previous ruling, we determined the department must release TranSystem's responsive information. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007. We

²As we are able to make this determination, we do not address the arguments to withhold this information.

³Although TranSystem raises section 552.101 of the Government Code in conjunction with sections 552.104 and 552.110, this office has concluded that section 552.101 does not encompass other exceptions found in the Act. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

note section 552.104 does not prohibit the release of information or make information confidential. *See id.* § 552.104. Thus, the department may not withhold TranSystem's previously released information under section 552.104. However, because information subject to section 552.110 is deemed confidential by law, we will address TranSystem's claim under this exception for its previously released information.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." *Id.* § 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*, 466 S.W.3d 831 (Tex. 2015). You represent the information in Exhibit B pertains to a competitive bidding situation. In addition, you state the information in Exhibit B pertaining to procurement 657 pertains to a contract that is still under negotiation. You state releasing the information pertaining to procurement 657 would give an advantage to other proposers and undermine the contract negotiation process. You explain the remaining information in Exhibit B consists of scoring and evaluation criteria documents that relate to contracts that 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 remaining information in Exhibit B will undercut the department's negotiating position with respect to future procurement 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 in Exhibit B would give advantage to a competitor or bidder. Therefore, we conclude the department may withhold Exhibit B in its entirety under section 552.104(a) of the Government Code.⁴

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) of the Government Code 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 Halff, TranSystem, Underwood, and Sanderson explaining why the submitted information should not be released. Therefore, we have no basis to conclude 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, 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

⁴ As we are able to make this determination, we do not address the other argument to withhold this information.

submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

As noted above, 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). A private third party may also invoke this exception, which is subject to the test discussed above. *Boeing*, 466 S.W.3d at 833. Underwood and Sanderson assert they have competitors. In addition, Underwood and Sanderson argue the release of their information in Exhibit C would give advantage to their competitors or other bidders. After review of the information at issue and consideration of the arguments, we find Underwood and Sanderson 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 indicated under section 552.104(a) of the Government Code.⁵

TranSystem claims its 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), *cert. denied*, 358 U.S. 898 (1958); *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

⁵As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

secret factors.⁶ 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 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.

As mentioned above, TranSystem’s information was subject to Open Records Letter No. 2016-00373. In the prior ruling, the department notified TranSystem of the request for information pursuant to section 552.305 of the Government Code. TranSystem did not object to the release of its information. Since the issuance of the previous ruling on January 6, 2016, TranSystem has not disputed this office’s conclusion regarding the release of the information. In this regard, we find TranSystem has not taken any measures to protect its pricing information in order for this office to conclude the information now either qualifies as a trade secret or commercial or financial information, the release of which would cause TranSystem substantial harm. *See* Gov’t Code § 552.110; RESTATEMENT OF TORTS § 757 cmt. b; *see also* ORDs 661, 319 at 2, 306 at 2, 255 at 2. Accordingly, we conclude the department may not withhold TranSystem’s pricing information that was at issue in Open Records Letter No. 2016-00373 under section 552.110 of the Government Code.

In summary, with the exception of the information pertaining to TranSystem, the department must continue to rely on Open Records Letter Nos. 2015-04614 and 2016-00373 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold Exhibit B in its entirety and the information we have

⁶The 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).

indicated 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,



Katelyn Blackburn-Rader
Assistant Attorney General
Open Records Division

KB-R/bw

Ref: ID# 597605

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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