



September 30, 2002

Ms. Janice Mullenix
Associate General Counsel
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 East 11th Street
Austin, Texas 78701-2483

OR2002-5503

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# 168635.

The Texas Department of Transportation (the “department”) received a request for information relating to an unsolicited proposal for a transportation corridor project between Denison and San Antonio. The department claims that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. The department also believes that this request implicates the interests of the private party that submitted the proposal. The department notified that party of this request for information and of its right to submit arguments to this office as to why the information should not be released.¹ The department also submitted the requested proposal. We received arguments from Texas Mobility Alliance (“TMA”). We also received comments from an attorney who represents the requestor.² We have considered all of the submitted arguments and have reviewed the submitted information.

¹See Gov’t Code § 552.305(d); Open Records Decision No. 542 (1990) (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).

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

We first note that TMA raises sections 552.104 and 552.105 of the Government Code. These exceptions to disclosure protect only the interests of governmental bodies, not those of private parties such as TMA. *See* Open Records Decision Nos. 592 at 8 (1991) (statutory predecessor protects interests of governmental bodies and not interests of private parties submitting information to the government), 564 at 2 (1990) (statutory predecessor protects governmental body's planning and negotiating position with regard to particular transactions). Therefore, TMA may not rely on sections 552.104 and 552.105, and thus we do not address its arguments under these exceptions.

Next, we address the department's claim under section 552.104. This exception protects "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. *See* Open Records Decision No. 541 at 4 (1990). Section 552.104 does not protect information relating to competitive bidding situations once a contract has been awarded and is in effect. *See* Open Records Decision Nos. 306 (1982), 184 (1978).

The department states that the requested information is an unsolicited proposal to enter into an Exclusive Development Agreement ("EDA") for a highway construction project. The department informs us that an EDA may originate in a request for proposals or an unsolicited proposal. The department explains that if it accepts an unsolicited proposal as being complete and worthy of further evaluation, the department's rules provide for the solicitation of competing proposals. *See* 43 T.A.C. § 27.1 *et seq.* The department contends that if the unsolicited proposal is released to the public at this time, any further proposals will have an unfair advantage in competing for the project. The department acknowledges, however, that it is still evaluating the unsolicited proposal and has not yet determined whether to solicit competing proposals. Having considered your representations, we find that the department has not established that the requested proposal relates to competition for a public contract. *See* Open Records Decision No. 331 at 2 (1982) (concluding that there was no competitive situation where only one developer submitted a proposal). Thus, we conclude that the department has not demonstrated that the release of the proposal at this time would adversely affect the department's financial interests in such a competitive situation. *See* Open Records Decision Nos. 592 at 8 (1991), 541 at 5 (1990). Therefore, the department may not withhold the requested proposal under section 552.104 of the Government Code.

Both the department and TMA also raise 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).

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.³ 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

³The 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).

information was obtained[.]” Gov’t Code § 552.110(b). Section 552.110(b) requires a 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 also* Open Records Decision No. 661 at 5-6 (1999); *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The department asserts that the requested proposal is excepted from disclosure under section 552.110(b) because its release would adversely affect the department’s ability to obtain similar proposals in the future. We disagree. The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *See* Open Records Decision No. 661 at 5-6 (1999) (discussing enactment of Gov’t Code § 552.110(b) by Seventy-sixth Legislature). Rather, section 552.110(b) requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. *Id.* As the department has not made the required showing, it has not demonstrated that the requested proposal is excepted from disclosure under section 552.110(b).

TMA appears to raise both aspects of section 552.110. TMA argues that the requested proposal contains information relating to the finance, design, building, and operation of a proposed highway project that constitutes TMA’s protected intellectual property. TMA also asserts that it would suffer substantial harm if its proposal is made available to competitive bidders. Having considered these arguments, we conclude that TMA has not shown that its proposal qualifies as a trade secret under section 552.110(a) of the Government Code. Likewise, TMA has not demonstrated by specific factual evidence under section 552.110(b) that the release of the proposal would cause TMA substantial competitive harm. Therefore, the proposal is not excepted from disclosure under section 552.110 of the Government Code.

We note, however, that the proposal contains e-mail addresses that are encompassed by section 552.137 of the Government Code. This exception, which the Seventy-seventh Legislature added to chapter 552 of the Government Code, provides as follows:

- (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.

Gov’t Code § 552.137. The e-mail addresses that we have marked must be withheld from disclosure under section 552.137 unless the person to whom a particular e-mail address belongs has affirmatively consented to its public disclosure.

In summary, the department must withhold the marked e-mail addresses under section 552.137 unless the person to whom a particular e-mail address belongs has affirmatively consented to its public disclosure. The department must release the rest of the requested information.

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).

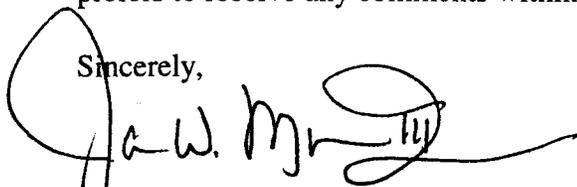
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a large, stylized flourish extending to the right.

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

JWM/sdk

Ref: ID# 168635

Enc: Submitted documents

c: Mr. W. Gardner Selby
Austin Bureau
San Antonio Express-News
1005 Congress Avenue, Suite 430
Austin, Texas 78701
(w/o enclosures)

Mr. Robert W. Pierce
Texas Mobility Alliance
c/o Granite Construction Company
701 East Main Street
Lewisville, Texas 75057
(w/o enclosures)

Mr. Mark J. Cannan
Clemens & Spencer
112 East Pecan Street, Suite 1500
San Antonio, Texas 78205
(w/o enclosures)