



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 15, 2011

Ms. Sharon Alexander
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Texas Department of Transportation
125 East 11th Street
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OR2011-13368

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# 430079.

The Texas Department of Transportation (the "department") received a request for information pertaining to the department's "Request for Information regarding development and operation of the Grand Parkway[.]" You state the department has released some of the requested information. You state that, although the department takes no position with respect to the remaining requested information, it may implicate the interests of third parties. Accordingly, you state the department notified the third parties of the request for information and of their right to submit arguments stating why their information should not be released.¹ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have reviewed the submitted information and the arguments submitted by FCC, Kiewit, and Odebrecht.

¹The third parties notified pursuant to section 552.305 are: Acciona S.A.; ACS Infrastructure Development, Inc.; Balfour Beatty Capital, Inc.; CDE Inc.; China Construction America, Inc.; Cintra/Meridiam Infrastructure; Edgemoor Infrastructure; FCC Construction Inc. ("FCC"); Fluor Enterprises, Inc.; HOCHTIEF PPP Solutions; Hunt Companies, Inc.; I.S. Engineers, L.L.C.; Isolux Corsan Infraestructuras, SL; Kiewit Infrastructure Group ("Kiewit"); Macquarie Capital Inc.; Odebrecht Development, Inc. ("Odebrecht"); OHL Concesiones, S.L.; Shikun & Binui; URS; VINCI Concessions S.A.S.; and Zachry Construction Corporation.

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 requested information relating to it should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has received comments from only FCC, Kiewit, and Odebrecht. We have not received comments from any of the remaining third parties explaining why their information should not be released to the requestor. Thus, we have no basis to conclude that the release of any portion of the information at issue would implicate any of the remaining third parties' interests. *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, we conclude that the department may not withhold any of the information at issue on the basis of any interests the remaining third parties may have in the information. We will consider FCC's, Kiewit's, and Odebrecht's submitted arguments for their respective information.

Kiewit raises section 552.104 of the Government Code. This section excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which 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 a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the department does not seek to withhold any information pursuant to this exception, no portion of Kiewit's information may be withheld on this basis.

FCC, Kiewit, and Odebrecht each claim some of their information is excepted from disclosure 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. Gov't Code § 552.110(a), (b). Section 552.110(a) protects the proprietary interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). A "trade secret" has been defined as the following:

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) (citation omitted); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

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.² *See* 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 2. 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.*; ORD 661 at 5-6 (business enterprise must

²There are six factors the Restatement gives as indicia of 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 the 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.

show by specific factual evidence that release of information would cause it substantial competitive harm).

FCC and Kiewit each claim portions of their information constitute trade secrets. Upon review, we find that FCC and Kiewit have failed to demonstrate that any of their information meets the definition of a trade secret. Furthermore, neither party demonstrated the necessary factors to establish a trade secret claim for the information at issue. Accordingly, the department may not withhold any of FCC's or Kiewit's information under section 552.110(a) of the Government Code.

FCC, Kiewit, and Odebrecht each contend their information is commercial or financial information, release of which would cause competitive harm. Upon review, we conclude FCC, Kiewit, and Odebrecht have established that release of some of their information would cause them substantial competitive injury. Accordingly, the department must withhold the information we have marked under section 552.110(b). However, we find that FCC, Kiewit, and Odebrecht have not made the specific factual or evidentiary showings required by section 552.110(b) that release of any of their remaining information would cause the companies substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). We, therefore, conclude that the department may not withhold any of the remaining information under section 552.110(b).

Kiewit raises section 552.137 of the Government Code for an e-mail address and cellular telephone number in its information. Section 552.137 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). Gov't Code § 552.137(a)-(c). Section 552.137(c) provides, in relevant part:

(c) Subsection (a) does not apply to an e-mail address:

...

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent; [or]

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract[.]

Id. § 552.137(c)(2)-(3). Upon review, we find the e-mail address Kiewit has marked is subject to section 552.137(c). Additionally, Kiewit seeks to withhold a cellular telephone

number under section 552.137. We note, however, that section 552.137 does not apply to telephone numbers. As such, the department may not withhold this information under section 552.137 of the Government Code.

In summary, the department must withhold the information we have marked under section 552.110 of the Government Code. The department must release the remaining information.

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,



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LEH/bs

Ref: ID# 430079

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