



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 27, 2005

Ms. Mary D. Marquez  
Legal/Records Manager  
Capital Metropolitan Transportation Authority  
2910 East Fifth Street  
Austin, Texas 78702

OR2005-06744

Dear Ms. Marquez:

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# 228977.

The Capital Metropolitan Transportation Authority (the "authority") received a request for information relating to three contracts between the authority and Trapeze Software Group, Inc. ("Trapeze"). You inform us that the authority has released some of the requested information. You take no position with respect to the public availability of the other responsive information that you have submitted to this office. You believe, however, that the submitted information may implicate the proprietary interests of Trapeze. You notified Trapeze of the request for this information and of its right to submit arguments to this office as to why the information should not be released.<sup>1</sup> We received correspondence from Trapeze. We have considered all of the submitted arguments and have reviewed the submitted information.<sup>2</sup>

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<sup>1</sup>See Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to Gov't Code § 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances).

<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the authority to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we address Trapeze's statement that the company clearly identifies as confidential any proprietary information that it provides to clients or other third parties. Trapeze also points out that the company included a confidentiality provision in a prior agreement with the authority. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless the submitted information comes within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, we address Trapeze's arguments under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties with respect to 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 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>3</sup> See Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable 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) 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) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Trapeze generally asserts that its information qualifies as a trade secret under section 552.110(a). Trapeze also generally asserts that its information is excepted from disclosure under section 552.110(b). Additionally, Trapeze specifically argues that its pricing information constitutes a trade secret under section 552.110(a) and also is protected by section 552.110(b).<sup>4</sup> Having considered Trapeze's arguments, we conclude that the authority must withhold the company's customer information under section 552.110(b). We have marked that information accordingly. We otherwise find that Trapeze has not presented a *prima facie* claim that any of the remaining information qualifies as a trade secret under section 552.110(a). Likewise, we find that Trapeze has not made the required showing that the release of any of the information encompassed by its claim under section 552.110(b) would be likely to cause Trapeze substantial competitive harm. We therefore conclude that the authority may not withhold any of the remaining information under section 552.110. See also Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might

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<sup>3</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).

<sup>4</sup>Trapeze also specifically claims section 552.110 with respect to "End User Agreements as found in Appendix A of [Trapeze's p]roposal." It is not clear, however, whether the submitted information includes such documents. This decision addresses only the representative-sample information that the authority submitted to this office in seeking this decision. See Gov't Code § 552.301(e)(1)(D).

give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). With respect to Trapeze's pricing information, we note that the information relates to a contract between Trapeze and the authority. Federal cases applying the analogous Freedom of Information Act exemption to prices in awarded government contracts have denied protection for cost and pricing information, reasoning that disclosure of prices charged the government is a cost of doing business with the government. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000). Moreover, we believe that the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision Nos. 514 (1988), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Furthermore, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision No. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency).

We also understand Trapeze to assert that its information is confidential under section 552.101 of the Government Code. Accordingly, we will address the applicability of section 552.101 to the rest of the submitted information. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Trapeze raises section 552.101 in conjunction with section 252.049 of the Local Government Code and the holding in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

First, section 252.049 of the Local Government Code 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. This provision merely duplicates the protection section 552.110 of the Government Code provides to trade secret and commercial or financial information. Trapeze has not demonstrated how any of the remaining information qualifies as either a trade secret or confidential commercial or financial information for purposes of section 552.110. Thus, the authority 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.

With respect to Trapeze's argument based on the holding in *National Parks*, although this office at one time applied the *National Parks* test to the statutory predecessor to section 552.110, that standard was overturned by the Third Circuit Court of Appeals when it held that *National Parks* was not a judicial decision within the meaning of former section 552.110. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and 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. *See Open Records Decision No. 661 at 5-6 (1999)* (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). Accordingly, none of the remaining submitted information may be withheld under section 552.101 on the basis of the holding in *National Parks*.

Next, we note that section 552.117 of the Government Code may be applicable to some of the remaining information.<sup>5</sup> Section 552.117(a)(1) excepts from public disclosure the home address and telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. The determination of whether a particular item of information is protected by section 552.117(a)(1) must be made at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989)*. Thus, the authority may only withhold information under section 552.117(a)(1) on behalf of a current or former employee who made a request for confidentiality under section 552.024 prior to the date of the authority's receipt of the request for the information. The authority may not withhold information under section 552.117(a)(1) on behalf of a current or former employee who did not make a timely election under section 552.024 to keep the information confidential.

We have marked information that the authority must withhold under section 552.117(a)(1) if the current or former employee to whom the information pertains timely requested confidentiality for the information under section 552.024.

We also note that 552.136 of the Government Code is applicable to some of the remaining information.<sup>6</sup> Section 552.136 provides as follows:

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<sup>5</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.117 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001)* (mandatory exceptions).

<sup>6</sup>Section 552.136 also is mandatory and may not be waived. *Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001)*.

(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.

Gov’t Code § 552.136. We have marked the information that the authority must withhold under section 552.136 of the Government Code.

Lastly, we note that some of the submitted information is protected by copyright. A governmental body must allow inspection of copyrighted information unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with copyright law, however, and is not required to furnish copies of copyrighted information. *Id.* A member of the public who wishes to make copies of copyrighted information 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: (1) the authority must withhold Trapeze’s customer information under section 552.110(b) of the Government Code; (2) the authority must withhold the information that we have marked under section 552.117(a)(1) if the current or former employee to whom the information pertains timely elected confidentiality for the information under section 552.024; and (3) the authority must withhold the information that is confidential under section 552.136. The rest of the submitted information must be released. In releasing information that is protected by copyright, the authority must comply with 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).

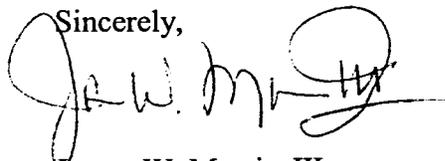
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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); *Tex. 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,

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# 228977

Enc: Submitted documents

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