



January 14, 2002

Mr. Jesus Toscano, Jr.  
Administrative Assistant City Attorney  
City of Dallas  
1500 Marilla, Room 7BN  
Dallas, Texas 75201

OR2002-0226

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 157283, 157537, and 158607. We have combined these files and will consider the issues presented in this single ruling assigned ID# 157283.

The City of Dallas (the "city") received five requests for the proposals submitted in response to RFCSP #S3Z0108 and related information. The city claims that the proposals are excepted from disclosure under section 552.101 of the Government Code. The city also believes that these requests for information implicate the proprietary interests of the private parties that submitted the proposals. You inform us that these private parties include Ascom Transport Systems, Inc. ("ATSI"); Associated Time and Parking Controls ("Associated"); Federal APD ("Federal"); Scheidt & Bachmann USA, Inc. ("Scheidt"); TransCore, Incorporated ("TransCore"); and WPS North America Parking Systems (USA) ("WPS"). The city notified these parties of the requests for information and of their right to submit arguments to this office as to why the requested information should not be released.<sup>1</sup> The

---

<sup>1</sup>See Gov't Code § 552.305(d); 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 to disclosure under Gov't Code ch. 552 in certain circumstances).

city also submitted the information at issue to this office.<sup>2</sup> We received correspondence from ASTI, Scheidt, and TransCore. We have considered these parties' arguments, as well as those of the city, and have reviewed the submitted information.<sup>3</sup> As the city did not submit the technical evaluations or review comments to which the first requestor seeks access, we assume that the city has released any responsive information.<sup>4</sup> If not, then the city must do so at this time. See Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).

Section 552.305 allows an interested party ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from Associated, Federal, or WPS. Thus, these parties have not demonstrated that any information relating to Associated, Federal, or WPS must be withheld from public disclosure. See Gov't Code § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990) (attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if governmental body takes no position, third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

Next, we address the arguments of ASTI, Scheidt, and TransCore under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) 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. See Gov't Code § 552.110(a)-(b).

---

<sup>2</sup>We note that the submitted materials include a Scheidt & Bachmann USA binder titled "CMS Operations Documentation Set." This decision does not address the contents of this binder, as this information does not appear to be responsive to any of these requests for information.

<sup>3</sup>You state that the contract to which the first requestor seeks access has not yet been drafted. Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information. See *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

<sup>4</sup>You refer to the information that you submitted to this office in connection with the first request for information as a representative sample. See Gov't Code § 552.301(e)(1)(D). However, the submitted documents do not appear to include any technical evaluations or review comments. See Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

The Texas Supreme Court has adopted the definition of a "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 a single or ephemeral event 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a private person's claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>5</sup> *See Open Records Decision No. 552 at 5 (1990).*

Section 552.110(b) of the Government Code 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

---

<sup>5</sup>The 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 also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).*

specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* Open Records Decision No. 661 at 5-6 (1999) (stating that business enterprise must show by specific factual evidence that the release of information would cause it substantial competitive harm); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Both ATSI and Scheidt point out that portions of their proposals are designated as being confidential and/or proprietary. Information may not be withheld from the public, however, simply because a person anticipated or requested confidentiality for the information in submitting it to the governmental body. *See Industrial Found. v. Texas Industrial Accident Bd.*, 540 S.W.2d at 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision Nos. 514 at 1 (1988), 479 at 1-2 (1987), 444 at 6 (1986); *see also* Open Records Decision No. 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to section 552.110).

ATSI also asserts that specific segments of its proposal qualify as trade secret information under section 552.110(a). Additionally, ATSI raises section 552.110(b) with regard to certain unit pricing and maintenance cost information. We find that ATSI has demonstrated that portions of its proposal qualify as trade secret information under section 552.110(a). ATSI also has shown that some of its pricing information is excepted from disclosure under section 552.110(b). We have marked the information relating to ATSI that the city must withhold under section 552.110. ATSI has not demonstrated that any of the remaining information in question is excepted from disclosure. *See also* Open Records Decision No. 319 at 3 (1982) (statutory predecessor ordinarily does not protect information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Scheidt raises section 552.110 with respect to the following portions of its proposal: (1) Technical Specifications and Clarifications; (2) Proposed Contractual Provisions; (3) Pricing Information; (4) System Drawings; and (5) Best and Final Offer. Scheidt asserts that these portions of its proposal qualify as trade secret information and/or confidential commercial or financial information, the disclosure of which would cause Scheidt substantial competitive harm. Scheidt has established that section 552.110 protects some of this information. We have marked the portions of Scheidt's proposal that the city must withhold. Scheidt has not shown that the remaining information in question is excepted from disclosure. *See also* Open Records Decision No. 319 at 3 (1982).

TransCore contends that the following parts of its proposal constitute trade secret information: (1) Section 4 - System Functional Description and Flow Charts; (2) Section 5 - Technical Environment; (3) Attachment C - Proposers Evaluation Questionnaire; (4) Appendix D - Product Data Sheets; and (5) Appendix E - Spare Parts List. Additionally,

TransCore claims an exception under section 552.110(b) with respect to the following: (1) portions of its cover letter and Bid Proposal Form; (2) Section 10 - Cost Summary; (3) Pricing Information; (4) Attachment B - Full Service Maintenance Contract Cost Evaluation; and (5) Attachment E - GFE Information. TransCore has demonstrated that the city must withhold some of this information under section 552.110. We have marked TransCore's materials accordingly. TransCore has not established that section 552.110 protects any of the remaining information from disclosure. *See* ORD 319 at 3.

TransCore also raises section 552.104 of the Government Code with regard to parts of its proposal. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." This exception protects the interests of governmental bodies, not those of private parties such as TransCore that submit information to governmental bodies. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). The city does not raise section 552.104. Therefore, none of the remaining designated parts of TransCore's proposal may be withheld under section 552.104.

Next, we address the city's claim under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that another statute makes confidential. The city raises section 552.101 in conjunction with section 252.049 of the Local Government Code. Section 252.049 provides as follows:

- (a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.
- (b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection.

Local Gov't Code § 252.049. The city asserts that the proposals submitted in response to RFCSP #S3Z0108 are confidential under section 252.049. However, this provision merely duplicates the protection that section 552.110 of the Government Code provides to trade secret and commercial or financial information. The city does not demonstrate that any of the remaining requested information qualifies as either trade secret or confidential commercial or financial information under section 552.110. Thus, the city may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 252.049 of the Local Government Code.

We note, however, that one of the submitted proposals contains account number information. The Seventy-seventh Legislature added section 552.136 to chapter 552 of the Government

Code.<sup>6</sup> This newly enacted exception to public disclosure makes certain account number information confidential. Senate Bill 694 was passed on May 14, 2001, became effective when it was signed by the Governor on May 26, 2001, and provides in relevant part:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (codified as Gov't Code § 552.136). We have marked the account number information that the city must withhold under section 552.136 of the Government Code.

The submitted proposals also contain the e-mail addresses of private individuals. An e-mail address may be confidential under section 552.137, which the Seventy-seventh Legislature recently added to chapter 552 of the Government Code.<sup>7</sup> Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

---

<sup>6</sup>The Legislature also enacted two other bills that add a section 552.136 to chapter 552. House Bill 2589 makes certain e-mail addresses confidential. *See* Act of May 22, 2001, 77th Leg., R.S., ch. 545, § 5, 2001 Tex. Sess. Law Serv. 974, 975 (Vernon) (codified as Gov't Code § 552.136). Senate Bill 15 makes information maintained by family violence shelter centers confidential. *See* Act of May 3, 2001, 77th Leg., R.S., ch. 143, § 1, 2001 Tex. Sess. Law Serv. 279 (Vernon) (codified as Gov't Code § 552.136). Senate Bill 694 also enacted the same language as House Bill 2589 regarding the confidentiality of e-mail addresses, but codified it as section 552.137 of the Government Code. *See* Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (codified as Gov't Code § 552.137).

<sup>7</sup>House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (codified as Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., ch. 356, § 1, 2001 Tex. Sess. Law Serv. 614 (Vernon) (codified as Gov't Code § 552.137). We have marked e-mail addresses that the city must withhold under section 552.137 unless the individuals who submitted the particular e-mail addresses have affirmatively consented to their disclosure.

Finally, we further note that the submitted proposals include copyrighted information. An officer for public information must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the city must withhold portions of the proposals of ATSI, Scheidt, and TransCore under section 552.110 of the Government Code. The city must also withhold the account number information under section 552.136 and the e-mail addresses of private individuals in accordance with section 552.137. The city must release the remaining information. In doing so, the city must comply with the copyright law.

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).

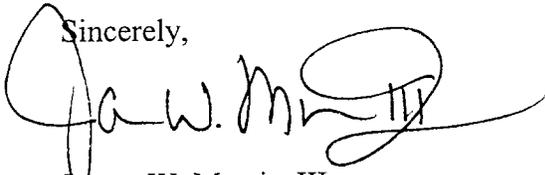
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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,

A handwritten signature in black ink, appearing to read "J.W. Morris III", written in a cursive style.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 157283

Enc: Marked documents

c: Ms. Adriane Y. Swinton-Hayes  
Contracts Manager  
TransCore, Incorporated  
19111 Dallas Parkway, Suite 300  
Dallas, Texas 75287-3108  
(w/o enclosures)

Ms. Jennifer Loranger  
PES Incorporated  
700 West Johnson Avenue, Suite 301  
Cheshire, Connecticut 06410  
(w/o enclosures)

Mr. Steve Womack  
Project Manager, Parking Systems  
Ascom Transport Systems, Inc.  
3100 Medlock Bridge Road, Suite 370  
Norcross, Georgia 30071-1439  
(w/o enclosures)

Mr. Jack Provencher  
Southeast District Manager  
Federal APD  
11126 Shady Trail #109  
Dallas, Texas 75229-4619  
(w/o enclosures)

Mr. Charlie Blum  
Sales Manager  
Associated Time & Parking Controls  
9104 Diplomacy Row  
Dallas, Texas 75247  
(w/o enclosures)

Mr. Thomas D. Perrie  
Perrie & Cole, LLC.  
8300 Dunwoody Place, Suite 140  
Atlanta, Georgia 30350  
(w/o enclosures)

Mr. Loring A. Cook, III  
Ms. Laurie Alexander-Krom  
Murtha Cullina Roche Carens & DeGiacomo  
99 High Street  
Boston, Massachusetts 02110-2320  
(w/o enclosures)