



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

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

OR2006-06796

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# 251180.

The Texas Department of Transportation (the "department") received a request for documents related to the SH 121 travel corridor survey effort including surveys related to transportation, mobility or potential tolling of SH 121 in Denton and Collin Counties over the past 24 months. You state that you are withholding and releasing some of the requested information based on a previous ruling, Open Records Letter Ruling No. 2005-03702 (2005). Assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the department may continue to rely on our decision in Open Records Letter No. 2005-03702.<sup>1</sup> See Gov't Code § 552.301(f); Open Records Decision No. 673. You claim that the remaining requested

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<sup>1</sup>The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673.

information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. Further, you indicate that release of the remaining requested information may implicate the proprietary interests of Pioneer Heritage Partners, J.V. ("Pioneer"), Macquarie 121 Partnership, L.P. ("Macquarie"), Cintra, Concesiones de Infraestructuras de Transporte, S.A. ("Cintra"), and Skanska. Accordingly, you state and provide documentation that you notified Pioneer, Macquarie, Cintra, and Skanska of the request and of their right to submit arguments to this office as to why the requested information should not be released. See Gov't Code § 552.305(d); see also 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 under Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, we address Skanska's contention that a portion of the submitted information is not responsive to the request for information. Skanska contends that because this information does not involve a "survey effort," it is not responsive to the instant request. We note that a governmental body must make a good-faith effort to relate a request to information that it holds. See Open Records Decision No. 561 at (1990) (construing statutory predecessor). We note that the information Skanska claims is nonresponsive consists of information relating to Skanska's proposal for the construction of a SH 121 travel corridor. After reviewing the entire request for information, we find that the department has made a good-faith effort to relate the request for information to the information that the department maintains. We therefore address the claimed exceptions with respect to this information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Pioneer and Cintra have not submitted to this office any reasons explaining why its information should not be released. Thus, we have no basis for concluding that any portion of the requested information constitutes proprietary information, and none of it may be withheld on that basis. See, e.g., Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Accordingly, we conclude that none of the submitted information may be withheld based on the proprietary interest of Pioneer or Cintra.

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. This exception encompasses information that another statute makes confidential. You assert the majority of the submitted information is confidential under section 223.204 of the Transportation Code, which provides in relevant part:

(a) To encourage private entities to submit proposals under this subchapter, 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 Sections 223.203(b)(1) and (2), unless the private entity consents to the disclosure of the information; [and]

(2) supplemental information or material submitted by a private entity in connection with a proposal for a comprehensive development agreement, unless the private entity consents to the disclosure of the information or material[.]

Transp. Code § 223.204(a)(1)-(2). Section 223.203 of the Transportation Code provides in relevant part:

(b) The department shall establish rules and procedures for accepting unsolicited proposals that require the private entity to include in the proposal:

(1) information regarding the proposed project location, scope, and limits; [and]

(2) information regarding the private entity's qualifications, experience, technical competence, and capability to develop the project[.]

*Id.* at § 223.203(b)(1)-(2). Subject to limitations on department financial participation, “the department may enter into a comprehensive development agreement with a private entity to design, develop, finance, construct, maintain, repair, operate, extend, or expand a . . .” a travel corridor. *Id.* § 223.201(a); *see id.* § 223.202. Section 223.201 of the Transportation Code defines a “comprehensive development agreement” as “an agreement that, at a minimum, provides for the design and construction, rehabilitation, expansion, or improvement of a [Trans-Texas corridor] and may also provide for the financing, acquisition, maintenance, or operation of a [Trans-Texas corridor].” *Id.* § 223.201(b); *see id.* § 223.201(a).

You indicate the submitted information consists of proposals for a comprehensive development agreement with the department. You inform us that the interested third parties have not consented to release of the requested proposal. You also inform us that the

department has not awarded a final contract for the project at issue. Based on your representations and our review of the submitted information, we conclude that, to the extent the submitted information does not come within subsections 223.203(b)(1) and (2), it is confidential pursuant to section 223.204 of the Transportation Code and must be withheld under section 552.101 of the Government Code. To the extent the submitted information does come within subsections 223.203(b)(1) and (2), it is not confidential under section 223.204 of the Transportation Code and may not be withheld under section 552.101. We now consider whether the information not made confidential under section 223.204 of the Transportation Code is otherwise excepted from disclosure.

Macquarie raises section 552.104 of the Government Code, which excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (section 552.104 may be waived by governmental body).

Based on Macquarie and Skanska's comments, we understand them to assert sections 552.110(a) and (b) of the Government Code for the remaining information. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code* § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See Gov't Code* § 552.110(a).

A "trade secret" may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees . . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (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. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[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 to disclosure 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. Gov’t Code § 552.110(b); *see also Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

While Macquarie and Skanska raise section 552.110 of the Government Code, they have failed to provide specific arguments demonstrating how any of the remaining submitted information qualifies as trade secrets for purposes of section 552.110(a). Further, they have failed to demonstrate that release of the remaining submitted information would cause them

substantial competitive harm. Therefore, no portion of the remaining submitted information may be withheld under section 552.110(b) of the Government Code. *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).

In summary, the submitted information is confidential under section 223.204 of the Transportation Code and must be withheld under section 552.101 of the Government Code except to the extent the submitted information comes within subsections 223.203(b)(1) and (2) of the Transportation Code. The remaining submitted information must be released.

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 Office of the Attorney General 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,



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Assistant Attorney General  
Open Records Division

MM/krl

Ref: ID# 251180

Enc. Submitted documents

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