



December 19, 2000

Ms. Anne M. Constantine  
Legal Counsel  
D/FW International Airport  
P.O. Drawer 619428  
DFW Airport, Texas 75261-9428

OR2000-4767

Dear Ms. Constantine:

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# 142380.

The Dallas/Fort Worth International Airport Board (the "board") received a request for the proposal submitted to the board by the Marubeni Corporation ("Marubeni") pertaining to an automated people mover system. You have submitted for our review the Marubeni proposal. You assert that the submitted information may be excepted from disclosure under sections 552.101 and 552.110 of the Government Code. You make no arguments in support of these exceptions. However, the board notified Marubeni of the request by a letter dated October 13, 2000, in compliance with section 552.305 of the Government Code. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *Open Records Decision No. 542 (1990)* (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). Through its legal counsel, Marubeni responded to the notice and asserts that portions of the Marubeni proposal are excepted from disclosure by sections 552.101 and 552.110 of the Government Code. We have considered the submitted comments and arguments, and we have reviewed the submitted information.

We note at the outset that no later than the fifteenth business day after receiving an open records request, the board must submit to this office, among other information, "a copy of

the written request for information.” Gov’t Code § 552.301(e)(1)(B). In this instance, however, the board did not provide this office with a copy of the written request for information. If a governmental body fails to request a decision of this office as provided by section 552.301, the requested information “is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” Gov’t Code § 552.302. This office has long held that sections 552.101 and 552.110 may provide a compelling reason sufficient to overcome the section 552.302 presumption of openness. *See, e.g.*, Open Records Decision Nos. 150 (1977), 71 (1975). We therefore proceed to consider the section 552.101 and 552.110 assertions.

Section 552.110 protects the interests of third parties by excepting from disclosure two types of information: (1) trade secrets, and (2) certain commercial or financial information. *See* Gov’t Code § 552.110. Among other arguments, Marubeni asserts that portions of its information constitute trade secret information and are thus excepted from required public disclosure by section 552.110(a). 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 . . . . 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 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as 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;
- (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 this 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 No. 232 (1979). The determination of whether any particular information is a trade secret is a determination of fact. Open Records Decision No. 552 at 2 (1990). In the open records ruling process, the Attorney General is unable to resolve disputes of fact regarding the status of information as “trade secrets,” and this office therefore must rely upon the facts alleged or that are discernible from the information at issue. Accordingly, 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. *Id.* at 5. Upon careful consideration of the arguments and assertions of Marubeni’s legal counsel, we believe a *prima facie* case has been made that some of the information in question constitutes trade secret information. None of the information provided this office by the board contradicts Marubeni’s factual assertions with respect to the applicability of section 552.110(a) to the information at issue.

We do not agree that all of the information at issue meets the above-cited definition of trade secret information. However, as to that information which we believe does not comprise trade secrets, we have also considered whether Marubeni has established that the information is protected by section 552.110(b). *See* Gov’t Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure). Upon careful consideration of the arguments submitted by Marubeni, we believe Marubeni has demonstrated through specific factual assertions that it actually faces competition, and that Marubeni would likely suffer substantial competitive harm if the information at issue were to be released to the public. Thus, we conclude in this instance that the board must withhold pursuant to section 552.110 of the Government Code the portions of the Marubeni proposal we have marked.<sup>1</sup>

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<sup>1</sup>Marubeni’s legal counsel also submitted for our review a copy of the Marubeni proposal, marked with tabs numbered 1 through 11. The portions of the board copy that we have marked as excepted by section 552.110 correspond to the portions that Marubeni’s legal counsel marked in its copy with tabs numbered 4 through 9.

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).

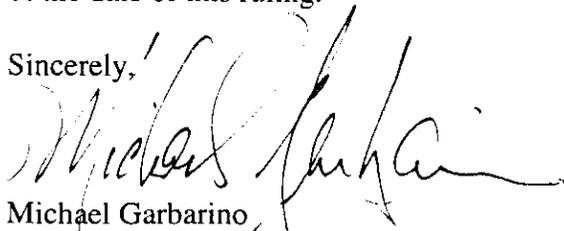
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 142380

Encl. Submitted documents

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