



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 7, 2011

Mr. Ken Kirkpatrick
Senior Program Manager
Transportation Department
North Central Texas Council of Governments
P.O. Box 5888
Arlington, Texas 76005-5888

OR2011-00395

Dear Mr. Kilpatrick:

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# 405202.

The North Texas Council of Governments (the "council") received a request for information related to the Cotton Belt Corridor Innovative Finance Initiative, including all bids submitted in response to the related request for proposals. You state you have released some of the responsive information to the requestor. Although you take no position on whether the requested bid information is excepted from disclosure, you state release of this information may implicate the proprietary interests of Deloitte Corporate Finance, LLC ("Deloitte"), Grant Thornton, LLP ("Grant Thornton"), AECOM Technology Corporation ("AECOM"), Pricewaterhouse Coopers ("PWC"), Partnership for Livable Communities, and Bank of America/Merrill Lynch. Accordingly, you have notified these third parties of the request and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305(d) (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from Deloitte and Grant Thornton 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 to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, we have not received correspondence from AECOM, PWC, Partnership for Livable Communities, or Bank of America/Merrill Lynch. Thus, these third parties have not demonstrated that they have a protected proprietary interest in any of the submitted information. *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 (1990). Accordingly, the council may not withhold the submitted information on the basis of any proprietary interests AECOM, PWC, Partnership for Livable Communities, or Bank of America/Merrill Lynch may have in the information. We will, however, consider Deloitte and Grant Thornton's arguments under sections 552.101 and 552.110 of the Government Code.

Grant Thornton generally asserts portions of its submitted proposal are subject to common-law privacy. 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. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The types of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. However, we find Grant Thornton has failed to demonstrate how any portion of the submitted information is highly intimate or embarrassing and not of legitimate public interest. Accordingly, no portion of Grant Thornton's submitted information may be withheld under section 552.101 of the Government Code in conjunction with common-law privacy.

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 property 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* ORD 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 exemption 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. *Id.*; *see also* Open Records Decision No. 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).

Upon review, we find Deloitte and Grant Thornton have established *prima facie* cases that their customer information constitutes trade secrets. Accordingly, the council must withhold the information we have marked under section 552.110(a) of the Government Code. However, upon review, we determine that Deloitte and Grant Thornton have failed to demonstrate how any portion of their remaining information constitutes a trade secret for purposes of section 552.110(a). *See* ORD 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). Accordingly, no portion of Deloitte or Grant Thornton’s remaining information may be withheld pursuant to section 552.110(a).

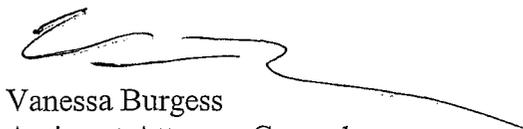
Deloitte and Grant Thornton both raise section 552.110(b) for portions of their submitted information. Upon review, we find Deloitte and Grant Thornton have demonstrated that release of their pricing information would result in substantial damage to their competitive positions. *See* ORD 661 (for information 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). Accordingly, the council must withhold the pricing information we have marked under section 552.110(b) of the Government Code. However, we find that Deloitte and Grant Thornton have failed to demonstrate how release of their remaining information would result in substantial damage to their competitive positions. Accordingly, we determine no portion of Deloitte or Grant Thornton’s remaining information is excepted from disclosure under section 552.110(b).

In summary, the council must withhold the information 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, 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 405202

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Amber MacIver
Baker Botts, L.L.P.
For Deloitte Corporate Finance, L.L.C.
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701
(w/o enclosures)

Mr. Scott King
Principal
Managing Partner, State and Local Government
Grant Thornton, L.L.P.
112 East Pecan Street, Suite 2800
San Antonio, Texas 78205
(w/o enclosures)

Mr. William Woodford
Vice President
AECOM
3101 Wilson Boulevard, Suite 400
Arlington, Virginia 22201
(w/o enclosures)

Sotiris Pagdadis, Ph.D.
Principal
PriceWaterhouseCoopers

300 Madison Avenue
New York, New York 10017
(w/o enclosures)

Mr. Scott Polikov
Partnership for Livable Communities
101 Summit Avenue, Suite 606
Fort Worth, Texas 76102
(w/o enclosures)

Mr. Dalton Smith
Director, Public Finance Group
Bank of America/Merrill Lynch
1221 McKinney, Suite 3330
Houston, Texas 77010
(w/o enclosures)