



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 29, 2012

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

OR2012-17236

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# 469251.

The Texas Department of Transportation (the "department") received a request for a copy of all proposals from all consultants that bid for a specified solicitation. Although you take no position on whether the requested information is excepted from disclosure, you state release of some of this information may implicate the proprietary interests of Alliance Transportation Group, Inc. ("Alliance"). Accordingly, you have notified this third party of the request and of its right to submit arguments to this office as to why its 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 Alliance. We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-15611 (2011). In that ruling, we determined the department must release the

submitted information in its entirety. We have no indication the law, facts, and circumstances on which the prior ruling was based have changed. Accordingly, to the extent the information responsive to the current request is identical to the information previously requested and ruled upon by this office, we conclude the department must continue to rely on Open Records Letter No. 2011-15611 as a previous determination and release the information in accordance with that ruling. Because you state the submitted information is not subject to Open Records Letter No. 2011-15611, we will address the submitted arguments against its disclosure.

Alliance asserts that a section of its proposal is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that 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, we find section 552.104 is not applicable to Alliance's proposal. See ORD 592 (governmental body may waive section 552.104).

Alliance raises section 552.110 of the Government Code for portions of the submitted information. 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 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. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex. 1957); see also ORD 552 at 2. 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 (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. 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.

Alliance raises section 552.110(b) for portions of its information. Upon review, we find release of the customer information we have marked in Alliance’s proposal would cause it substantial competitive harm. Accordingly, the department must withhold the information we have marked under section 552.110(b) of the Government Code. We note, however, Alliance has made one of its customer’s information publicly available on its website. As this information is publicly available, we find the release of this information would not cause Alliance substantial competitive harm. Upon further review, we find Alliance has failed to demonstrate with specific factual evidence that the release of any of the remaining

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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

information would cause it substantial competitive harm. Accordingly, the department may not withhold any of the remaining information under section 552.110(b) of the Government Code.

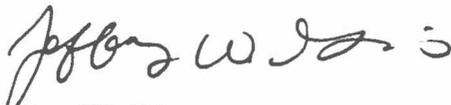
Alliance contends a portion of the remaining information is excepted under section 552.110(a). Having considered Alliance's arguments, we find that Alliance has failed to demonstrate that any of the remaining information meets the definition of a trade secret, nor has Alliance demonstrated the necessary factors to establish a trade secret claim for this information. *See* Open Records Decision Nos. 319 at 3 (information relating to organization and personnel, professional references, market studies, and qualifications not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, we find none of the information at issue may be withheld under section 552.110(a) of the Government Code.

In summary, the department must continue to rely on Open Records Letter No. 2011-15611 as a previous determination and release the information subject to that ruling in accordance with it. The department must withhold the information we have marked under section 552.110(b) of the Government Code. The remaining 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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 469251

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ms. Gayle L. Heath
Chief Executive Officer
Alliance Transportation Group
Building M-1, Suite 150
11500 Metric Boulevard
Austin, Texas 78758
(w/o enclosures)