



ATTORNEY GENERAL OF TEXAS
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Mr. Ronny H. Wall
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Office of the General Counsel
Texas Tech University System
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OR2013-12669

Dear Mr. Wall:

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# 493991.

The Texas Tech University System (the "system") received a request for the following information regarding project number 12-17: the evaluation/scoring matrices and the proposals of each of the short-listed firms. The system received a second request from the same requestor for the following information regarding project number 13-01: the Phase II request for proposal, evaluation/scoring matrices, and each of the proposals of the short-listed firms. Although you take no position on the public availability of the submitted information, you state the release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you inform us, and provide documentation showing, you notified Balfour Beatty/Carcon/Gensler; Broaddus & Associates; HC Beck, Ltd. ("Beck"); Hill & Wilkinson General Contractors; Linbeck Group, LLC ("Linbeck"); Manhattan Construction Company; Vaughn Construction; and The Whiting-Turner Contracting Company ("Whiting-Turner") of the request and of their right to submit comments to this office as to why the submitted information should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from Beck and Linbeck. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304

(interested party may submit comments stating why information should or should not be released).

Initially, we note the requestor has excluded some of the submitted information from his request, and this information is, therefore, not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to this request.

Next, we note you have not submitted the requested evaluation/scoring matrices or the Phase II request for proposal for project number 13-01. To the extent information responsive to these portions of the requests existed on the date the system received the requests, we assume you have released it. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, you inform us you have released the proposal submitted by Whiting-Turner, which was the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2013-05693 (2013). In Open Records Letter No. 2013-05693, we determined the system must release the information at issue in that ruling; however, any information subject to copyright may be released only in accordance with copyright law. We have no indication there has been any change in the law, facts, or circumstances on which the prior ruling was based. Accordingly, we agree the system must continue to rely on Open Records Letter No. 2013-05693 as a previous determination and release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we must address the system's procedural obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Gov't Code § 552.301(b). *See* Gov't Code § 552.301(a), (b). In addition, pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples,

labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). You inform us the system received the instant requests on April 16, 2013. On April 29, 2013, the system provided the requestor with a cost estimate for the first request pursuant to section 552.263(a), and, you inform us the system received a deposit from the requestor in accordance with section 552.263(a) on May 14, 2013. *See id.* § 552.263(a)(1)(A). You also inform us that on April 29, 2013, the system provided the requestor with a cost estimate pursuant to section 552.2615 of the Government Code for the second request and, you inform us the requestor complied with section 552.2615 by accepting the charges on April 30, 2013. *See id.* § 552.2615(a), (b). We note, while section 552.263(e) provides when a governmental body requires a deposit or bond for anticipated costs, the request for information is considered received on the date the governmental body receives the deposit or bond, section 552.2615 provides the submission of an estimate of charges to the requestor does not toll the governmental body's deadlines to ask for an attorney general decision under section 552.301. *See id.* §§ 552.2615(g) (providing "[t]he time deadlines imposed by this section do not affect the application of a time deadline imposed on a governmental body under Subchapter G"), .263(e). Thus, the system's ten-business-day deadline for the second request was April 30, 2013, and its fifteen-business-day deadline was May 7, 2013. However, the envelope in which the system submitted its request for a ruling and submitted the information at issue for the second request bears a postmark of May 14, 2013. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, the system failed to comply with the procedural requirements mandated by section 552.301 as to the second request.

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). Because third party interests can provide a compelling reason to withhold information, we will consider whether any of the responsive information may be excepted under the Act.

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 only received comments from Beck and Linbeck on why their submitted information should not be released. Therefore, we have

no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *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 system may not withhold any portion of the submitted information on the basis of any proprietary interest any of the remaining third parties may have in it.

Beck and Linbeck assert some of their information is excepted from public disclosure under section 552.104 of the Government Code, which excepts “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). This exception protects the competitive interests of governmental bodies such as the system, not the proprietary interests of private parties such as Beck and Linbeck. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). In this instance, the system does not raise section 552.104 as an exception to disclosure. Therefore, the system may not withhold any of the submitted information under section 552.104 of the Government Code.

Section 552.110 of the Government Code 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, 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 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 Open Records Decision No. 552 at 5 (1990). 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) of the Government Code 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).

Beck claims section 552.110(b) of the Government Code for portions of the company’s submitted information. In advancing its arguments, Beck relies, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption under the federal Freedom of Information Act to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The *National Parks* test provides that commercial or financial information is confidential if disclosure of information is likely to impair a governmental body’s ability to obtain necessary information in the future. *National Parks*, 498 F.2d 765. However, section 552.110(b) has been amended since the issuance of *National Parks*. Section 552.110(b) now expressly states the standard for excepting from disclosure confidential information. The current statute does not incorporate this aspect of the

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 Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

National Parks test; it now requires only a specific factual demonstration that release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Thus, the ability of a governmental body to obtain information from private parties is no longer a relevant consideration under section 552.110(b). *Id.* Therefore, we will only consider Beck's interest in its information.

Beck and Linbeck contend some of their information is commercial or financial information, release of which would cause substantial competitive harm to the companies. Upon review, we find Beck and Linbeck have established that some of their submitted information, which we have marked, constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm.² Accordingly, the system must withhold the information we have marked under section 552.110(b) of the Government Code. However, upon review, we find Beck and Linbeck have not established any of the remaining information constitutes commercial or financial information, the disclosure of which would cause the companies substantial competitive harm. Accordingly, the system may not withhold any of the remaining information under section 552.110(b) of the Government Code.

Beck and Linbeck assert their submitted information contains trade secrets. However, upon review, we find Beck and Linbeck have failed to demonstrate any of their remaining submitted information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the system may not withhold any of Beck's and Linbeck's remaining information under section 552.110(a) of the Government Code.

Beck asserts some of its remaining information is protected from disclosure by section 552.153 of the Government Code. Section 552.153 protects proprietary records and trade secrets involved in certain partnerships under chapter 2267 of the Government Code and provides in part:

(a) In this section, "affected jurisdiction," "comprehensive agreement," "contracting person," "interim agreement," "qualifying project," and "responsible governmental entity" have the meanings assigned those terms by [s]ection 2267.001.

(b) Information in the custody of a responsible government entity that relates to a proposal for a qualifying project authorized under [c]hapter 2267 is excepted from the requirements of [the Act] if:

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(1) the information consists of memoranda, staff evaluations, or other records prepared by the responsible governmental entity, its staff, outside advisors, or consultants exclusively for the evaluation and negotiation of proposals filed under [c]hapter 2267 for which:

(A) disclosure to the public before or after the execution of an interim or comprehensive agreement would adversely affect the financial interest or bargaining position of the responsible governmental entity; and

(B) the basis for the determination under Paragraph (A) is documented in writing by the responsible governmental entity; or

(2) the records are provided by a contracting person to a responsible governmental entity or affected jurisdiction under [c]hapter 2267 and contain:

(A) trade secrets of the contracting person;

(B) financial records of the contracting person, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or other means; or

(C) other information submitted by the contracting person that, if made public before the execution of an interim or comprehensive agreement, would adversely affect the financial interest or bargaining position of the responsible governmental entity or the person.

Gov't Code § 552.153(a)-(b). Section 2267.001(10) of the Government Code provides "qualifying project" means:

(A) any ferry, mass transit facility, vehicle parking facility, port facility, power generation facility, fuel supply facility, oil or gas pipeline, water supply facility, public work, waste treatment facility, hospital, school, medical or nursing care facility, recreational facility, public building, or other similar facility currently available or to be made available to a governmental entity for public use, including any structure, parking area, appurtenance, and other property required to operate the structure or facility and any technology

infrastructure installed in the structure or facility that is essential to the project's purpose; or

(B) any improvements necessary or desirable to unimproved real estate owned by a governmental entity.

Id. § 2267.001(10).³ Further, section 2267.001(11) provides that "responsible governmental entity" means "a governmental entity that has the power to develop or operate an applicable qualifying project." *Id.* § 2267.001(11). However, neither the system nor Beck have explained, nor can we discern, how the system constitutes a responsive governmental entity and the information relates to a proposal for a qualifying project authorized under chapter 2267 of the Government Code. Accordingly, we find the system may not withhold any portion of the submitted information under section 552.153 of the Government Code.

In summary, the system must withhold the information we marked under section 552.110 of the Government Code. The remaining responsive 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kathryn R. Mattingly
Assistant Attorney General
Open Records Division

KRM/bhf

³We note the 82nd Legislature created two versions of chapter 2267 of the Government Code. Section 552.153(a) refers to the version of chapter 2267 entitled "Public and Private Facilities and Infrastructure," which was added by Senate Bill 1048.

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Enc. Submitted documents

c: Requestor
(w/o enclosures)

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