



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 11, 2016

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

OR2016-15574

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# 617811.

The Texas Department of Transportation (the "department") received a request for information pertaining to seven specified solicitations. You claim some of the submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Additionally, you state release of the remaining information may implicate the proprietary interests of several third parties.<sup>1</sup> Accordingly, you state, and

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<sup>1</sup>The third parties include AECOM Technical Services, Inc.; AIA Engineers, Ltd.; Alliance-Texas Engineering Company d/b/a Alliance Transportation Group, Inc.; ARCADIS U.S. Inc.; Arredondo, Zepeda & Brunz, L.L.C.; ARS Engineers, Inc.; Atkins North America, Inc.; Binkley & Barfield, Inc. ("Binkley"); Bridgefarmer & Associates, Inc.; Brown & Gay Engineers, Inc.; Burns & McDonnell Engineering Company, Inc.; CDM Smith Inc.; CH2M Hill, Inc.; Civil Associates, Inc.; Civil Corp.; Cobb, Fendley & Associates, Inc. ("Cobb"); CP&Y, Inc. ("CP&Y"); Criado & Associates, Inc.; Dannenbaum Engineering Corporation; Dunaway & Associates, L.P.; Entech Civil Engineers, Inc.; Garver, LLC; Halff Associates, Inc. ("Halff"); HDR Engineering, Inc.; HNTB Corporation; HR Green, Inc.; Huitt-Zollars, Inc.; H.W. Lochner, Inc.; IDCUS Inc. d/b/a IDC, Inc.; IEA, Inc.; IQ Infrastructure, L.L.C.; I.S. Engineers, LLC; Jacobs Engineering Group, Inc.; Johnson, Mirmiran & Thompson, Inc.; Jones & Carter, Inc.; Kellogg Brown & Root Services, Inc.; Kennedy Consulting, Inc.; Kimley-Horn and Associates, Inc.; Klotz Associates, Inc.; Lamb-Star Engineers, L.P.; Landesign Services, Inc.; Landtech, Inc. d/b/a Landtech Consultants, Inc.; Lina T. Ramsey and Associates, Inc.; LJA Engineering, Inc.; Lockwood, Andrews & Newman, Inc.; Michael Baker Jr., Inc.; Nathan D. Maier Consulting Engineers, Inc.; Neel-Schaffer, Inc.; OMEGA Engineers, Inc.; OTHON, INC.; Pacheco Koch

provide documentation showing, you notified these 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 Binkley, Cobb, CP&Y, Halff, Pape-Dawson, RTG, and S&BI. We have reviewed the submitted representative sample of information and the submitted arguments.<sup>2</sup>

Initially, we note some of the responsive information was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2015-19036 (2015), 2015-22463 (2015), and 2015-26376 (2015). We note some of the third parties now seek to withhold some of their information previously ordered released in these rulings under sections 552.104 and 552.110 of the Government Code. Except with regard to the claims of these third parties, we understand the law, facts, and circumstances on which Open Records Letter Nos. 2015-19036, 2015-22463, and 2015-26376 were based have not changed. Accordingly, except with regard to the claims of these third parties, we conclude the department must continue to rely on Open Records Letter Nos. 2015-19036, 2015-22463, and 2015-26376 as previous determinations and withhold or release the identical information in accordance with these rulings.<sup>3</sup> *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, 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

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Consulting Engineers, Inc.; Pape-Dawson Engineers, Inc. ("Pape-Dawson"); Parkhill, Smith & Cooper, Inc.; Parsons Brinckerhoff, Inc.; Parsons Transportation Group, Inc.; Poznecki-Camarillo, Inc.; Ramos Consulting, LLC; R. G. Miller, Inc.; RJ RIVERA Associates, Inc.; Rodriguez Transportation Group, Inc. ("RTG"); R.O.W. Surveying Services, L.L.C.; RS&H, Inc.; Sanchez-Salazar & Associates, LLC; S&B Infrastructure, Ltd. ("S&BI"); Seiler/Lankes Group, LLC; Stantec Consulting Services Inc.; Surveying and Mapping, L.L.C.; Teague Nall and Perkins, Inc.; TEDSI Infrastructure Group, Inc.; Terra Associates, Inc.; TranSystems Corporation d/b/a TranSystems Corporation Consultants; Unintech Consulting Engineers, Inc.; Vickrey & Associates, Inc.; Volkert, Inc.; VRX, Inc.; Walker Partners, L.L.C.; Walter P. Moore and Associates, Inc.; Westwood Professional Services; and White Hawk Engineering & Design, L.L.C.

<sup>2</sup>We 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.

<sup>3</sup>As we are able to make this determination, we need not address the third parties' arguments against disclosure of this information.

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, the department 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 third parties now raise section 552.104 of the Government Code for some of the previously released information, 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) (waiver of discretionary exceptions), 592 (1991) (stating that governmental body may waive section 552.104). Thus, the department may not now withhold any of the previously released information under section 552.104 of the Government Code on behalf of these third parties. However, because information subject to section 552.110 is deemed confidential by law, we will address Binkley's claims under section 552.110 for the previously released information subject to Open Records Letter No. 2015-26376. Further, we will consider the arguments against the disclosure of the submitted information that is not subject to these prior rulings.

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 Binkley, Cobb, CP&Y, Halff, Pape-Dawson, RTG, and S&BI explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties 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 department may not withhold the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

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 Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The department represents Exhibit B pertains to a competitive bidding situation. The department explains Exhibit B consists of scoring and evaluation criteria documents that relate to contracts that have been awarded and executed. However, the department states it "solicits proposals for professional services, including the same types of services at issue here, on a recurring basis." The department asserts the disclosure of Exhibit B will undercut its negotiating position with respect to future

procurements 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 Exhibit B would give advantage to a competitor or bidder. Thus, the department may withhold Exhibit B under section 552.104(a) of the Government Code.<sup>4</sup>

Binkley 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 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 secret factors.<sup>5</sup> RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that

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

<sup>5</sup>The 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;

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, Binkley’s information was subject to Open Records Letter No. 2015-26376. In the prior ruling, the department notified Binkley of the request for information pursuant to section 552.305 of the Government Code. Binkley did not object to the release of its information. Since the issuance of the previous ruling on December 15, 2015, Binkley has not disputed this office’s conclusion regarding the release of the information. In this regard, we find Binkley has not taken any measures to protect its 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 this third party 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 Binkley’s information under section 552.110 of the Government Code.

In summary, the department must continue to rely on Open Records Letter Nos. 2015-19036, 2015-22436, and 2015-26376 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold Exhibit B under section 552.104(a) of the Government Code.

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.

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- (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).

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](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,



Nicholas A. Ybarra  
Assistant Attorney General  
Open Records Division

NAY/bw

Ref: ID# 617811

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

79 Third Parties  
(w/o enclosures)