



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 1, 2016

Mr. W. Montgomery Meitler
Senior Counsel
Office of Legal Services
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

OR2016-19863

Dear Mr. Meitler:

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# 624862 (TEA PIR Nos. 27333 and 27341).

The Texas Education Agency (the "agency") received a request for the awarded vendor's bid response related to a specified request for proposals and a second request from a different requestor for the scoring rubric and all submitted vendor bid responses, excluding the bid response submitted by one specified third party, related to the same request for proposals. You state you will release the evaluation and scoring information to the second requestor. Although you take no position with respect to the public availability of the submitted information, you state the proprietary interests of specified third parties might be implicated. Accordingly, you notified Alvarez & Marsal Public Sector Services, LLC ("A&MPSS"), The Boston Consulting Group, Inc. ("BCG"), Deloitte Consulting LLP ("Deloitte"), The Evolvers Group, ICF Incorporated, L.L.C. ("ICF"), Kaepfel Consulting, LLC, North Highland Worldwide Consulting, Safal Partners, Inc., and VRI – Variance Reduction International, Inc. of the requests for information and of their rights to submit arguments to this office explaining why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have received comments from A&M PSS, BCG, Deloitte, and ICF. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the first requestor only seeks the bid response submitted by the winning bidder, which is BCG in this case. Accordingly, the remaining submitted information is not responsive to the first request. The agency need not release non-responsive information in response to the first request, and this ruling will not address that information.

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) 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 not received comments from any remaining third party explaining why its information should not be released. Therefore, we have no basis to conclude 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, the agency may not withhold any responsive information on the basis of any proprietary interest any remaining third party may have in the information.

Next, we note BCG, Deloitte, and ICF argue against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the agency has submitted to us 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 agency submitted as responsive to the request for 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). 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. Deloitte and ICF state they have competitors. In addition, Deloitte and ICF indicate release of portions of their information would give advantage to their competitors. After review of the information at issue and consideration of the arguments, we find Deloitte and ICF have established the release of portions of their information would give advantage to a competitor or bidder. Thus, we conclude the agency may withhold the information we have marked under section 552.104(a) of the Government Code.¹

A&M PSS and BCG assert 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)

¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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.

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.² 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).

²The 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).

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.

Upon review of the submitted arguments, we find A&MPSS and BCG have established their customer information constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent A&M PSS’s and BCG’s customer information is not publicly available on the companies’ websites, the agency must withhold the customer information we have marked under section 552.110(a) of the Government Code.³ A&M PSS and BCG contend some of their remaining information, including BCG’s pricing information, constitutes trade secret information under section 552.110(a). Upon review, we find the agency must withhold the additional information we have marked under section 552.110(a) of the Government Code.⁴ However, 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). Further, we find A&MPSS and BCG have failed to establish a *prima facie* case that any portion of their remaining information meets the definition of a trade secret, and have failed to demonstrate the necessary factors to establish a trade secret claim for any of their remaining information. *See* ORDs 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), 319 at 2 (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted under section 552.110). Consequently, the agency may not withhold any of A&MPSS’s or BCG’s remaining information, including any information made publicly available on A&MPSS’s or BCG’s website, under section 552.110(a) of the Government Code.

A&MPSS and BCG seek to withhold some of their remaining information, including BCG’s pricing information, under section 552.110(b) of the Government Code. However, BCG was the winning bidder with respect to the contract at issue. We note the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see also* ORD 319 at 3. *See generally*

³As our ruling is dispositive, we do not address the remaining arguments to withhold this information.

⁴As our ruling is dispositive, we do not address the remaining arguments to withhold this information.

Dep't of Justice Guide to the Freedom of Information Act 344-45 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency). Moreover, we find A&M PSS and BCG have failed to demonstrate the release of their remaining information, including any information made publicly available on A&M PSS's or BCG's website, would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, none of A&M PSS's or BCG's remaining information may be withheld under section 552.110(b) of the Government Code.

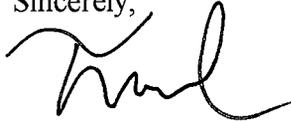
ICF claims some of its remaining information may be protected by copyright law. However, we note copyright law does not make information confidential under the Act. *See generally* Open Records Decision No. 660 at 5 (1999) (Federal Copyright Act does not make information confidential, but rather gives copyright holder exclusive right to reproduce his work, subject to another person's right to make fair use of it). Nevertheless, a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the agency may withhold the information we have marked under section 552.104(a) of the Government Code. To the extent A&M PSS's and BCG's customer information is not publicly available on the companies' websites, the agency must withhold the customer information we have marked under section 552.110(a) of the Government Code. The agency must withhold the additional information we have marked under section 552.110(a) of the Government Code. The agency must release the remaining responsive information; however, any information protected by copyright may only be released in accordance with copyright law.

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,



Tim Neal
Assistant Attorney General
Open Records Division

TN/bhf

Ref: ID# 624862

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

Third Parties
(w/o enclosures)