



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 25, 2016

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

OR2016-11133A

Dear Ms. Parker:

Our office issued Open Records Letter No. 2016-11133 (2016) on May 16, 2016. Since that date, we have received new information that affects the facts on which this ruling was based. Consequently, this decision serves as the corrected ruling and is a substitute for the decision issued on May 16, 2016. *See generally id.* § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act")).

You ask whether certain information is subject to required public disclosure under the Act, chapter 552 of the Government Code. Your request was assigned ID# 619732.

The Texas Department of Transportation ("TxDOT") received a request for all files and documents pertaining to fifty-six different solicitations, including all specified evaluation materials.¹ You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Although you take no position as to whether the remaining submitted information is excepted under the Act, you state release

¹We note TxDOT sought and received clarification of the information requested. *See Gov't Code* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

of this information may implicate the proprietary interests of 223 named third parties.² Accordingly, you state you 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 Cobb, Fendley & Associates, Inc. ("Cobb"); CP&Y, Inc. ("CP&Y"); Freese and Nichols, Inc. ("Freese"); Halff Associates, Inc. ("Halff"); Jacobs Engineering Group, Inc. ("Jacobs"); Johnson, Mirmiran & Thompson, Inc. ("Johnson"); Kennedy Consulting, Inc. ("Kennedy"); Maldonado-Burkett Intelligent Transportation Systems, LLP ("Maldonado"); Pape-Dawson Engineers, Inc. ("Pape"); PaveTex Engineering & Testing, Inc. ("PaveTex"); Rodriguez Transportation Group, Inc. ("Rodriguez"); RPS Klotz Associates, Inc. ("RPS"); S&B Infrastructure, Ltd ("S&B"); and Walter P. Moore and Associates, Inc. ("Walter"). We have considered the submitted arguments and reviewed the submitted information, a portion of which includes a representative sample of information.³

We understand some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2014-16480 (2014), 2015-12115 (2015), 2015-16048 (2015), 2015-19036 (2015), 2015-26376 (2015), 2016-02008 (2016), 2016-03313 (2016), 2016-03677 (2016), 2016-5954 (2016), 2016-07611 (2016), 2016-07944 (2016), 2016-10545 (2016), and 2016-10664 (2016). We note some of the third parties now seek to withhold some of their information previously ordered released under section 552.104 of the Government Code. Section 552.007 of the Government Code provides that, 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 under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, TxDOT may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although these parties now raise section 552.104 of the Government Code for the information at issue, this section does not prohibit the release of information or make information confidential. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999)

²We note TxDOT did not comply with section 552.301 of the Government Code in requesting a decision for the third party information. *See* Gov't Code § 552.301(b). Nonetheless, because the interests of a third party can provide a compelling reason to overcome the presumption of openness, we will consider the submitted third party arguments. *See id.* §§ 552.007, .302, .352.

³We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, TxDOT may not now withhold any of the previously released information under section 552.104 of the Government Code on behalf of these parties. Furthermore, there is no indication the law, facts, and circumstances on which most of the prior rulings were based have changed. Accordingly, for the requested information that is identical to the information previously requested and ruled upon by this office, we conclude TxDOT must continue to rely on Open Records Letter Nos. 2014-16480, 2015-12115, 2015-16048, 2015-19036, 2015-26376, 2016-02008, 2016-03313, 2016-03677, 2016-5954, 2016-07611, 2016-07944, 2016-10545, and 2016-10664 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

However, you inform us the circumstances have changed in regard to Solicitation 601CT0000001362, which we addressed in Open Records Letter No. 2016-07944. Therefore, TxDOT may not rely on Open Records Letter No. 2016-07944 as a previous determination for the eleven proposals TxDOT received in response to the solicitation at issue; nonetheless, to the extent the law, facts, and circumstances on which prior ruling was based have not changed, TxDOT must continue to rely on Open Records Letter 2016-07944 for the remaining information at issue. Next, we address the arguments against disclosure of the submitted information that is not subject to these prior rulings.

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 id.* § 552.305(d)(2)(B). As noted above, as of the date of this letter we have only received comments from Cobb, CP&Y, Freese, Halff, Jacobs, Johnson, Kennedy, Maldonado, Pape, PaveTex, Rodriguez, RPS, S&B, and Walter. We note RPS does not object to release of the information at issue. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests 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, TxDOT may not withhold any portion 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 exempts 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*, 466 S.W.3d 831 (Tex. 2015). You represent the scoring and evaluation information in Exhibit B pertains to a competitive bidding situation. In addition, you state the release of this information would undermine competition among competitors and “undercut TxDOT’s negotiating position with respect to future procurements for such contracts.” After review of the information at issue and consideration of the arguments, we find TxDOT has established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude TxDOT may withhold the scoring and evaluation information in Exhibit B under section 552.104(a) of the Government Code.

We note a private third party may also invoke section 552.104(a) of the Government Code. *See generally id.* Cobb, CP&Y, Halff, Jacobs, Johnson, Kennedy, Maldonado, Pape, PaveTex, Rodriguez, S&B, and Walter state they have competitors. In addition, Cobb, CP&Y, Halff, Jacobs, Johnson, Kennedy, Maldonado, Pape, PaveTex, Rodriguez, S&B, and Walter state the release of some of their information would negatively affect their ability to compete in the market. After review of the information at issue and consideration of the arguments, we find Cobb, CP&Y, Halff, Jacobs, Kennedy, Maldonado, Pape, PaveTex, Rodriguez, S&B, and Walter have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude TxDOT may withhold the information the third parties have indicated in the remaining information in Exhibit C under section 552.104(a) of the Government Code.⁴

Freese claims portions of its information are 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 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

⁴As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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.⁵ 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 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).

Freese asserts portions of its information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Freese has failed to establish a *prima*

⁵The 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).

facie case that any portion of its information at issue meets the definition of a trade secret. We further find Freese has not demonstrated the necessary factors to establish a trade secret claim for its information. *See* ORDs 402, 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Therefore, none of Freese's information may be withheld under section 552.110(a).

Freese contends some of its information is commercial or financial information, the release of which would cause substantial competitive harm to the company. Upon review, we find Freese has not established any of its information constitutes commercial or financial information the disclosure of which would cause the company substantial competitive harm. *See* Gov't Code § 552.110(b). Therefore, TxDOT may not withhold any of the remaining information at issue on this basis.

In summary, except for Solicitation 601CT0000001362 addressed in Open Records Letter No. 2016-07944, TxDOT must continue to rely on Open Records Letter Nos. 2014-16480, 2015-12115, 2015-16048, 2015-19036, 2015-26376, 2016-02008, 2016-03313, 2016-03677, 2016-5954, 2016-07611, 2016-07944, 2016-10545, and 2016-10664 as previous determinations and withhold or release the identical information in accordance with those rulings. TxDOT may withhold Exhibit B and the information the third parties have indicated in the remaining information in Exhibit C under section 552.104 of the Government Code. TxDOT 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,



Ashley Crutchfield
Assistant Attorney General
Open Records Division

AC/dls

Ref: ID# 619732

Enc. Submitted documents

c: Requestor
(w/o enclosures)

223 Third Parties
(w/o enclosures)