



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 10, 2008

Ms. Sharon Alexander
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OR2008-16843

Dear Ms. Alexander:

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# 329600.

The Texas Department of Transportation (the "department") received a request for information submitted in response to the most recent request for letters of interest for a professional services contract for professional land surveying in the San Antonio District. Although you take no position as to the disclosure of the requested information, you state it may contain proprietary information subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the department notified the interested third parties of the request for information and of their right to submit arguments to this office as to why the requested information should not be released.¹ 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 correspondence on

¹The interested third parties are as follows: M.W. Cude Engineers, LLC; Alamo Consulting Engineering & Surveying, Inc.; Bain Medina Bain, Inc.; Zamora-Warrick and Associates, LLC; Pate Engineers, Inc. ("Pate"); Surveying And Mapping, Inc.; Walker Texas Surveyors, Inc.; Pollock & Sons Surveying, Inc.; RODS Surveying, Inc.; Cobb, Fendley, & Associates; DFW Geodesy, Inc.; The Schultz Group, Inc.; Davis Geomatics, LLC; M.D.S. Land Surveying Company, Inc.; Gorrondona & Associates, Inc. ("G&A"); Poznecki-Camarillo & Associates, Inc. ("Poznecki"); SURVCON, Inc.; H.A. Kuehlem Survey Company; Arredondo, Zepeda & Brunz, LLC; GeoSurv; The Wallace Group; Mark W. Whiteley and Associates, Inc. ("MWW"); Maverick Engineering, Inc. ("MEI"); Lina T. Ramey & Associates, Inc. ("LTRA"); Bohannan Huston, Inc.; Half Associates; Civil Engineering Consultants, Inc.; Weisser Engineering Co. ("WEC"); Garcia & Wright Consulting Engineers, Inc.; Landesign Services, Inc.; Carter & Burgess, Inc.; SURVTEX, LLC ("SURVTEX"); McGray & McGray Land Surveyors, Inc.; Sherwood Surveying, LLC; Pape-Dawson Engineers, Inc.; Vickrey & Associates, Inc. ("V&A"); and CDS/Muery Services.

behalf of G&A, LTRA, MEI, MWW, Pate, Poznecki, SURVTEX, V&A, and WEC. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that 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 decision, we have only received correspondence from G&A, LTRA, MEI, MWW, Pate, Poznecki, SURVTEX, V&A, and WEC. The remaining third parties have not submitted to this office any reasons explaining why their information should not be released. Thus, these companies have not demonstrated that any of their information is proprietary for purposes of the Act. *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, we conclude the department 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.

MEI generally asserts that its information should not be released because it is privileged and confidential. We note, however, that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). Thus, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract.”), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless MEI's information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

We next address Poznecki's arguments under section 552.101 of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov't Code § 552.101. This exception encompasses information that is considered to be confidential under other constitutional, statutory, or decisional law. *See* Open Records Decision Nos. 600 at 4 (1994) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). We understand Poznecki to raise section 552.101 in conjunction with common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and of no legitimate public interest. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). We note that common-law privacy protects the interests of

individuals, and not those of corporate entities and other business organizations such as Poznecki. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also* *U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). Therefore, the department may not withhold any of Poznecki's information under section 552.101 of the Government Code in conjunction with common-law privacy. As Poznecki has not directed our attention to any other law under which any of its information is considered to be confidential for the purposes of section 552.101, we conclude that the department may not withhold any of Poznecki's information under section 552.101 of the Government Code.

Next, LTRA, Poznecki, and SURVTEX assert that their information is excepted from disclosure pursuant to section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the department does not seek to withhold any information pursuant to this exception, the department may not withhold any of the information at issue pursuant to section 552.104 of the Government Code. *See* ORD 592 (governmental body may waive section 552.104).

Poznecki additionally raises section 552.114 of the Government Code. Section 552.114 excepts from disclosure "information in a student record at an educational institution funded wholly or partly by state revenue." Gov't Code § 552.114. This office generally has treated "student record" information under section 552.114(a) as the equivalent of "education record" information under the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. "Education records" are those records, files, documents, and other materials which

- (i) contain information directly related to a student; and
- (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.

Id. § 1232g(a)(4)(A). The submitted information does not contain any "education records" as defined by FERPA. *See* Open Records Decision No. 390 (1983). Accordingly, section 552.114 of the Government Code is not applicable to Poznecki's information, and it may not be withheld on that basis.

G&A, LTRA, MWW, Pate, Poznecki, SURVTEX, V&A, and WEC, contend that their information is 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 the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See id.* § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others 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 to [its] competitors;

- (5) the amount of effort or money expended by [the company] in developing this information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232. 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. Open Records Decision No. 552 (1990). 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. 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. *See id.*; *see also* ORD 661.

After reviewing the submitted information and arguments, we conclude the department must withhold some of SURVTEX’s customer information, which we have marked, under section 552.110(a). We note, however, that G&A, LTRA, and WES make the identities of some of their current and past customers publicly available on their websites. In light of the companies’ own publication of such information, we cannot conclude that the identities of these customers qualify as trade secrets. Furthermore, we determine that G&A, LTRA, MWW, Pate, Poznecki, V&A, and WEC failed to demonstrate that any of their information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for their information. Accordingly, the department must only withhold the information we have marked pursuant to section 552.110(a).

Additionally, we conclude that G&A, LTRA, MWW, Pate, Poznecki, SURVTEX, V&A, and WEC have not demonstrated that any portion of the remaining information is excepted under section 552.110(b). *See* Open Records Decision Nos. 661 (for information to be withheld under commercial or financial information prong of section 552.110(b), business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 541 at 8 (public has interest in knowing terms of contract with state agency), 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), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to

section 552.110). We therefore conclude that the department may not withhold any of the remaining information pursuant to section 552.110(b).

In summary, the department must withhold the information we have marked under section 552.110(a) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

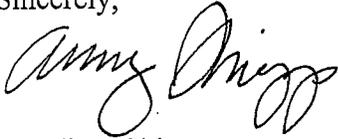
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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ALS/jb

Ref: ID# 329600

Enc. Submitted documents

cc: Requestor
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