



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2011-13813

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# 430846.

The Texas Department of Transportation (the "department") received a request for information pertaining to two competitive procurements, CSJ# 1114BRNET and CSJ# 1118ADDON, including proposals submitted by the winning bidders. You state you have released some of the requested information. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, although you take no position as to whether the remaining submitted information is excepted under the Act, you state release of the remaining information may implicate the proprietary interests of R.W. Armstrong & Associates, Inc. ("Armstrong"). Accordingly, you state, and provide documentation showing, you notified Armstrong of the request for information and of its right 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 comments from Armstrong. We have considered the submitted arguments and reviewed the submitted information.

You state Exhibit C was submitted in connection with a specific competitive procurement for the 1114BRNET (Burnet Airport) project. You further state the contract arising from that process has not yet been awarded or executed. You claim release of the information at issue would undermine the contract negotiation process and result in less competition because each potential competitor would have advance knowledge of the capabilities and plans of its

competitors. Based on your representations and our review, we conclude you have demonstrated the applicability of section 552.104 to the information at issue. Accordingly, the department may withhold Exhibit C under section 552.104 of the Government Code until such time as a contract has been executed. *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation).

Armstrong raises section 552.110 of the Government Code for portions of its information. Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* 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, 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.¹ RESTATEMENT OF TORTS § 757 cmt. b. This

¹The 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; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown 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).

Armstrong asserts portions of its information, submitted as Exhibit B, constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude Armstrong has failed to establish a *prima facie* case that any of the information at issue meets the definition of a trade secret and has not demonstrated the necessary factors to establish a trade secret claim. Therefore, no portion of Exhibit B may be withheld under section 552.110(a).

In summary, the department may withhold Exhibit C under section 552.104 of the Government Code until such time as a contract has been executed. 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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/agn

Ref: ID# 430846

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Christopher D. Coons, P.E.
Senior Project Manager
R.W. Armstrong & Associates, Inc.
Barton Oaks Plaza, Building Five
901 South MoPac Expressway, Suite 110
Austin, Texas 78746
(w/o enclosures)