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September 11, 2014

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OR2014-06324A

Dear Ms. Parker:

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# 536605.

We understand you have asked this office to reconsider Open Records Letter No. 2014-06324 (2014), which we issued on April 16, 2014. We note a governmental body is prohibited from asking this office to reconsider a decision issued under section 552.306 of the Government Code. *See* Gov't Code § 552.301(f). Furthermore, you have not demonstrated this office made an error in issuing the prior ruling. Nevertheless, we have determined the prior ruling should be corrected for purposes of due process. *See id.* §§ 552.306, .352. Accordingly, we hereby withdraw the prior ruling. This decision is substituted for Open Records Letter No. 2014-06324 and serves as the correct ruling.

The Texas Department of Transportation (the "department") received four requests from two requestors for specified information relating to solicitation numbers 31-4RFP5019, 31-4RFP5021, 32-3RFP1062, 32-313P5041, 32-314P5046, 32-321P5045, 32-4RFP5076, 32-4RFP5084, 32-4RFP5087, 36-4RFP1001, 36-4RFP5021, 36-4RFP5024, 36-4RFP5031, 36-4RFP5034, 86-2IDP5039, 86-2IDP5042, and 86-2RFP5012. You claim some of the requested information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of some of the submitted information may implicate the proprietary interests of a number of third parties. Accordingly, you state you notified the third parties 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 AIA Engineers, Ltd. ("AIA"), Landtech Consultants, Inc. ("Landtech"), Cobb, Fendley & Associates, Inc. ("Cobb"), Lina T. Ramey and Associates, Inc. ("LTRA"), Dannenbaum Engineering Corporation ("Dannenbaum"), Gorrondona & Associates, Inc. ("Gorrondona"), Brown & Gay Engineers, Inc. ("Brown"), Utility Mapping Services, Inc. ("UMS"), and Surveying and Mapping, L.L.C. ("SAM"). We have reviewed the submitted arguments and the submitted information, a portion of which you state constitutes a representative sample.¹

Initially, we must address the department's obligations under the Act. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the claimed 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. Gov't Code § 552.301(e)(1)(A)-(D). You received the first request for information on January 29, 2014. This office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, the fifteen business day deadline for that request was February 20, 2014. Although the department submitted most of the information responsive to that request as required by section 552.301(e), the department submitted a portion of the responsive information after the fifteen business day deadline. Accordingly, we conclude the department has failed to comply with the procedural requirements mandated by section 552.301(e) of the Government Code for that information.

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). The presumption that information is

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

public under section 552.302 can be overcome by demonstrating that the information is confidential by law or third-party interests are at stake. *See* Open Records Decision Nos. 630 at 3, 325 at 2 (1982). Because section 552.110 of the Government Code can provide a compelling reason to withhold information and because third-party interests are involved in this instance, we will consider whether the additional responsive information must be released under the Act. We will also consider the arguments for the responsive information that the department timely submitted.

Next, you state the requested information pertaining to solicitation numbers 32-313P5041, 32-314P5046, 32-321P5045, 32-4RFP5076, 86-2IDP5042, 86-2RFP5012, and 86-2IDP5039 was the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2014-01439 (2014) and 2014-04286A (2014). In Open Records Letter No. 2014-01439, we determined the department must withhold the marked insurance policy numbers under section 552.136 of the Government Code and must release the remaining information at issue. In Open Records Letter No. 2014-04286A, we determined the department may withhold part of the information at issue under section 552.104 of the Government Code, must withhold some information under section 552.110(b) of the Government Code, and must release the remaining information at issue. We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, the department must rely on Open Records Letter Nos. 2014-01439 and 2014-04286A as previous determinations and withhold or release the information pertaining to solicitation numbers 32-313P5041, 32-314P5046, 32-321P5045, 32-4RFP5076, 86-2IDP5042, 86-2RFP5012, and 86-2IDP5039 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). We will consider the submitted arguments against release of the remaining requested information which was not previously requested and ruled upon by this office.

The department, Brown, and Cobb each raise section 552.104 of the Government Code for some of the submitted information. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). Because section 552.104 protects the interests of governmental bodies, not third parties, we will not consider Brown's or Cobb's claims under this section. Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular

competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract has been executed. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

You state the information pertaining to solicitation numbers 31-4RFP5019, 31-4RFP5021, 32-4RFP5087, 36-4RFP1001, 36-4RFP5021, 36-4RFP5024 and 36-4RFP5034, which you have submitted as Exhibit C, was submitted in connection with specific competitive procurements. You further state the contracts arising from that process have not yet been 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 contracts have been executed.² *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).

We now turn to the submitted arguments against disclosure of the remaining information, which consists of solicitation numbers 32-3RFP1062, 32-4RFP5084, and 36-4RFP5031. 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why the information at issue should not be released. Therefore, we have no basis to conclude any of the remaining third parties have 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 any of the information relating to solicitation numbers 32-3RFP1062, 32-4RFP5084, and 36-4RFP5031 on the basis of any proprietary interest any of the remaining third parties may have in the information.

²As our ruling for this information is dispositive, we need not address AIA's, Brown's, Cobb's, Dannenbaum's, Gorrondona's, Landtech's, or LTRA's arguments against its disclosure.

AIA, Cobb, Dannenbaum, LTRA, Landtech, SAM, and UMS each argue their information is excepted from disclosure under section 552.110 of the Government Code.³ 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. 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

³Although Landtech does not cite to section 552.110 of the Government Code in its brief to this office, we understand it to raise this exception based on the substance of its arguments.

⁴The 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).

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).

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.

AIA, Cobb, Landtech, LTRA, SAM, and UMS each assert portions of their information constitute trade secrets under section 552.110(a) of the Government Code. Upon review, we conclude these parties have failed to establish a *prima facie* case that any portion of their information meets the definition of a trade secret. We further find these parties have not demonstrated the necessary factors to establish a trade secret claim for their information. *See* ORD 402. Therefore, none of the information at issue may be withheld under section 552.110(a).

Cobb, Dannenbaum, Landtech, LTRA, SAM, and UMS each argue portions of their information consist 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 Dannenbaum and SAM have demonstrated portions of its information constitute commercial or financial information, the release of which would cause substantial competitive injury. Accordingly, the department must withhold this information, which we have marked, under section 552.110(b) of the Government Code. However, we find Dannenbaum and SAM, as well as Cobb, Landtech, LTRA, and UMS have failed to demonstrate the release of any of the remaining information at issue would result in substantial harm to their competitive positions. *See* Open Records Decision Nos. 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), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110), 175 at 4 (1977) (résumés cannot be said to fall within any exception to the Act). Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

In summary, the department must rely on Open Records Letter Nos. 2014-01439 and 2014-04286A as previous determinations and withhold or release the information pertaining to solicitation numbers 32-313P5041, 32-314P5046, 32-321P5045, 32-4RFP5084,

86-2IDP5042, 86-2RFP5012, and 86-2IDP5039 in accordance with those rulings. The department may withhold Exhibit C under section 552.104 of the Government Code until such time as contracts have been executed. The department must withhold the information we have marked under section 552.110(b) of the Government Code. The department must release the remaining information.

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,



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Ref: ID# 519766

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