



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

October 27, 2010

Ms. Jacqueline E. Hojem
Public Information Coordinator
Metropolitan Transit Authority
P.O. Box 61429
Houston, Texas 77208-1429

OR2010-16294

Dear Ms. Hojem:

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# 398257 (MTA No. 2010-0624).

The Metropolitan Transit Authority of Harris County ("Metro") received a request for all proposals and tabulations used to determine the final award of Solicitation No. RP0900042, Energy Consultant Services. You state you do not have information responsive to the request for tabulations used to determine the final award.¹ Although you raise no exceptions to disclosure of the submitted information, you state release of this information may implicate the proprietary interests of certain third parties.² You state Empower Energy Solutions does not object to the release of their information and you will release this information to the requestor. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, Metro notified the interested third parties of the

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

²The interested third parties are as follows: Exponent, Inc. ("Exponent"); DKY Energy/ANDX Co.; LPB Energy Management; Accretive Solutions-Houston, LP ("Accretive"); Tradition Energy ("Tradition"); Fulcrum Power Services ("Fulcrum"); Choice Energy Services; Partners Energy Group; and Acclaim Energy Advisors.

request and of their right 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 that 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 arguments from Exponent, Accretive, Tradition, and Fulcrum. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the third party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from the remaining third parties. Thus, because these third parties have not demonstrated that any of the requested information is proprietary for the purposes of the Act, Metro may not withhold any of their information on that basis. *See id.* § 552.110(a)-(b); 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.

Accretive argues that its information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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 governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As Metro does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Accretive's information. *See* ORD 592 (governmental body may waive section 552.104). Accordingly, none of Accretive's submitted information may be withheld under section 552.104 of the Government Code.

Exponent, Accretive, Tradition, and Fulcrum raise section 552.110 of the Government Code for portions of their information. 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 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* ORD 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 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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

³The 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 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 [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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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 (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).

Having reviewed Accretive’s, Tradition’s, and Fulcrum’s arguments, we find each has made a *prima facie* case that its customer information constitutes trade secrets. Thus, Metro must withhold the information we have marked in Accretive’s, Tradition’s, and Fulcrum’s proposals under section 552.110(a) of the Government Code. We note, however, Tradition and Fulcrum published the identities of some of their clients on their websites. In light of Tradition’s and Fulcrum’s own publication of such information, we cannot conclude the identities of the published clients qualifies as a trade secret. Accretive and Tradition also assert that the portions of their proposals that concern their methodology should be protected as trade secret information under section 552.110(a). However, this information reflects it was tailored for this particular bid proposal. We note that 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 (1939); *see Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3, 306 at 3. Upon review of the submitted arguments, we conclude Accretive and Tradition have failed to demonstrate that any of their remaining submitted information meets the definition of a trade secret, nor have Accretive and Tradition demonstrated the necessary factors to establish a trade secret claim for their information. Therefore, Metro may not withhold any of the remaining submitted information under section 552.110(a) of the Government Code.

Exponent indicates release of its information could deter third parties such as Exponent from competing for government contracts, so as to lessen competition for such contracts and deprive governmental entities in future procurements. In advancing this argument, Exponent appears to rely on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See also Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not

customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) of the Government Code by Seventy-sixth Legislature). Consequently, the ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only Exponent's interests in its information.

Upon review, we find Exponent, Tradition, and Fulcrum have established that the release of their pricing information would cause each company substantial competitive harm. Thus, Metro must withhold the pricing information, which we have marked, in Exponent's, Tradition's, and Fulcrum's proposals under section 552.110(b) of the Government Code. We also determine that Exponent has established that the release of some of its information would cause the company substantial competitive harm. Therefore, Metro must withhold the information we have marked in Exponent's proposal under section 552.110(b) of the Government Code. However, we find Exponent, Accretive, Tradition, and Fulcrum have made only conclusory allegations that release of their remaining information would result in substantial competitive injury. See generally Open Records Decision Nos. 661, 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 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, Metro may not withhold any of Exponent's, Accretive's, Tradition's, or Fulcrum's remaining information under section 552.110(b).

We note that portions of the remaining submitted information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). 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. See Open Records Decision No. 550 (1990).

In summary, Metro must withhold the information we have marked under sections 552.110(a) and 552.110(b) of the Government Code. The remaining information must 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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



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ALC/eeg

Ref: ID# 398257

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