



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 30, 2010

Mr. Tyler F. Wallach  
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1000 Throckmorton Street, 3rd Floor  
Fort Worth, Texas 76102

OR2010-17940

Dear Mr. Wallach:

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# 401338 (Fort Worth Request No. W003525).

The City of Fort Worth (the "city") received a request for the proposals submitted in response to the city's request for proposals for a specified green house gas project. You state the city will redact insurance policy numbers in the submitted proposals under section 552.136 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You also state the city has redacted certain Texas motor vehicle record information under section 552.130 of the Government Code pursuant to previous determinations issued to the city in Open Records Letter Nos. 2006-14726 (2006) and 2007-00198 (2007). *See Gov't Code* § 552.301(a); Open Records Decision No. 673 at 7-8 (2001). Although you take no position as to the public availability of the remaining submitted information, you state its release may implicate the proprietary interests of the third parties whose information is at issue. Thus, pursuant to section 552.305 of the Government Code, you notified SCS Engineers ("SCS"); Eastern Research Group, Inc. ("ERG"); URS Corporation ("URS"); Terracon Consultants, Inc. ("Terracon"); Trinity Consultants, Inc. ("Trinity"); Bureau Veritas North America, Inc. ("BVNA"); Environ International Corporation ("Environ"); Shaw Environmental &

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<sup>1</sup>Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

Infrastructure, Inc.; CP&Y, Inc.; Providence Engineering and Environmental Group, LLC; MWH Americas, Inc.; GDS Associates, Inc.; EcoAsset Solutions, LLC; Gresham, Smith and Partners; Breitling Consulting, LLC; TRC; Sage Environmental Consulting, LP; FCStone Environmental, LLC; RMI Consulting, Inc.; and Emergent Ventures International, Inc. of the request and of the companies' right to submit arguments to this office as to why their information should not be released. Gov't Code § 552.305(d); *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 to disclosure under in certain circumstances). We have considered the comments submitted by SCS, ERG, URS, Terracon, Trinity, BVNA, and Environ and reviewed the submitted information.

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). Although we have received comments from SCS, ERG, URS, Terracon, Trinity, BVNA, and Environ, as of the date of this letter we have not received comments from any of the remaining third parties explaining why any portion of those companies' submitted information should not be released. Therefore, we have no basis to conclude the remaining third parties have any protected proprietary interests in their 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 (1990). Consequently, the city may not withhold any portion of the information pertaining to the third parties that have not submitted arguments against disclosure to this office on the basis of any proprietary interests those companies may have in that information.

ERG asserts portions of its submitted proposal are 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. 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 the city does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to ERG's information. *See* ORD 592 (governmental body may waive section 552.104).

SCS and Environ claim their submitted information is confidential because the companies specifically labeled their proposals as confidential prior to submitting them to the city.

However, information is not confidential under the Act simply because the party that submits the information anticipates or requests it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See Attorney General Opinion JM-672* (1987); *Open Records Decision Nos. 541 at 3* (1990) (“[T]he obligations of a governmental body under [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 of the Government Code). Consequently, unless the information in these companies’ proposals comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

SCS, ERG, URS, Terracon, Trinity, BVNA, and Environ each raise section 552.110 for portions of their submitted proposals. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision,” and (2) “commercial 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.” *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 a “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 a single or ephemeral event 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 763, 776 (Tex. 1958). This office will accept a private person’s claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See ORD 552 at 5*. 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.<sup>2</sup> Open Records Decision No. 402 (1983).

Section 552.110(b) 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* ORD 661 at 5-6 (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).

URS raises section 552.110(a) for the portions of its submitted proposal that contain screen captures of the company's proprietary software applications. URS explains the screen captures reveal the content, format, and functionality of the software applications URS has developed as a tool in tracking green house gas emissions. Upon review of the information at issue, we agree these screen captures, which we have marked, constitute URS's trade secrets, and the city must withhold this information under section 552.110(a). Trinity and BNVA also generally allege their proposals contain trade secrets protected by section 552.110(a). However, neither Trinity nor BNVA provide any arguments explaining how any portion of their information meets the definition of a trade secret, and no part of these companies' proposals may be withheld under section 552.110(a).

ERG and SCS both claim the portions of their proposals that identify the companies' clients should be withheld under section 552.110(b). Upon review, we agree both ERG and SCS have shown release of most of their client information would result in substantial competitive injury, and the city must withhold the client information we have marked in these companies' proposals under section 552.110(b). However, the remaining client information has been posted on the companies' websites. Because ERG and SCS have not explained how release of information identifying clients whose identities are published on their respective websites could cause competitive harm, these clients' identifying information may not be withheld.

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<sup>2</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 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.

ERG additionally claims its insurance policy limits should be withheld as financial information release of which would result in substantial competitive injury. SCS also claims release of its legal and compliance history and financial statement will cause the company substantial injury. Additionally, Terracon, Trinity, and Environ claim portions of their proposals contain confidential financial information. However, upon review of the submitted arguments and proposals, we find ERG, SCS, Terracon, Trinity, and Environ have not made the specific factual or evidentiary showing required by section 552.110(b) that substantial competitive injury would result from the release of any of their remaining information. *See generally* Open Records Decision Nos. 661 at 5-6 (1999), 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). We additionally note the pricing information of a winning bidder, such as SCS, is generally not excepted under section 552.110(b) as this office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is cost of doing business with government). Accordingly, none of the remaining information at issue in the proposals pertaining to ERG, SCS, Terracon, Trinity, or Environ may be withheld under section 552.110(b).

Next, we note BNVA's brief submitted to this office mentions sections 552.101, 552.113, and 552.131 of the Government Code. However, BNVA does not provide any arguments explaining how any of those sections apply to its information. Therefore, we have no basis to conclude section 552.101, section 552.113, or section 552.131 is applicable to BNVA's proposal, and the city may not withhold any of BNVA's information on the basis of those sections. *See* Gov't Code § 552.305(b); ORD 542 at 3; *cf.* ORDs 661 at 5-6, 552 at 5.

Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). You state the city intends to redact certain e-mail addresses in the submitted information pursuant to Open Records Decision No. 684. However, the e-mail addresses you have marked for redaction are all subject to section 552.137(c)(3) of the Government Code. Consequently, these e-mail addresses are not excepted under section 552.137 and may not be redacted pursuant to Open Records Decision No. 684.

The remaining information contains documents 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. 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 city must withhold the information we 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](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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RSD/tp

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