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February 16, 2016

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OR2016-03677

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# 598340.

The Texas Department of Transportation (the "department") received two requests from different requestors for information pertaining to specified procurements. The department claims some of submitted information is excepted from disclosure under sections 552.104 and 552.111 of the Government Code. Although the department does not take a position as to whether the remaining information is excepted from disclosure under the Act, it states release of this information may implicate the proprietary interests of third parties. Accordingly, you state you notified these third parties of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 at 3 (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 CobbFendley ("Cobb"); CP&Y; Half Associates, Inc. ("Half"); S&B Infrastructure, Ltd.; Kellogg Brown & Root Services,

Inc.; and Structural Engineering Associates, Inc. (“SEA”). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

Initially, the department informs us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2015-19036 (2015), 2015-24395 (2015), 2015-26376 (2015), and 2015-26573 (2015). We have no indication the law, facts, or circumstances on which the prior rulings were based have changed. Accordingly, the department must continue to rely on Open Records Letter Nos. 2015-19036, 2015-24395, 2015-26376, and 2015-26573 as previous determinations and withhold or release the identical information in accordance with those rulings.² 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).

Section 552.104(a) of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. The department represents Exhibit B pertains to a competitive bidding situation. The department explains Exhibit B consists of scoring and evaluation criteria documents that relate to contracts that have been awarded and executed. However, the department states it “solicits proposals for professional services, including the same types of services at issue here, on a recurring basis.” The department asserts the disclosure of Exhibit B will undercut its negotiating position with respect to future procurements for such contracts, and would allow third-party competitors to tailor their letters of interest to specific evaluation criteria, undermining the quality of letters of interest and undermining competition among competitors. Upon review, we find the department has established the release of Exhibit B would give advantage to a competitor or bidder. In addition, CP&Y, Cobb, and Halff assert they have competitors and argue the release of some of the information at issue in Exhibit C would give advantage to their competitors or other bidders. We conclude these third parties have also established the release of this information, which we have indicated, would give advantage to a competitor or bidder. Therefore, the

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.

²As we are able to make this determination, we do not address the arguments to withhold this information.

department may withhold Exhibit B in its entirety and the information we have indicated in Exhibit C under section 552.104(a) of the Government Code.³

SEA asserts some of its information is excepted from release under section 552.110 of the Government Code, which protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” Gov’t Code § 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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides 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.⁴ RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a private person’s claim for exception as valid under that branch if that person establishes a *prima*

³As we are able to make this determination, we do not address the other arguments to withhold this information.

⁴The following are the six factors that the Restatement gives 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 others 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).

facie case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies 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. *See* Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure “[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). Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, substantial competitive injury would likely result from release of the requested information. *See* ORD 661 at 5-6 (business enterprise must show by specific factual evidence release of information would cause it substantial competitive harm).

Upon review, we find SEA has not shown any of its information meets the definition of a trade secret or demonstrated the necessary factors to establish a trade secret claim. *See* Gov’t Code § 552.110(a). We also find SEA has failed to establish release of the information at issue would cause it substantial competitive injury. *See id.* § 552.110(b). Therefore, the department may not withhold any of SEA’s information pursuant to section 552.110 of the Government Code.

Finally, 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 requested information relating to it should be withheld from disclosure. *See* Gov’t Code § 552.305(d)(2)(B). As of the date of this letter, no other interested third party has submitted to this office reasons explaining why any of the remaining information should not be released. Thus, we have no basis for concluding the remaining information constitutes proprietary information of any other interested third party, and the department may not withhold any portion of it on that basis. *See* 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 that information is trade secret), 542 at 3.

To conclude, the department must continue to rely on Open Records Letter Nos. 2015-19036, 2015-24395, 2015-26376, and 2015-26573 as previous determinations and withhold or release the identical information in accordance with those rulings. The department may withhold Exhibit B in its entirety and the information we have indicated in Exhibit C under section 552.104(a) of the Government Code. The department must release the remaining information in Exhibit C.

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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TH/som

Ref: ID# 598340

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