HUSCH BLACKWELL
111 Congress Avenue, Suite 1400
Austin, Texas 78701
512.472.5456

Nikelle S. Meade
512.479.1147 direct
512.226.7373 fax
nikelle.meade@huschblackwell.com

August 14, 2018

Via the Texas Attorney General Public Information Act Electronic Filing System

The Honorable Ken Paxton
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, TX 78711-2548

Re: City of Austin PIR # C003876

Request for Attorney General Decision under Tex. Gov't Code § 552.301 in response to an Open Records Request (the ***"Request"***) submitted to the City of Austin (the ***"City"***) by Mr. Ryan Hobbs (the ***"Requestor"***)

Attorney General Paxton:

Husch Blackwell represents Synagro of Texas-CDR, Inc. (***"Synagro"***) in connection with the Request and respectfully requests notice of any action by the Texas Attorney General and of correspondence with the Requestor, or any other parties related to the Request, be provided to Synagro by mail or email to Husch Blackwell at the addresses provided above.

By this letter, and in accordance with the Texas Public Information Act (the ***"Act"***), Synagro requests that the Attorney General issue a decision that the City of Austin to withhold the requested information (the ***"Documents"***) for the reasons stated herein.

On July 13, 2018, the Requestor filed the Request with the City. On July 31, 2018, Synagro received notice of the Request. Thus, today marks the tenth day from the date that Synagro received notice of the Request.

Disclosure of the information provided to you by the City in response to this Request are subject to exceptions from disclosure of information pursuant to numerous sections of the Texas Government Code, including, but not necessarily limited to, Sections 552.104, 552.110(a), and 552.110(b).

BACKGROUND

The Request is for a proposal or bid submitted to the City in response to a competitive contract bidding and procurement process, specifically, a Request for Proposals (an ***"RFP"***)

issued by the City for a biosolids contract valued at approximately $200 million. The Requestor is a representative of Texas Disposal System (***"TDS"***) and Texas Landfill Management (***"TLM"***), which submitted a proposal to the City in response to the RFP at issue here, and which is a competitor to Synagro.

The City recently canceled the RFP and has reissued the solicitation for the very same biosolids contract through an Invitation for Bids (an ***"IFB"***) process, which, like an RFP, is a competitive solicitation process governed by City procurement rules. In addition, we expect that the Requestor, via TDS or TLM, will submit a bid in response to the pending IFB. As a consequence, the Documents are comprised of information that, if released, would give advantage to a competitor or bidder.

Since the City still needs to procure a contractor for the biosolids contract, and due to the ongoing competitive process, the entire proposal should be excepted from disclosure pursuant to Texas Government Code Section 552.104 ("Information Relating to Competition or Bidding"), as well as pursuant to the Texas Supreme Court holding in *Boeing Co. v. Paxton*, 466 S.W. 3d 831 (Tex. 2015), in addition to other sections of the Local Government Code. However, should the Attorney General prefer a more targeted response, we have included a more detailed explanation regarding why the various portions of the proposal are covered by exceptions to disclosure under the Act.

GROUNDS FOR WITHHOLDING AND EXEMPTIONS FROM DISCLOSURE

Generally

It is an offense under the Act for any person to "distribute information considered confidential under the terms of [the Act]." Section 552.352.[1] And, it is a misdemeanor and official misconduct for any person to "knowingly … disclose the confidential information to a person who is not authorized to receive the information." *Id.*

"There is no authority under the [Public Information A]ct for requiring a third party to substantiate any claims of confidentiality at the time it submits material to a government body." Open Records Decision 575 (1990). Confidentiality of information under the Act is not determined by whether or not the third party "submitting the information marks it as confidential." *Id.* (citing *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976)). Rather, the determination is based on whether "disclosure of the information submitted might result in an injury" to the third party or its interest. *Id.*

"The attorney general may not disclose to the requestor or the public any information submitted to the attorney general" for review. Section 552.3035. While the issue of whether certain types of information must be disclosed, may be withheld, or is excepted under the Public

[1] "Section" references herein are to the Texas Government Code.

Information Act is a usually question of law,[2] such determinations as to a particular document or datum turn on application of facts to law.[3]

When applying facts, the Attorney General must base its decision "on a review of the information at issue and on any other information provided to the attorney general by the government body or third parties." Office of the Attorney General of Texas, Public Information Handbook (2018) [hereinafter "*Handbook*"] at 43 (citing Open Records Decision 652 (1997)).

Comments of the public and third parties "must be received before the attorney general renders a decision under section 552.306." *Handbook* at 49. Because a governmental body is not required to raise an exception to the release of a third party's information, any failure by the governmental body to raise an exception to the information's disclosure is not a waiver of any exception, nor is it acquiescence in the disclosure of the information. *Boeing*, 466 S.W.3d at 838.

If facts are insufficient for the Attorney General to make a determination, the Attorney General "shall give written notice of that fact to the governmental body and the requestor" in order to ensure the law is properly applied and that the rights of requestors, government bodies, and third parties are not prejudiced as a result from a misinterpretation or misapplication of fact to law.[4]

Third parties have standing to assert any exceptions to public disclosure where "no statutory language limits [such exception] to the government." *See Boeing Co. v. Paxton*, 466 S.W.3d 831, 838, 839 (Tex. 2015); Section § 552.305.

If facts are disputed, then the Attorney General's "office cannot resolve disputes of fact in the opinion process." Open Records Decision 652 (1997). Where there is any uncertainty to relevant facts, then "the attorney general must accept a claim for exception as valid if the *prima facie* case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law." Open Records Decision 552 (1990). "To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact. " *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 896 (1984)).

Responsiveness or Nonresponsiveness

A government body has no obligation to disclose information not requested. *See* Section 552.221(a) (requiring disclosure only "on application" by the requestor). Information not responsive to or subject to a request is therefore excepted from any requirement of mandatory disclosure. While a "government body must make a good faith effort to relate a request to

---

[2] *Heidenheimer v. Tex. Dept. of Transp.*, Case No. 03-02-00187-CV, 2003 WL 124248, at *1 (Tex. App. Jan. 16, 2003).

[3] *See e.g.* Open Records Decision 609 (1992).

[4] Handbook at 48.

information that it holds,"[5] mere submission by the government body to the Attorney General does not in itself mean such submitted information is actually responsive to the request. *See* Informal Letter Ruling No. OR2017-03211 (Feb. 13, 2017) (determining information submitted by government entity was not responsive to the request).

Section 552.110(a): Trade Secrets

Section 552.110(a) excepts from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Tex. Gov't Code § 552.110(a). Under Texas judicial decisions, a trade secret is "any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it." *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003).

A trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, the design and operation of which in unique combination affords a competitive advantage, is a protected trade secret. *Metallurgical Industries, Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1202 (5th Cir. 1986), *rev'd on other grounds sub nom. Sw. Energy Prod. Co. v. Berry–Helfand*, 491 S.W.3d 699 (Tex. 2016). The Texas Supreme Court defines trade secret using Section 757 of the Restatement of Torts as:

> [A]ny 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 is a trade secret, the Attorney General considers the Restatement's definition of trade secret and the Restatement's six trade secret factors, none of which are singularly necessary to find a trade secret:

1. the extent to which the information is known outside of [the company's] business;
2. the extent to which it is known by employees and others involved in [the company's business];

[5] Handbook at 17 (citing Open Records Decision 561 at 8 (1990).

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 to [its] competitors;
5. the amount of effort or money expended by [the company] in developing the information; [and]
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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

A party asserting the trade secret under Section 552.110 is not required to satisfy all six factors listed in the Restatement in order to prevail on its claim. *In re Bass*, 113 S.W.3d 735, 740 (Tex. 2003). Rather, the party seeking the exception need only show the information meets the definition of a trade secret when considered with some of the factors. Open Records Decision No. 402 (1983).

The Attorney must accept a claim that information 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).

When determining whether information is excepted under Section 552.110(a), the Attorney General must base its decision "on a review of the information at issue and on any other information provided to the attorney general by the government body or third parties." Handbook, p. 48 (citing Open Records Decision 652 (1997)). If facts are disputed, then the Attorney General's "office cannot resolve disputes of fact in the opinion process." Open Records Decision 652 (1997).

Where there is any uncertainty to relevant facts, then "the attorney general must accept a claim for exception as valid if the *prima facie* case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law." Open Records Decision 552 (1990). "To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact." *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 896 (1984)).

Section 552.110(b): Competitive Harm

Section 552.110(b) excepts from disclosure "commercial 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."

A party asserting this exception need only identify specific facts or evidence of a potential competitive injury which could result from release of the requested information. See Open Records Decision No. 661 at 5 6 (1999).

When determining whether information is excepted under Section 552.110(b), the Attorney General must base its decision "on a review of the information at issue and on any other information provided to the attorney general by the government body or third parties." Handbook, p. 48 (citing Open Records Decision 652 (1997)). If facts are disputed, then the Attorney General's "office cannot resolve disputes of fact in the opinion process." Open Records Decision 652 (1997).

Where there is any uncertainty to relevant facts, then "the attorney general must accept a claim for exception as valid if the prima facie case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law." Open Records Decision 552 (1990). "To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact." *Id.* (*citing Ruckelshaus v. Monsanto Co.*, 467 U.S. 896 (1984)).

Section 552.104: Competition

Section 552.104 excepts from disclosure information that, if released, would give advantage to a competitor or bidder. 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." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015).

As "no statutory language limits" Section 552.104 "to the government," third parties have standing to assert them as exceptions to disclosure. *See Id.* at 838, 839; Tex. Gov't Code § 552.305. When determining whether information is excepted under Section 552.104, the Attorney General must base its decision "on a review of the information at issue and on any other information provided to the attorney general by the government body or third parties." Handbook, p. 48 (citing Open Records Decision 652 (1997)).

Where there is any uncertainty to relevant facts, then "the attorney general must accept a claim for exception as valid if the prima facie case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law." Open Records Decision 552 (1990). "To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact." *Id.* (*citing Ruckelshaus v. Monsanto Co.*, 467 U.S. 896 (1984)).

The Applicable Exceptions to Disclosure

Even if a document were responsive, it would fall within various exceptions to disclosure and should be withheld. In the sections below, you will find the applicable exceptions to disclosure. They include the following Sections: 552.104 (Information relating to competition or bidding); 552.110(a) (Trade secrets); and 552.110(b) (Commercial or financial information that would cause substantial competitive harm).

I. Some of the Documents are Not Responsive to the Request.

Some of the documents that the City provided to you are not responsive due to their content. The Request was very specific: "The Request was for "a digital copy of the response submitted to the City of Austin by Synagro in response to Request for Proposal CDL2003REBID." The documents that the City provided to you in response to the Request consisted of 342 pages of documents that the City marked as potentially responsive, even though Synagro's submitted proposal only consisted of 300 pages. It appears that the City included duplicate portions of certain parts of the proposal, but, at a minimum, Pages 339-342 were not part of the Synagro proposal, and should be withheld.

II. Sections 552.104, 552.110(a), and 552.110(b) apply to protect Synagro's proprietary information.

The Documents should be excepted from disclosure because they fall within the exceptions provided by Sections 552.104, 552.110(a), and 552.110(b).

By its terms, Section 552.104 exempts from disclosure information that, "if released, would give advantage to a competitor or bidder." Tex. Gov't Code § 552.104(a). Section 552.110(b) excepts from disclosure, "Commercial 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." Tex. Gov't Code § 552.110(b).

Synagro is a large, national company with many competitors. The Documents would, if released, give advantage to a competitor or bidder due to their proprietary nature and given their use in highly competitive procurement processes and business operations. Moreover, any commercial or financial information or other business information in the Proposal, including regarding Synagro's business capacity and experience, proposed solutions and schedule, marketing and other plans, proposed cost, and business exceptions, if released, would cause Synagro substantial harm since this information is based on the unique skills, knowledge, and experience of Synagro executives, financial analysts, engineers, and other critical employees.

The disclosure of the Documents would cause Synagro real harm not just in the pending competitive procurement process for the biosolids contract in Austin, but also in other cities in which Synagro conducts or plans to seek business throughout the United States, including in other cities in which Synagro and TDS or TLM compete for valuable business contracts. The disclosure of the requested information could allow TDS, TLM, or other competitors of Synagro to gain insight into Synagro's proprietary solutions and business information. It would also allow competitors to undercut Synagro in terms of bid price. All of these harms to Synagro could also harm the municipalities and other governmental bodies that contract for the types of services that Synagro provides.

In addition, the information in the Documents is not generally known outside of Synagro's business, is generally contained within the company on a need-to-know basis, and is

vigorously protected by Synagro from disclosure to its competitors and the general public. Synagro protects this information because it gives it a competitive advantage, was acquired at great cost of time and funding, and could not be easily acquired or duplicated by its competitors, which is demonstrated by the fact of the Requestor having requested the Documents.

Accordingly, we respectfully request that your Office determine that the City may withhold the Documents pursuant to Section 552.104, 552.110(a), and 552.110(b).

INFORMATION SUBJECT TO WITHHOLDING AND EXEMPTION

Attached hereto as ***Exhibit A*** is a document-by-document explanation of how the foregoing grounds for withholding and/or excepting from mandatory or permissive disclosure are applied to the documents which the City has identified as being potentially responsive to the Request.

CONCLUSION

The City is not required to disclose any of the documents discussed in in the Proposal or in Exhibit A because they are not responsive to the Request and/or are excepted from disclosure by the Texas Government Code. Therefore, Synagro respectfully requests that the Attorney General issue a decision permitting or instructing the City to withhold the Documents.

Pursuant to Texas Gov't Code § 552.305(e), we are contemporaneously providing a copy of this letter the Requestor, with Exhibit A omitted, as it reveals the substance of the Documents.

Should you have any questions concerning the foregoing, please do not hesitate to contact us with the information provided above.

Sincerely,

Nikelle Meade

Nikelle Meade

cc: The Requestor, Mr. Ryan Hobbs, via email: rhobbs@texasdisposal.com