ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

December 10, 2010

Ms. Katinka Howell
Assistant City Attorney
Department of Aviation
City of San Antonio
9800 Airport Boulevard, MO63
San Antonio, Texas 78216

OR2010-18555

Dear Ms. Howell:

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# 402702 (COSA File Nos. ORR 10-1544, ORR 10-1602, ORR 10-1642, and ORR 10-1859).

The City of San Antonio (the "city") received four requests from different requestors for the "Best Value Bid submitted by each respondent to the Annual Contract for Operation and Maintenance Services for Baggage Handling System, Passenger Loading Bridges, Pre-Conditioned Air Units[, and] 400Hz Systems." Although you take no position with respect to the public availability of the submitted information, you state the submitted documents may contain proprietary information of third parties subject to exception under the Act. Accordingly, you state, and provide documentation showing, that the city notified Elite Line Services, LLC ("ELS"); G&S Airport Conveyor ("G&S"); Global Aviation Services ("Global"); Linc Facility Services, LLC ("Linc"); Oxford Airport Technical Services ("Oxford"); and Vanderlande Industries, Inc. ("Vanderlande") of the request for information and of the 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 arguments from ELS, Linc, and Vanderlande. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us the city asked the requestors to clarify the requests. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). You state the city has not received a response to its request for clarification from one of the requestors. Thus, we determine the city has no obligation at this time to release any additional information that may be responsive to the request for which it has not received clarification. However, if the requestor at issue responds to the request for clarification, the city must again seek a ruling from this office before withholding any additional responsive information from that requestor. *See City of Dallas*, 304 S.W.3d at 387.

Next, we note one of the requestors has excluded information from a personnel file, information protected as a trade secret, insurance policy numbers, proposal bond numbers, and federal tax identification and other tax identification numbers. In addition, two of the requestors have excluded all financial information and financial plans, insurance certificates and all policy numbers, proposal bond numbers, federal identification numbers and other tax identification numbers, and discretionary contract disclosure forms. Therefore, any such information is not responsive to each corresponding request. The city need not release any non-responsive information in response to this request, and this ruling will not address the third-party arguments for such information.

Next, we must address the city's procedural obligations under the Act. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). In this instance, you state the city received the first request for information on September 21, 2010. However, you did not submit some of the information at issue until November 19, 2010. Thus, the city has failed to comply with the requirements of section 552.301(e) for the information that was not timely submitted.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because third-party interests may be at stake, we will consider whether the information at issue must be withheld on those grounds.

An interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, G&S, Global, and Oxford have not submitted comments to this office explaining why any portion of the submitted information relating to them should not be released to the requestor. Thus, we have no basis to conclude that release of any portion of the submitted information would implicate the proprietary interests of these third parties. Accordingly, none of the information at issue may be withheld on the basis of these third parties' proprietary interests. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

We understand Linc to argue that its submitted information is confidential because it submitted its information to the city with the understanding that the information would remain confidential. We note that information is not confidential under the Act simply because the party that submits the information anticipates or requests that 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). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Vanderlande asserts portions of its proposal are excepted from disclosure 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 section encompasses information protected by other statutes. Vanderlande contends section 106 of title 17 of the United States Code constitutes statutory law that, for purposes of section 552.101, prohibits copying those portions of its proposal that are copyrighted. 17 U.S.C. § 106. Similarly, Vanderlande asserts these records are excepted from disclosure pursuant to section 552.007 of the Government Code, which provides that a governmental body is not prohibited "from voluntarily making part of all of its information available to the public, unless the disclosure is expressly prohibited by law." Gov't Code § 552.007(a). We understand Vanderlande to indicate the city is prohibited from making copyrighted portions of its proposal available to the public pursuant to section 106 of title 17 of the United States Code and section 552.007 of the Government Code. We disagree. Generally, copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use

of it. 17 U.S.C. §§ 106, 107. A governmental body must allow inspection of copyrighted materials unless an exception to required public disclosure applies to the information. Attorney General Opinion JM-672 (1987) at 2-3. Accordingly, no portion of Vanderlande's proposal may be withheld on the basis of copyright law.

Next, we understand Vanderlande to assert portions of its proposal are excepted from disclosure under section 552.101 in conjunction with section 252.049 of the Local Government Code, which provides as follows:

> (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
>
> (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. This statutory provision merely duplicates the protection that section 552.110 of the Government Code provides to trade secret and commercial or financial information. Therefore, we will address Vanderlande's arguments with respect to section 252.049 of the Local Government Code under section 552.110 of the Government Code.

Vanderlande raises section 552.102(a) of the Government Code for a portion of its proposal. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" Gov't Code § 552.102(a). Section 552.102(a) protects information relating to public officials and employees. *See id.* In this instance, the information at issue is related to a private entity, Vanderlande. Therefore, the city may not withhold any portion of Vanderlande's proposal under section 552.102(a) of the Government Code.

Vanderlande contends portions of its 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." *Id.* § 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 Vanderlande's proposal. *See* ORD 592 (governmental body may waive section 552.104). Accordingly,

none of Vanderlande's proposal may be withheld under section 552.104 of the Government Code.

ELS, Linc, and Vanderlande all raise section 552.110 of the Government Code for portions of their proposals. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* ORD 552 at 2. Section 757 provides 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.[1] 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 exemption is made and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5. However, we cannot conclude section 552.110(a) applies unless it has been shown the information meets the definition of a trade secret and the necessary factors have

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[1]The following are the six factors that the Restatement gives 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).

been demonstrated to establish a trade secret claim. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code excepts from disclosure "[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). 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 requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

ELS, Linc, and Vanderlande contend portions of their proposals consist of trade secrets excepted from disclosure under section 552.110(a). Upon review, we find ELS and Vanderlande have established a *prima facie* case that some of their customer information constitutes trade secrets. Accordingly, the city must withhold the information we have marked in ELS's and Vanderlande's proposals under section 552.110(a). We note, however, that ELS and Vanderlande have made some of the customer information they seek to withhold publicly available on their respective websites. Because ELS and Vanderlande have published this information, they have failed to demonstrate that this information is a trade secret, and none of it may be withheld under section 552.110(a). Additionally, we find ELS, Linc, and Vanderlande have failed to demonstrate how any of their remaining information meets the definition of a trade secret or shown the necessary factors to establish a trade secret claim. *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). We note pricing information pertaining to a particular proposal or 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." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Therefore, ELS, Linc, and Vanderlande have failed to establish that any portion of their remaining information constitutes a protected trade secret under section 552.110(a) of the Government Code, and none of their remaining information may be withheld on that basis.

ELS, Linc, and Vanderlande also claim portions of their proposals are excepted from disclosure under section 552.110(b). Linc argues that it was required to submit its pricing information to the city "as part of the bidding process in response to a competitive solicitation," and Linc will suffer competitive harm if this information is revealed. In advancing its argument, Linc relies 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 & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that

commercial or financial information is confidential if disclosure of information is likely to impair a governmental body's ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. 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 that 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) by Seventy-sixth Legislature). 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 Linc's interest in its information.

Upon review, we find Linc has established release of its pricing information would result in substantial competitive harm to the company. Therefore, the city must withhold the information we marked in Linc's proposal under section 552.110(b). However, we find ELS and Vanderlande have failed to provide specific factual evidence demonstrating that release of any of their information would result in substantial competitive harm to the companies. *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 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, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note the pricing information of a winning bidder, such as Vanderlande, 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. *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 a cost of doing business with government). Accordingly, the city may not withhold any portion of ELS's or Vanderlande's proposals pursuant to section 552.110(b) of the Government Code.

Finally, we note some of the remaining information may be 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 have marked under section 552.110(a) and section 552.110(b) of the Government Code. The remaining responsive information must be released, but any information protected by copyright 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,

Sarah Casterline
Assistant Attorney General
Open Records Division

SEC/eeg

Ref: ID# 402702

Enc. Submitted documents

c: 4 Requestors
(w/o enclosures)

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