



August 10, 2000

Mr. Roland Castañeda
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2000-3054

Dear Mr. Castañeda:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 137899.

Dallas Area Rapid Transit ("DART") received a request for a copy of the response to RFP No. P-99036634 submitted by ATC/Vancom ("ATC"), including ATC's original proposal, correspondence between DART and ATC, ATC's best and final offer, and all pricing information submitted by ATC. You state that you have released documents responsive to all requested items, except for three items identified by ATC as proprietary information, which are the ATC Safety Manual, the sample test materials for mechanics, and the sample training program for Field Supervisors. You take no position as to whether any of the information requested is excepted from disclosure. You have notified ATC, in accordance with section 552.305 of the Government Code, in order to allow ATC to establish the applicability of an exception to disclosure should ATC seek to protect the information from public disclosure. *See* Open Records Decision No. 542 (1990).

ATC did submit arguments asserting that portions of the information, specifically pages 9 and 10 of the document titled "Dallas Area Rapid Transit Paratransit Service Deficiencies Response" and pages 13, 16, and 17 of the document titled "Questions Regarding Dallas Area Rapid Transit Paratransit Transportation Services" are excepted from disclosure based on sections 552.101 and 552.110 of the Government Code.¹ Section 552.110 excepts from required disclosure:

¹Because the document titled "Questions Regarding Dallas Area Rapid Transit Paratransit Transportation Services" was not submitted to this office to review, we assume that pages 9 and 10 of the deficiencies response constitute a representative sample of pages 13, 16, and 17 of that unsubmitted document. *See* Open Records Decision Nos. 499 (1988), 497 (1988). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

(a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision [; and]

(b) 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

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. A "trade secret":

may consist of 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, . . . [but] 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) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

The determination of whether any particular information is a trade secret is a determination of fact.² Noting that an exact definition of a trade secret is not possible, the Restatement lists six factors to be considered in determining whether particular 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;

²Open Records Decision No. 552 at 2 (1990).

(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.³

Open Records Decision No. 552 (1990) noted that the attorney general is unable to resolve disputes of fact regarding the status of information as “trade secrets” and must rely upon the facts alleged or upon those facts that are discernible from the documents submitted for inspection. For this reason, the attorney general will accept a claim for exception as a trade secret when a *prima facie* case is made that the information in question constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law.⁴

ATC addresses each of the six factors considered in making a trade secret determination. They emphasize the efforts they have made to protect the secrecy of the information, the value of the information to ATC in winning contracts, and the value the information would have to competitors.

ATC also claims that the information is excepted from disclosure under section 552.110(b). Section 552.110(b) excepts from required public 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.” An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information.

ATC contends that the release of the information at issue would result in substantial harm to its competitive position in the marketplace because the information is “relevant to ongoing competition for the award of future contracts[.]” In addition, disclosure “could injure ATC by subverting current and pending labor negotiations[.]”

After reviewing the documents and the arguments presented, we conclude that ATC has established that pages 9 and 10 of the document titled “Dallas Area Rapid Transit Paratransit Service Deficiencies Response,” and other responsive information which those pages represent fall within the protection of section 552.110(b). DART may not release that information. However, ATC makes no argument to withhold either the ATC Safety Manual, the sample test materials for mechanics, or the sample training program for Field Supervisors. DART must release those items.

³RESTATEMENT OF TORTS § 757 cmt. b (1939); see *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. filed).

⁴Open Records Decision No. 552 at 5 (1990)

This letter ruling is limited to the particular records 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 records or any other circumstances.

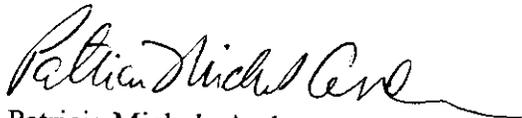
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/ljp

Ref: ID# 137899

Encl. Submitted documents

cc: Mr. John Farrell
Transit Contracting-First Transit
2711 LBJ Freeway Suite 670
Dallas, Texas 75234
(w/o enclosures)

cc: Mr. David C. Schulze
Senior Assistant General Counsel
Winstead Sechrest & Minick
100 Congress Ave., Ste. 800
Austin, Texas 78701
(w/o enclosures)