



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

June 24, 2016

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

OR2016-14418

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# 615750.

The Texas Department of Transportation (the "department") received a request for the statements of qualifications submitted in response to twelve specified solicitations.¹ The department claims Exhibit B is excepted from disclosure under section 552.104 of the Government Code. Additionally, the department takes no position as to whether Exhibit C is excepted under the Act, but informs us release of this information may implicate the proprietary interests of multiple third parties. Accordingly, the department states, and provides documentation showing, 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

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

not be released.² *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 Pape-Dawson, Halff, MBITS, Cobb, S&B, and from a representative of WPM. We have considered the submitted arguments and reviewed the submitted representative samples of information.³

Initially, the department states some of the responsive information was the subject of a previous request for information in response to which this office issued Open Records Letter No. 2016-11428 (2016). In Open Records Letter No. 2016-11428, we ruled the department may withhold the submitted information under section 552.104(a) of the Government Code. As we have no indication the law, facts, and circumstances on which the prior ruling was based has changed, the department may continue to rely on Open Records Letter No. 2016-11428 as a previous determination and withhold the identical information in accordance with that ruling.⁴ *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).

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*

²The department notified the following: Aecom Technical Services, Inc.; AIA Engineers, Ltd.; Arcadis U.S., Inc.; Brown and Gay Engineers, Inc.; Bury, Inc.; Epic Transportation Group, L.P.; Gunda Corp.; Iteris, Inc.; Kimley-Horn and Associates, Inc.; Klotz Associates, Inc.; Parsons Brinckerhoff, Inc.; RG Miller Engineers, Inc.; RS&H, Inc.; Rummel, Klepper & Kahl, L.L.P.; Teds Infrastructure Group; Terra Associates, Inc.; Bridgefarmer & Associates, Inc.; HDR Engineering, Inc.; HNTB Corp.; LJA Engineering, Inc.; Arredondo, Zepeda & Brunz, L.L.C.; CH2M Hill, Inc.; Burns & McDonnell Engineering; I.S. Engineers, L.L.C.; Teague Nall and Perkins, Inc.; Alliance Transportation Group, Inc.; Atkins North America, Inc.; CDM Smith; Dannenbaum Engineering Corp.; DKS Associates; Freese and Nichols, Inc.; Hatch Mott Macdonald, L.L.C.; IEA, Inc.; Lee Engineering, L.L.C.; Othon, Inc.; Savant Group, Inc.; Stantec Consulting Services, Inc.; Pape-Dawson Engineers, Inc. ("Pape-Dawson"); Halff Associates, Inc. ("Halff"); Maldonado-Burktt Intelligent Transportations Systems, L.L.P. ("MBITS"); Cobb, Fendley & Associates, Inc. ("Cobb"); S&B Infrastructure, Ltd. ("S&B"); and Walter P. Moore and Associates, Inc. ("WPM").

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 those records contain substantially different types of information than that submitted to this office.

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

Co. v. Paxton, 466 S.W.3d 831 (Tex. 2015). The department states the information in Exhibit B pertains to a competitive bidding situation. In addition, the department states the procurements at issue are still under negotiation and the contracts have not yet been executed as of the date the present request was received. 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 the information in Exhibit B under section 552.104(a) of the Government Code.⁵

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 Pape-Dawson, Halff, MBITS, WPM, Cobb, and S&B explaining why their information should not be released. Therefore, we have no basis to conclude the remaining third parties have protected proprietary interests in the remaining 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 remaining information on the basis of any proprietary interest 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." *Id.* § 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. Pape-Dawson, Halff, MBITS, WPM, Cobb, and S&B each state they have competitors. In addition, these third parties state release of their information at issue would give advantage to their competitors. After review of the information at issue and consideration of the arguments, we find the third parties at issue 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 marked under section 552.104(a) of the Government Code.⁶

S&B claims some of its information is excepted from disclosure under section 552.110 of the Government Code, which protects (1) trade secrets, and (2) commercial or financial

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

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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 Open Records Decision No. 552 at 2 (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 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.⁷ 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

⁷The 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).

factors have been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

S&B claims portions of its information are excepted from disclosure under section 552.110(a) of the Government Code. Upon review, we find S&B has established a *prima facie* case its customer information constitutes trade secret information for purposes of section 552.110(a). Nevertheless, to the extent S&B has published any of the customer information at issue on its website, this information is not confidential under section 552.110. Accordingly, the department must withhold S&B's customer information, which we have marked, under section 552.110(a) of the Government Code, provided S&B has not published the information on its website.

In summary, the department may continue to rely on Open Records Letter No. 2016-11428 as a previous determination and withhold the identical information in accordance with that ruling. The department may withhold the information in Exhibit B under section 552.104(a) of the Government Code. The department may withhold the information we have marked under section 552.104(a) of the Government Code. The department must withhold S&B's customer information, which we have marked, under section 552.110(a) of the Government Code, provided S&B has not published the information on its website. 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# 615750

Enc. Submitted documents

c: Requestor
(w/o enclosures)

38 Third Parties
(w/o enclosures)