



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 28, 2011

Mr. B. Chase Griffith  
Brown & Hofmeister, L.L.P.  
For City of McKinney  
740 East Campbell Road, Suite 800  
Richardson, Texas 75081

OR2011-04191

Dear Mr. Griffith:

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# 412612.

The City of McKinney (the "city"), which you represent, received a request for information pertaining to a specific RFQ/RFP for environmental assessment and cleanup planning services related to an EPA brownfields assessment grant. You state some responsive information has been released to the requestor. You claim the submitted information is excepted from disclosure under section 552.110 of the Government Code. You also indicate that release of the submitted information may implicate the proprietary interests of seventeen third parties. Accordingly, you state you have notified the third parties of this request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 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 Terracon Consultants, Inc. ("Terracon"). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note 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, we have received comments only from Terracon explaining why its information should not be released. Therefore, we have no basis to conclude the remaining notified companies have protected proprietary interests in their information.<sup>1</sup> 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 city may not withhold these companies' information on the basis of any proprietary interest they may have in their information.

The city raises section 552.110 of the Government Code for the information at issue. We note that section 552.110 is designed to protect the interests of third parties such as Terracon, not the interests of a governmental body. Thus, we do not address the city's arguments under section 552.110. However, we will address Terracon's arguments under 552.110 for its information.

Section 552.110 of the Government Code protects the proprietary interests of private parties by excepting from disclosure two types of information: (a) trade secrets obtained from a person and privileged or confidential by statute or judicial decision; and (b) 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. 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. 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

---

<sup>1</sup>The other third parties are LOCHNER, BWR Division; G.E.C., Inc.; Berg Oliver Associates, Inc.; Kleinfelder; Rone Engineering Services; Bucher, Willis & Ratliff Corporation; Santee Consulting Corporation; Ecology and Environment, Inc.; Technico Environmental, Inc.; Alpha Testing; KBA EnviroScience, Ltd.; H2A Environmental, Ltd.; LCA Environmental, Inc.; ATC Associates, Inc.; CHA; and Dunway Associates, L.P.

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.<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. *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 (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 that Terracon has established a *prima facie* case that some of its customer information constitutes a trade secret. Therefore, the city must withhold this information, which we have marked, under section 552.110(a) of the Government Code. We

---

<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).

note, however, that Terracon has made publicly available on its website some of the customer information it seeks to withhold. Because Terracon has published this information, it has failed to demonstrate that this information is a trade secret, and none of it may be withheld under section 552.110(a). Further, Terracon has failed to demonstrate that any of the remaining information the company seeks to withhold meets the definition of a trade secret, nor has Terracon demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision No. 319 at 3 (1982) (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). Thus, none of Terracon's remaining information at issue may be withheld under section 552.110(a) of the Government Code.

Upon review of Terracon's arguments and the information at issue, we find the company has made only conclusory allegations that the release of the remaining information it seeks to withhold would result in substantial damage to its competitive position. Thus, Terracon has not demonstrated that substantial competitive injury would result from the release of any of its remaining information. *See* Open Records Decision Nos. 661, 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). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

We note some of the remaining information is subject to section 552.136 of the Government Code. Section 552.136(b) states "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." *Id.* § 552.136(b). This office has concluded that insurance policy numbers constitute access device numbers for purposes of section 552.136. Accordingly, the city must withhold the insurance policy numbers we have marked under section 552.136 of the Government Code.<sup>3</sup>

Finally, we note that some of the submitted information appears to 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 (1978). 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.

---

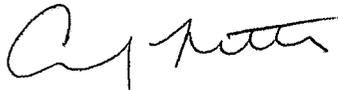
<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including insurance policy numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, the city must withhold the information we have marked under sections 552.110(a) and 552.136 of the Government Code. The city must release the remaining information, but any copyrighted information may only 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/dls

Ref: ID# 412612

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Bob Helmberger  
Vice President  
Practice Leader-Municipal  
Services  
LOCHNER, BWR Division  
2620 CR 1106  
Anna, Texas 75409  
(w/o enclosures)

Mr. R. Scott Knaus  
Vice President - Planning  
G.E.C., Inc.  
9357 Interline Avenue  
Baton Rouge, Louisiana 70809  
(w/o enclosures)

Ms. Amy Brook  
Project Coordinator  
Berg Oliver Associates, Inc.  
14701 St. Mary's Lane, Suite 400  
Houston, Texas 77079  
(w/o enclosures)

Ms. Sonja Williams  
Rone Engineering Services  
8908 Ambassador Row  
Dallas, Texas 75247  
(w/o enclosures)

Mr. Michael J. Yost  
Vice President/General Counsel  
Terracon Consultants, Inc.  
18001 West 106<sup>th</sup> Street, Suite 300  
Olathe, Kansas 66061  
(w/o enclosures)

Mr. Douglas N. Dreiling, RBP #101  
Vice President  
Bucher, Willis & Ratliff Corporation  
903 East 104<sup>th</sup> Street, Suite 900  
Kansas City, Missouri 64131  
(w/o enclosures)

Ms. Kristine Lloyd  
Project Manager  
Ecology and Environment, Inc.  
1412 Main Street, Suite 1500  
Dallas, Texas 75202  
(w/o enclosures)

Mr. Jeffrey G. Wilt  
Principal  
Alpha Testing  
2209 Wisconsin Street, Suite 100  
Dallas, Texas 75229  
(w/o enclosures)

Mr. Kenneth S. Tramm  
Kleinfelder  
7805 Mesquite Bend Drive, Suite 100  
Irving, Texas 75063  
(w/o enclosures)

Ms. Dana Lumpkin  
Rone Engineering Services  
8908 Ambassador Row  
Dallas, Texas 75247  
(w/o enclosures)

Ms. Amy M. Dzialowski  
Project Manager  
Bucher, Willis & Ratliff Corporation  
903 East 104<sup>th</sup> Street, Suite 900  
Kansas City, Missouri 64131  
(w/o enclosures)

Mr. Russ Weigand  
Principal Hydrogeologist  
Global Account Manager  
Santec Consulting Corporation  
2225 East Randol Mill Road, Suite 530  
Arlington, Texas 76011  
(w/o enclosures)

Dr. Sohrab Kourosch  
Vice President  
Technico Environmental, Inc.  
424 East Lamar Boulevard, Suite 202  
Arlington, Texas 76011  
(w/o enclosures)

Mr. C. Keith Bradley  
Managing General Partner  
KBA EnviroScience, Ltd.  
101 East Southwest Parkway, Suite 114  
Lewisville, Texas 75067  
(w/o enclosures)

Ms. M. Kay Hawthorne  
CEO/General Partner  
H2A Environmental, Ltd.  
1862 Keller Parkway  
Keller, Texas 76248  
(w/o enclosures)

Mr. Y. Lynn Clark  
Principal Geoscientist  
LCA Environmental, Inc.  
13221 Bee Street  
Dallas, Texas 75234  
(w/o enclosures)

Mr. Jeff Isbell  
Vice President  
CHA  
1405 West Chapman Drive  
Sanger, Texas 76266  
(w/o enclosures)

Ms. Mary Ann Clark  
President  
LCA Environmental, Inc.  
13221 Bee Street  
Dallas, Texas 75234  
(w/o enclosures)

Mr. Sal M. Gazioglu  
Program Manager  
ATC Associates, Inc.  
1555 Valwood Parkway, Suite 160  
Carrollton, Texas 75006  
(w/o enclosures)

Mr. Peter D. McKone  
Director - Environmental Services  
Dunway Associates, L.P.  
550 Bailey Avenue, Suite 400  
Fort Worth, Texas 76107  
(w/o enclosures)