



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 16, 2010

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 E. 11<sup>th</sup> Street  
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OR2010-18938

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# 403875.

The Texas Department of Transportation (the "department") received a request for the submittals for the most recent Environmental Documentation Services Contract RFP, how many contracts were typically awarded, and which firms currently have the contract.<sup>1</sup> We understand you have released some of the requested information. While you take no position with respect to the public availability of the requested proposals, you state that the request may implicate the proprietary interests of Arcadis; Cox McLain Environmental Consulting ("Cox"); URS Corporation ("URS"); Blanton & Associates, Inc. ("Blanton"); Ecological Communications Corporation; S&B Infrastructure, Ltd.; AECOM; Geo-Marine, Inc. ("GMP"); Michael Baker Jr., Inc. ("Baker"); Halff Associates ("Halff"), PBS&J; HNTB Corporation; TRC Environmental Corporation; Jacobs Engineering Group, Inc.; and Berg

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<sup>1</sup>You inform us the department received a clarification of this request. *See* Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

Oliver Associates, Inc. Accordingly, you notified these entities of this request for information and of their right to submit arguments to this office as to why the 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). Cox, URS, Blanton, GMI, Baker, and Halff responded to the notice and argue that some or all of their information is excepted from disclosure. We have considered the submitted arguments and reviewed the submitted information.

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 letter, this office has not received comments from the remaining third parties explaining why each third party's submitted information should not be released. Therefore, we have no basis to conclude that these third parties have a protected proprietary interest 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 department may not withhold any portion of the submitted proposals based upon the proprietary interests of the remaining third parties. As no further exceptions to the disclosure of this information have been raised, it must be released.

Halff asserts that the present request is overly broad, vague, and may, in fact, refer to one or more other department RFP's and that, as a result, its proposal may not be responsive to the present request. We note that a governmental body must make a good-faith effort to relate a request for information to responsive information that is within the governmental body's possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). The department has submitted Halff's proposal as information the department deems to be responsive to this request for information. Upon review of the submitted information, we conclude the department has made a good-faith effort to relate this request to responsive information. Therefore, we will consider Halff's arguments against the disclosure of its information.

Blanton claims its proposal is confidential under section 552.101 of the Government Code. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. However, Blanton has not directed our attention to any law, nor are we aware of any law, under which any of this information is considered to be confidential for purposes of section 552.101 of the Government Code. *See* Open Records Decision Nos. 611 at 1 (1992) (common-law privacy), 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987)

(statutory confidentiality). Therefore, the department may not withhold any of Blanton's proposal under section 552.101 of the Government Code.

Blanton and Baker assert their 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. 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 department does not seek to withhold Blanton or Baker's proposals under this exception, no portion of these proposals may be withheld on this basis.

Cox, URS, Blanton, GMI, Baker, and Halff all assert either some or all of their proposals are confidential 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 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.<sup>2</sup> 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 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). We note that 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 (1939).

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, we find that Blanton, GMI, Baker, and Halff has made the specific factual or evidentiary showing that portions of their proposals, Blanton's client information and GMI, Baker, and Halff's pricing information, which we have marked, constitute commercial or financial information the release of which would cause the companies substantial competitive injury under section 552.110(b). Accordingly, the department must withhold the information we have marked under section 552.110 of the Government Code.<sup>3</sup>

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

<sup>3</sup>As our ruling is dispositive, we need not address Halff's remaining argument against disclosure of this information.

However, upon review, we find that none of the parties have established a *prima facie* case that any portion of the remaining information constitutes a trade secret protected by section 552.110(a). We also conclude that none of the parties have made the specific factual or evidentiary showing required by section 552.110(b) that the release of any of the remaining information would cause substantial competitive harm. *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 (because costs, bid specifications, and circumstances would change for future contracts, assertions that release of bid proposal might give competitor unfair advantage on future contracts was entirely 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), 175 at 4 (1977) (resumes cannot be said to fall within any exception to the Act). Additionally, we note that the pricing information of winning bidders, such as Cox, URS, and Blanton, 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* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, the department may not withhold any of the remaining information under section 552.110 of the Government Code.

Blanton claims its information is subject to section 552.128 of the Government Code. Section 552.128 is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” Gov't Code § 552.128(a). However, Blanton does not indicate it submitted its proposal in connection with an application for certification under such a program. Moreover, section 552.128(c) states that

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list . . . is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

*Id.* § 552.128(c). In this instance, Blanton submitted its proposal to the department in connection with a specific proposed contractual relationship with the department. We therefore conclude that the department may not withhold any portion of Blanton's proposal under section 552.128 of the Government Code.

In summary, the department must withhold Blanton's client information and GMI, Baker, and Half's pricing information, which we have marked, under section 552.110 of the Government Code. The remaining information must be released.

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,



Kate Hartfield  
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KH/em

Ref: ID# 403875

Enc. Submitted documents

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