



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 13, 2012

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

OR2012-10907

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# 459624.

The Texas Department of Transportation (the "department") received a request for letters of interest for the top ranked firms received in response to contract number 32-2RFP5002. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of AIA Engineers, Ltd. ("AIA") and Lockwood, Andrews & Newnam, Inc. ("Lockwood"). Accordingly, you state, and provide documentation showing, you notified the AIA and Lockwood of the request for information and of their rights 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 AIA and Lockwood. We have considered the submitted arguments and reviewed the submitted information.

We must first address the department's obligations under section 552.301 of the Government Code, which prescribes the procedural obligations that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires that a governmental body ask for a decision from this office and state which exceptions apply to the requested information by the tenth business day after receiving the request. *See* Gov't Code § 552.301(b). You state you received the request at issue by United States mail. You indicate you cannot establish the

date the department received the request because the department did not date stamp the request for information or the envelope in which the request was sent on the date it was received. Section 552.301(a-1) states:

[I]f a governmental body receives a written request by United States mail and cannot adequately establish the actual date on which the governmental body received the request, the written request is considered to have been received by the governmental body on the third business day after the date of the postmark on a properly addressed request.

Id. § 552.301(a-1). You have provided us a copy of the envelope in which the request was sent, and it is postmarked April 20, 2012. Thus, pursuant to section 552.301(a-1), the request is considered to have been received by the department on April 25, 2012. The department's ten-business-day deadline was May 9, 2012. Your letter requesting a decision from this office was hand delivered to this office on May 16, 2012. Consequently, the department failed to request a decision from this office within the ten-business-day period prescribed by subsection 552.301(b).

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ); Open Records Decision No. 630 (1994). Generally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Although you raise section 552.104 for the submitted information, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 592 (1991) (governmental body may waive statutory predecessor to section 552.104). As such, section 552.104 does not constitute a compelling reason to withhold information for purposes of section 552.302. Accordingly, the department may not withhold any of the submitted information under section 552.104 of the Government Code. However, because third party interests can provide compelling reasons to withhold information, we will consider whether the submitted information is excepted from disclosure under the Act.

AIA and Lockwood each claim section 552.110 of the Government Code for their information. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information, the release of which would cause a third party substantial competitive harm. Section 552.110(a) excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1958); *see also* Open Records Decision 552 at 2 (1990). 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 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.¹ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for exception, and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983). We note 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; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial

¹The following are the six factors the Restatement gives 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 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 [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).

competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(b). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

AIA contends its entire proposal constitutes a trade secret under section 552.110(a). Upon review, we find AIA has not demonstrated any portion of its proposal constitutes a trade secret under section 552.110(a), nor has it demonstrated the necessary factors to establish a trade secret claim for its information. Thus, the department may not withhold any portion of AIA’s information under section 552.110(a).

Lockwood claims section 552.110(b) for its entire proposal. Upon review, we find Lockwood has not made the specific factual or evidentiary showing required by section 552.110(b) that release of its proposal would cause Lockwood substantial competitive harm. We therefore conclude the department may not withhold any of the information at issue under section 552.110(b) of the Government Code. *See* Open Records Decision No. 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). As there are no remaining arguments against disclosure, the submitted 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,



Charles Galindo Jr.
Assistant Attorney General
Open Records Division

CG/sdk

Ref: ID# 459624

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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