



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 31, 2005

Ms. Sharon Alexander  
Associate General Counsel  
Texas Department of Transportation  
125 E. 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2005-04699

Dear Ms. Alexander:

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# 225148.

The Texas Department of Transportation ("TXDOT") received two requests for information. The first seeks "all documents and exhibits composing the 'Conceptual Development Plan' and 'Conceptual Financial Plan'" for the Comprehensive Development Agreement ("CDA") entered into between TXDOT and Cintra Zachry, LP ("Cintra"). The other requestor asks for the entire CDA, including "all exhibits/attachments to the Agreement." You inform us that you have released some of the requested information, but claim that the submitted information is excepted from disclosure under sections 552.101 and 552.104 of the Government Code. You further assert that the requested information may be excepted from disclosure under section 552.110 of the Government Code, although you take no position regarding this exception. Instead, you have notified Cintra of the request and of its opportunity to submit comments to this office. 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). In correspondence with this office, Cintra contends that the information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. We have considered the claimed exceptions and reviewed the submitted information.

We begin with section 552.104, as it is potentially the broadest exception to disclosure. Section 552.104 of the Government Code excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” The purpose of this exception is to protect a governmental body’s interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991). This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from public disclosure after bidding is completed and a contract has been entered into. *See, e.g.*, Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

In this instance, you inform us that the contract at issue has already been entered into. You do not otherwise explain how release of the requested information would interfere with any particular, on-going competitive situation. Because TXDOT does not demonstrate how releasing the information at issue will cause it harm in this instance, we find that none of the information at issue may be withheld pursuant to section 552.104.

Section 552.101 of the Government Code excepts from public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information made confidential by other statutes. Gov’t Code § 552.101. TXDOT and Cintra both assert that the submitted information is confidential under section 361.3023(a) of the Transportation Code, which provides:

(a) To encourage private entities to submit proposals under Section 361.3022, the following information is confidential, is not subject to disclosure, inspection, or copying under Chapter 552, Government Code, and is not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release until a final contract for a proposed project is entered into:

(1) all or part of a proposal that is submitted by a private entity for a comprehensive development agreement, except information provided under Section 361.3022(b)(1) and (2);

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement; and

(3) information created or collected by the department or its agent during consideration of a proposal for a comprehensive development agreement.

Transp. Code § 361.3023(a).

Cintra asserts that the phrase "until a final contract for a proposed project is entered into" only modifies the phrase "not subject to disclosure, discovery, subpoena, or other means of legal compulsion for its release" and does not apply to the phrase "not subject to disclosure, inspection, or copying under Chapter 552, Government Code." Under Cintra's interpretation, even if TXDOT has entered into a final contract, TXDOT is prohibited from releasing information in response to a request under chapter 552 but may release such information if it is sought through "discovery, subpoena, or other means of legal compulsion."

We disagree with the limitation that Cintra's interpretation requires. The primary goal in statutory interpretation is ascertaining and effectuating the Legislature's intent. *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). In discerning the Legislature's intent, we begin with a statute's plain language because we assume that the Legislature tried to say what it meant and, thus, that its words are the surest guide to its intent. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865-66 (Tex. 1999).

[E]ven when a statute is not ambiguous on its face, a court may consider numerous factors to determine the Legislature's intent, including: the object sought to be obtained; the circumstances of the statute's enactment; the legislative history; the common law or former statutory provisions, including laws on the same or similar subjects; the consequences of a particular construction; the administrative construction of the statute; and the title, preamble, and emergency provisions.

*City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 324 (Tex. App.—Austin 2002, no pet.) (citing Gov't Code § 311.023; *Ken Petroleum Corp. v. Questor Drilling Corp.*, 24 S.W.3d 344, 350 (Tex. 2000)).

In this instance, the analysis that accompanied the version of the bill that added the language found in section 361.3023 states that this provision is intended to make information confidential "until the entering into of a final contract." See House Comm. on Transportation, Bill Analysis, H.B. 3588, 78th Leg. (2003). The bill analysis gives no indication that the legislature intended confidentiality under section 361.3023 to depend on the manner in which the information was requested. Given the language of the statute and the legislature's stated intent with regards to this language, we conclude that the confidentiality afforded by section 361.3023 ceases once a final contract is entered into, regardless of the form that a request for such information may take.

We turn now to Cintra's argument that the contract at issue here is not final because the conceptual development plan and conceptual financial plan are only preliminary and will be replaced once final plans have been adopted. Parties may leave provisions for later negotiation, yet still create a contract. *Foreca, S.A. v. GRD Development Co., Inc.*, 758 S.W.2d 744, 746 (Tex. 1988); see also *Scott v. Ingle Bros. Pacific, Inc.*, 489 S.W.2d 554, 555 (Tex. 1972) (parties may fully agree upon the terms of a contract, knowing

that there are other matters on which they have not agreed and on which they expect further negotiation, yet still create an enforceable contract). In this instance, TXDOT and Cintra have entered into a comprehensive development agreement but have provided for flexibility with regard to certain details.<sup>1</sup> Because the parties have entered into a final contract for purposes of section 361.3023, the confidentiality provisions of section 361.3023 cease to apply. Therefore, none of the submitted information may be withheld under section 552.101 of the Government Code on the basis of section 361.3023 of the Transportation Code.

We next address whether the submitted information is excepted from disclosure under section 552.110. This section 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.

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

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<sup>1</sup>The CDA is available at [http://www.dot.state.tx.us/txdotnews/ttc-35/TTC-35cda\\_signed\\_version.pdf](http://www.dot.state.tx.us/txdotnews/ttc-35/TTC-35cda_signed_version.pdf).

cmt. b (1939).<sup>2</sup> 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). However, we cannot conclude that section 552.110(a) applies unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. See Open Records Decision No. 402 (1983).

Section 552.110(b) of the Government Code exempts 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 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 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).

Having considered Cintra’s arguments and reviewed the information at issue, we conclude that Cintra has failed to make a *prima facie* case that its information constitutes trade secrets. Further, we find that Cintra has made only conclusory allegations that release of the requested information would cause the company substantial competitive injury and has provided no specific factual or evidentiary showing to support these allegations. See Open Records Decision Nos. 661 (1999) (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue), 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative). Accordingly, no portion

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<sup>2</sup>The 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).

of the submitted information may be withheld pursuant to section 552.110. Because the claimed exceptions do not apply and the information is not otherwise confidential by law, the submitted 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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).

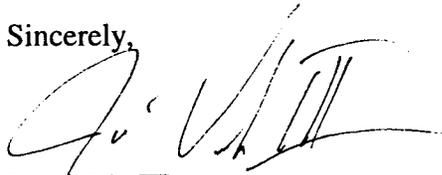
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



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Open Records Division

JV/krl

Ref: ID# 225148

Enc. Submitted documents

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