



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 6, 2014

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

OR2014-07646

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# 521737.

The Texas Department of Transportation (the "department") received a request for annual projected and actual revenues and traffic counts on State Highway 130 segments 5 and 6 and financial statements of SH 130 Concession Company, LLC ("SH 130"). Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of SH 130 and CDM Smith ("CDM"). Accordingly, you state, and provide documentation showing, you notified SH 130 and CDM of the request for information and of the right of each 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 SH 130. We have reviewed the submitted information and arguments.

Initially, you state some of the requested information is available to the requestor on the department's website. We note section 552.228 of the Government Code requires a governmental body to provide a requestor with a "suitable copy" of requested public information. *Id.* § 552.228(a). We also note "[a] public information officer does not fulfill

his or her duty under the Act by simply referring a requestor to a governmental body's website for requested public information." Open Records Decision No. 682 at 7 (2005). Instead, section 552.221 of the Government Code requires a governmental body "to either provide the information for inspection or duplication in its offices or to send copies of the information by first class United States mail." *Id.*; see Gov't Code § 552.221(b). Thus, the department must provide access to or copies of the responsive information you state is on the department's website to the requestor. However, we note a requestor may agree to accept information on a governmental body's website in fulfillment of a request for information under the Act. *See* ORD 682 at 7.

Next, we note 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 id.* § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from CDM explaining why the submitted information should not be released. Therefore, we have no basis to conclude CDM has a protected proprietary interest 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 department may not withhold the submitted information on the basis of any proprietary interest CDM may have in the information.

Next, you state the department will release some of the requested information to the requestor. We understand some of the information at issue will be released in accordance with the previous determinations issued in Open Records Letter Nos. 2013-04581 (2013) and 2013-11911 (2013), which determined the department may not withhold any of SH 130's information under section 552.110 of the Government Code, and must release the information at issue. With respect to that information, we have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, we agree the department must rely on Open Records Letter Nos. 2013-04581 and 2013-11911 as previous determinations and release the information at issue in accordance with those rulings. *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).

SH 130 informs us some of the information to be released was the subject of Open Records Letter Nos. 2014-00514 (2014), 2014-00947(2014), and 2014-01015 (2014). In those rulings, the department stated, and provided documentation demonstrating, it notified SH 130 of the request for information and its right to submit arguments to this office as to why the

information at issue should not be released. *See* Gov't Code § 552.305; ORD 524. The rulings concluded the information at issue must be released because SH 130 did not submit comments explaining why its information should not be released, and thus this office had no basis to conclude SH 130 had a protected proprietary interest in the information. *See* Gov't Code § 552.110; ORDs 661 at 5-6, 552 at 5, 542 at 3. SH 130 now contends it has no record of having received any notification under section 552.305. Whether SH 130 received such notification is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Records Decision No. 522 at 4 (1990). Thus, we assume the department notified SH 130 of the requests for information at issue in these prior rulings.

As noted above, in Open Records Letter Nos. 2014-00514, 2014-00947, and 2014-01015, we determined the department must release SH 130's information at issue. We understand the department did so. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure, unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the department may not now withhold the previously released information, unless its release is expressly prohibited by law or the information is confidential by law. In this instance, SH 130 has submitted arguments to our office against release of the information at issue. SH 130 claims the information at issue is excepted under section 552.110 of the Government Code, which makes information confidential under the Act. Therefore, because circumstances have changed with respect to the information at issue in Open Records Letter Nos. 2014-00514, 2014-00947, and 2014-01015, the department may not rely upon these prior rulings as previous determinations, and we will address SH 130's argument against release of the information at issue. We will also address the public availability of the remaining information, which was not at issue in any of the previous rulings.

Next, SH 130 asserts some of the information submitted by the department is either not responsive to the instant request, or should not be released because it is "erroneous and misleading." Whether the information at issue is erroneous or misleading is a question of fact that this office cannot resolve through the open records ruling process. *See* Open Records Decision Nos. 554 (1990), 552 (1990). We note a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this case, the department has reviewed its records and determined the submitted documents are responsive to the requests. Accordingly, we find the department has made a good-faith effort to relate the request to

information within its possession or control. Therefore, we will determine whether the department must release this information to the requestor under the Act.

SH130 asserts its information relating to transaction count and revenue 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. *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 RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret

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).

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). We note pricing 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 (1980), 232 (1979), 217 (1978).

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* Open Records Decision No. 661 at 5 (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).

As noted above, some of the information at issue was the subject of Open Records Letter Nos. 2014-00514, 2014-00947, and 2014-01015. In the prior rulings, the department notified SH130 of the requests for information pursuant to section 552.305 of the Government Code, and SH130 failed to submit arguments demonstrating its information was excepted from disclosure under the Act. Moreover, the submitted documentation demonstrates SH130 received copies of the rulings at the time each ruling was issued. Since the issuance of the previous rulings, SH130 has not taken any measures to protect the information at issue such that this office may now conclude the information at issue qualifies as a trade secret or commercial or financial information, the release of which would cause SH130 substantial harm. Accordingly, the department may not withhold any of the information that was the subject of Open Records Letter Nos. 2014-00514, 2014-00947, and 2014-01015 under section 552.110 of the Government Code.

SH130 asserts the remaining information at issue constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude SH130 has failed to establish a *prima facie* case that any portion of the remaining information at issue meets the definition of a trade secret. We further find SH130 has not demonstrated the necessary factors to establish a trade secret claim for this information. *See* ORD 402. Therefore, none of SH130’s remaining information may be withheld under section 552.110(a).

SH130 further argues the information at issue consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the

Government Code. Upon review, we find SH130 has failed to establish the release of any of the submitted information would result in substantial harm to its competitive position. *See* Open Records Decision No. 661 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Furthermore, we note the contract at issue was awarded to SH130. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Accordingly, none of SH130's remaining information may be withheld under section 552.110(b).

SH 130 argues, and we agree, the submitted documents include information that is subject to section 552.136 of the Government Code. Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the department must withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code. No portion of the remaining information is subject to section 552.136 and the department may not withhold any of the remaining information on that basis.

We note some of the materials at issue may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the department must rely on Open Records Letter Nos. 2013-04581 and 2013-11911 as previous determinations and release the information at issue in accordance with those rulings. The department must withhold the routing and bank account numbers we marked under section 552.136 of the Government Code. The department must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law.

You have asked this office to issue a previous determination as to whether State Highway 130 toll revenue and traffic count information must be released. After due

consideration, we have decided to grant your request. Accordingly, this letter ruling serves as a previous determination that State Highway 130 toll revenue and traffic count information of the type at issue in this ruling may be released by the department in response to a request under the Act without seeking a ruling from this office. See Gov't Code § 552.011 (stating "the attorney general shall maintain uniformity in the application, operation, and interpretation" of the Act, and may "prepare, distribute, and publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on" the Act). Therefore, so long as the elements of law, fact, and circumstances do not change so as to no longer support the findings set forth above, the department need not ask for a decision from this office with respect to these types of information.

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,



Claire V. Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 521737

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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