



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2014

Ms. L. Carolyn Nivens
Paralegal
Counsel for the City of League City
Ross, Banks, May, Cron & Cavin, P.C.
2 Riverway, Suite 700
Houston, Texas 77056

OR2014-17254

Dear Ms. Nivens:

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# 537543 (City Ref. No. 14-276).

The City of League City (the "city"), which you represent, received a request for information pertaining to a specified request for proposals, including the bid tabulation and scoring sheets. You state the city will redact certain information pursuant to section 552.136(c) of the Government Code.¹ Although you take no position with respect to the public availability of the submitted information, you state its release may implicate the proprietary interests of certain third parties, namely: Whitley Penn, LLP; White Samaniego Campbell, LLP; Sanderson Knox & Company, LLP; Pattillo, Brown & Hill, LLP; Weaver and Tidwell, LLP; BrooksCardiel, PLLC ("Brooks"); and BKD, LLP ("BKD"). Accordingly, you state, and provide documentation showing, you have notified these third parties of the request for information and of their right to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be

¹Section 552.136(c) of the Government Code allows a governmental body to redact the information described in section 552.136(b) without the necessity of seeking a decision from the attorney general. Gov't Code § 552.136(c). If a governmental body redacts such information, it must notify the requestor in accordance with section 552.136(e). *See id.* § 552.136(d), (e).

released); *see also* 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 the circumstances). We have received comments from Brooks and BKD. We have considered the submitted arguments and reviewed the submitted information.²

Initially, we note the city did not submit the bid tabulation and scoring sheets. To the extent this information existed on the date the city received the request, we assume the city has released it. If the city has not released this information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

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 received comments from only Brooks and BKD explaining why the submitted information should not be released. Therefore, we have no basis to conclude 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, release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case information is trade secret), 542 at 3. Accordingly, the city may not withhold the submitted information on the basis of any proprietary interests the remaining third parties may have in the information.

BKD raises section 552.104 of the Government Code. This section excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). However, section 552.104(a) protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision No. 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). As the city did not submit arguments against disclosure of any of the responsive information under section 552.104, no portion of BKD's information may be withheld on this basis.

²Although BKD raises sections 552.021 and 552.305 of the Government Code, we note these provisions are not exceptions to disclosure under the Act. *See* Gov't Code §§ 552.021 (providing public information is available during normal business hours), .305 (addressing the procedural requirements for notifying third parties their interests may be affected by a request for information).

Brooks and BKD raise 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, 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.³ 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 section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary

³The 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).

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 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, substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* ORD 661 at 5.

Brooks and BKD contend some of their respective information, including customer and reference information, constitutes trade secrets under section 552.110(a) of the Government Code. Upon review, we find Brooks and BKD have established *prima facie* cases their customer and reference information, which we have marked, constitutes trade secret information for purposes of section 552.110(a). Accordingly, to the extent this information is not publicly available on the companies’ respective websites, the city must withhold it under section 552.110(a) of the Government Code. However, we find Brooks and BKD have failed to establish a *prima facie* case any portion of their remaining information meets the definition of a trade secret, nor have they demonstrated the necessary factors to establish a trade secret claim for its remaining information. *See* ORD 402. Therefore, none of their remaining information may be withheld under section 552.110(a).

Brooks and BKD further argue portions of their information consist of commercial information, the release of which would cause the companies substantial competitive harm under section 552.110(b) of the Government Code. To the extent these companies’ client information is publicly available on their respective websites and not excepted from disclosure under section 552.110(a), the city may not withhold such information under section 552.110(b). Upon review, we find Brooks and BKD have made only conclusory allegations the release of any of their remaining information 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 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 their remaining information may be withheld under section 552.110(b).

In summary, to the extent the customer and reference information we have marked is not publicly available on Brooks’ and BKD’s respective websites, the city must withhold it under

section 552.110(a) of the Government Code. The city 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,



Lee Seidlits
Assistant Attorney General
Open Records Division

CLS/som

Ref: ID# 537543

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Timothy K. McNamara
Counsel for BKD, LLP
Lathrop & Gage, L.L.P.
2345 Grand Boulevard, Suite 2200
Kansas City, Missouri 64108-2618
(w/o enclosures)

Mr. Michael Brooks, CPA
BrooksCardiel, PLLC
1095 Evergreen Circle, Suite 200
The Woodlands, Texas 77380
(w/o enclosures)

Mr. Thomas Pedersen, CPA
Partner - Audit Services
Whitley Penn
600 Gulf Freeway, Suite 226
Texas City, Texas 77591
(w/o enclosures)

Mr. Alan K. Sandersen
CPA/Partner
Sanderson Knox & Company, LLP
130 Industrial Boulevard, Suite 130
Sugar Land, Texas 77478
(w/o enclosures)

Mr. Kevin Sanford, CPA
Partner, Assurance Services
Weaver and Tidwell, L.L.P.
24 Greenway Plaza, Suite 1800
Houston, Texas 77046
(w/o enclosures)

Ms. Roxie Samaniego, CPA
White Samaniego Campbell, LLP
810 East Yandell Drive
El Paso, Texas 79902-5332
(w/o enclosures)

Mr. John K. Manning
Partner
Pattillo, Brown & Hill, L.L.P.
8300 FM 1960 West, Suite 450
Houston, Texas 77070
(w/o enclosures)