



March 19, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR2002-1366

Dear Ms. Mullenix:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 159949.

The Texas Department of Transportation ("TxDOT") received a request for all information collected, assembled or maintained by TxDOT regarding:

- 1) All correspondence and documents of any kind relating to any aspect of SH 45 South, or any part of SH 45 South, where such document or correspondence was received or generated from September 15, 2001 until the date this request is answered.
- 2) All contracts for any environmental, engineering or other work related in any way to SH 45 South or any part of SH 45 South, regardless of the date such contracts were entered and any work product provided by any such contractors.
- 3) A copy of the application for and document providing or making the federal grant or loan moneys targeted for development of the Loop 1/Mopac North, SH 45 North, and/or SH 130 highways or toll roads.
- 4) All correspondence to or from any representative or member of the Capital Area Metropolitan Planning Organization from October 1, 2001 to the date this request is fulfilled.
- 5) All financial disclosure statements on file for each of the three Texas Transportation Commission members.

You state that TxDOT will release most of the requested information. You claim that the remaining requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. You state, and provide documentation showing, that you notified an interested third party whose proprietary interests may be implicated by the request, Texas Corridor Constructors, of the request for information.¹ While you claim no exceptions on behalf of the third party, we have received correspondence from Zachry Construction Corporation (also known and doing business as Transportation Corridor Constructors, referred to herein as "Zachry") claiming that their records constitute trade secrets and commercial or financial information excepted under sections 552.101 and 552.110. We have also considered the requestor's submitted comments.² We have considered all claimed exceptions and reviewed the submitted information.

We first address the issue of the timeliness of TxDOT's request for opinion. TxDOT states that the instant request was received on December 27, 2001. The requestor states that the request was faxed to, and received by TxDOT on December 21, 2001. We cannot resolve disputes of fact in the open records process. We must rely on the representations of the governmental body requesting our opinion. Open Records Decision Nos. 554 (1990), 552 (1990). Accordingly, we find that TxDOT has timely submitted information to this office. *See* Gov't Code §552.301.

On another threshold matter, we address TxDOT's concern as to the scope of the request. The requestor asks for all responsive documents "until the date this request is answered." The Act does not require a governmental body to make available information which did not exist at the time the request was received. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 (1986); Open Records Decision No. 362 (1983) (document not within purview of chapter 552 if not in existence at time of request). Here, you represent that the commission received the request on December 27, 2001. Thus, information that was not in existence on that day is not responsive to the request and need not be released to the requestor.

Turning now to the information at issue, we note that a portion of Exhibit B is subject to section 552.022 of the Government Code. Section 552.022 provides, in pertinent part:

¹*See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* 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 (the "Act") in certain circumstances).

²*See* Gov't Code § 552.304 (providing that interested person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). One of the submitted documents, which we have marked, appears to be a completed report. This document must be released under section 552.022, unless the information is expressly made confidential under other law. You claim that this report, which was prepared by consultants to TxDOT, is excepted from disclosure pursuant to section 552.111 of the Government Code. However, we have previously concluded that section 552.111 is a discretionary exception that does not make information confidential.³ See Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). Accordingly, you may not withhold the marked documents pursuant to section 552.022(a)(1) of the Government Code. We will address your claim that the remaining information is excepted under section 552.111.

Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). Section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. You claim that the submitted information concerns TxDOT’s policymaking process. After reviewing the submitted documents, we agree that some of the documents contain internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of TxDOT and that information may be withheld under section 552.111. On the other hand,

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute “other law” that makes information confidential.

some of the information does not consist of advice, recommendations, or opinions and therefore may not be withheld under section 552.111. We have marked the documents accordingly.

We note that Exhibit B contains e-mail addresses of members of the public. Section 552.137 provides that “[a]n 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 [the Public Information Act].” Therefore, unless the relevant individuals have affirmatively consented to the release of their e-mail addresses, TxDOT must withhold the e-mail addresses in the submitted information that we have marked under section 552.137.

Section 552.107(1) excepts information that an attorney of a political subdivision cannot disclose because of a duty to the client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. When communications from attorney to client do not reveal the client’s communications to the attorney, section 552.107(1) protects them only to the extent that such communications reveal the attorney’s legal opinion or advice. ORD 574 at 3.

The submitted information contains communications between TxDOT and its attorneys. You represent that these communications reveal TxDOT’s confidences and consist of legal advice and opinions rendered for TxDOT as the client. Having reviewed these communications, we agree that, in some instances, they reveal TxDOT’s confidences or the attorney’s legal opinion or advice. Therefore, you may withhold the information we have marked under section 552.107(1).

Zachry claims that its information is excepted from disclosure under sections 552.101 and 552.110. Section 552.101 excepts from disclosure information made confidential by law. However, Zachry cites no specific law in conjunction with its 552.101 claim. Accordingly, TxDOT may not withhold Zachry’s information under 552.101.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets 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). Zachry’s comments appear to invoke both components of section 552.110.

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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that 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). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).⁴ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). Here, Zachry has not established that the information is for continuous use in its business rather than for a single event in the conduct of its business. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). Accordingly, Zachry has not demonstrated that the requested information meets the Restatement definition of a trade secret.

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(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 (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Zachry also raises section 552.110(b), which 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). This exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury likely would 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). We have carefully considered Zachry’s comments and have thoroughly examined the information that Zachry claims should be withheld from disclosure. We conclude, however, that Zachry has not demonstrated that release of the information would cause substantial competitive injury to Zachry. Therefore, the information may not be withheld from disclosure under section 552.110 of the Government Code. *See* Open Records Decision No. 661 (1991).

In sum, the information we have marked under section 552.022(a)(1) must be released. The remaining information we have marked under sections 552.111 and 552.107 may be withheld. TxDOT must not release e-mail addresses of the public under section 552.137 unless the member of the public has affirmatively consented to the release of the e-mail address. The information submitted by Zachry may not be withheld under 552.110. The remaining information must be released to the requestor.

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Joyce K. Lowe
Assistant Attorney General
Open Records Division

JKL/sdk

Ref: ID# 159949

Enc: Submitted documents

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