



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

April 19, 2016

Ms. Dena DeNooyer Stroh
General Counsel
North Texas Tollway Authority
5900 West Plano Parkway, Suite 100
Plano, Texas 75093

OR2016-08817

Dear Ms. Stroh:

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# 606490 (NTTA File Nos. 2016-00192 & 2016-00306).

The North Texas Tollway Authority (the "authority") received a request for the bid tab evaluation summary and final bid tabulation pertaining to a specified request for proposals, all proposals submitted in response to the specified request for proposals, agenda and correspondence of any meetings discussing the specified request for proposals, scoring information for the submitted proposals, and any correspondence discussing the bid winner of the specified request for proposals. The authority received another request for the bid tabulation or evaluation information for the specified request for proposals. You state you will release some information. 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 Business Ink, Co. ("Business Ink"), Data Integrators, KUBRA, NDSI Direct Solutions ("NDSI"), ONEIL, QuestMark, RR Donnelley, and SourceHOV. Accordingly, you state, and provide documentation showing, you notified the third parties of the request for information and of their right 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). In response to the first request, we have received comments from NDSI, KUBRA, and Questmark. In response

to the second request, we have received comments from Business Ink, KUBRA, and QuestMark. We have reviewed the submitted information and the submitted arguments.

Initially, we note Business Ink argues against the disclosure of information not submitted by the authority to this office. This ruling does not address information beyond what the authority has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the authority has submitted as responsive to the request for information.¹

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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Data Integrators, ONEIL, RR Donnelley, or SourceHOV explaining why the submitted information should not be released. Therefore, we have no basis to conclude Data Integrators, ONEIL, RR Donnelley, or SourceHOV 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, 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 authority may not withhold the submitted information on the basis of any proprietary interest Data Integrators, ONEIL, RR Donnelley, or SourceHOV may have in the information.

In response to both requests, KUBRA and QuestMark raise section 552.104 of the Government Code. 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 invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 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 841. KUBRA and QuestMark state they have competitors. KUBRA states release of the information it has marked would allow competitors to modify products to "provide the same functionality" as KUBRA and cause competitive harm. After review of the information at issue and consideration of the arguments, we find KUBRA has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold KUBRA's information, which we marked, under section 552.104(a) of the Government Code. QuestMark states release of the information it has indicated would give "competitors a clear and inequitable advantage by allowing them to utilize QuestMark's systems, processes, [and] techniques." We note

¹As our ruling is dispositive, we need not address Business Ink's submitted arguments against disclosure.

QuestMark is the winning bidder in this instance. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 832. After review of the information at issue and consideration of the arguments, we find QuestMark has established the release of some of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the authority may withhold the information we have marked pertaining to QuestMark under section 552.104(a) of the Government Code.²

KUBRA and NDSI state portions of their information are 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:

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.

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

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.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* Open Records Decision No. 552 at 5 (1990). 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). 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 of the business." RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records 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* ORD 661 at 5 (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).

In response to both requests, KUBRA argues portions of its information consist of employee and client information, the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find KUBRA has demonstrated its client information consists of commercial or financial information, the

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).

disclosure of which would cause the company substantial competitive harm. Accordingly, to the extent KUBRA's customer information is not publicly available on KUBRA's website, the authority must withhold KUBRA's customer information at issue, which we marked, under section 552.110(b). The authority must withhold the remaining portions of KUBRA's information we marked under section 552.110(b). However, we find KUBRA has not demonstrated the release of its remaining information would result in substantial harm to its competitive position. *See* Open Records Decision No. 319 at 3 (1982) (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). Therefore, none of KUBRA's remaining information may be withheld under section 552.110(b) of the Government Code.

Further, we find KUBRA has failed to demonstrate any of the remaining information at issue meets the definition of a trade secret, nor has KUBRA 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). Therefore, the authority may not withhold any of the remaining information pursuant to section 552.110(a) of the Government Code.

In response to the first request, NDSI argues portions of its information consist of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. Upon review, we find NDSI has demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the authority must withhold the portions of NDSI's information we have marked under section 552.110(b) of the Government Code.

In summary, the authority may withhold the information we marked under section 552.104(a) of the Government Code. To the extent KUBRA's customer information is not publicly available on the company's website, the authority must withhold the customer information at issue under section 552.110(b) of the Government Code. The authority must withhold the remaining information we marked under section 552.110(b). The authority 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,

A handwritten signature in black ink, appearing to read 'Meagan J. Conway', written over a horizontal line.

Meagan J. Conway
Assistant Attorney General
Open Records Division

MJC/akg

Ref: ID# 606490

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

6 Third Parties
(w/o enclosures)