

The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 7, 2006

Ms. Paula Alexander
General Counsel
1900 Main, 3rd Floor
Houston, Texas 77002

OR2006-10412

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# 258648.

The Metropolitan Transit Authority of Harris County ("METRO") received a request for the following information:

1. All proposals submitted in response to METRO RFP No. RP0500021 (the "RFP");
2. All previous request for proposals seeking bids related to performing work within the scope of METRO Contract No. CT030003 (the "Previous RFPs");

3. "All documents, notes, records, memoranda, letters, opinions, email transmissions and any other documents whatsoever generated by any person and/or firm and/or entity, including but not limited to certified public accountants pertaining to the evaluation of proposals submitted in response to the RFP or Previous RFPs[;]"
4. "All documents relating to communications between [METRO] and ASCOM Transport Systems, Inc. ("ASCOM") relating to the RFP[;]"
5. "All documents relating to communications between [METRO] and Affiliated Computer Services, Inc. ("ACS") relating to the RFP[;]"
6. "All notes, records, memoranda, letters, opinions, email transmissions and any other documents justifying or explaining the reasoning behind the award of [METRO] Contract No. CT030003 to ASCOM and/or ACS[;]"
7. "A copy of the contract awarded to ASCOM and/or ACS as a result of [the] RFP (the "ASCOM Contract")[;]"
8. "All notes, records, memoranda, letters, opinions, or email transmissions, or any other documents related to the negotiation of the ASCOM Contract[;] and
9. "All notes, records, memoranda, letters, opinions, or email transmissions, or any other documents relating to any modifications or amendments to the ASCOM Contract[.]"

You state METRO has no information responsive to item 2 of the request.¹ You state METRO will release the ASCOM Contract and modifications to the ASCOM Contract, responsive to item 7 and a part of item 9 of the request. We understand you to claim that the submitted information responsive to items 2 through 9 of the request is excepted from disclosure under section 552.103 of the Government Code. Additionally, you claim that the submitted information responsive to item 1 of the request may be subject to the proprietary interests of ASCOM, ERG Transit Systems ("ERG"), Gengare ("Gengare"), Indra ("Indra"), Init Innovations in Transportation ("Init"), and Wayfarer Transit Systems, Ltd. ("Wayfarer"). You inform us, and provide documentation indicating, that you notified ASCOM, ERG,

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

Gengare, Indra, Init, and Wayfarer of the request and of each company's 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). We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that the submitted information contains a resolution adopted by METRO's board of directors. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). The submitted resolution is analogous to an ordinance. Accordingly, METRO must release the submitted resolution.

You claim that most of the remaining submitted information is excepted from disclosure by section 552.103 of the Government Code. Section 552.103 provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that a pending lawsuit, Cause Number 2005- 17997, has been filed in the 80th Judicial District Court of Harris County against METRO regarding Contract No. CT030003. You explain that METRO terminated Contract No. CT030003 and replaced it with the ASCOM contract. You indicate that this litigation was pending on the date METRO received the request for information. Upon review of the information at issue, we conclude that it is related to the pending litigation. Therefore, you may generally withhold this information under section 552.103.

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, we address the remaining information which you indicate may be subject to third party proprietary interests. 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, this office has not received comments from ERG, Gengare, Indra, Init, or Wayfarer explaining how the release of the submitted information will affect their proprietary interests. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate the proprietary interests of ERG, Gengare, Indra, Init or Wayfarer and none of the information at issue may be withheld on that basis. *See, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence 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).

ASCOM² argues that the portion of the submitted information which pertains to it is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Gov't Code § 552.103. As METRO does not seek to withhold any of the remaining information at issue pursuant to section 552.103, we find this section does not apply to the remaining information, and it may not be withheld on that basis. *See, e.g.*,

²We note that in his brief to this office, this third party's attorney informs us that ASCOM is now known as ACS Transport Solution, Inc. ("ACS"). However, METRO refers to this third party as ASCOM, and informs us it sent notice pursuant to section 552.305 of the Government Code to ASCOM and not ACS. Thus, we will refer to this third party as ASCOM.

Dallas Area Rapid Transit v. Dallas Morning News, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 663 (1991) (governmental body may waive section 552.103), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 522 at 4 (1989) (discretionary exceptions in general).

ASCOM also asserts that its information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. 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. ASCOM raises section 552.101 in conjunction with the holding in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Because section 552.110 of the Government Code incorporates the holding in *National Parks*, we will address ASCOM’s claim under section 552.101 with its claim under section 552.110.

Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Gov’t Code § 552.110.

Section 552.110(a) of the Government Code excepts from disclosure “[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision.” 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. 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); *see also Huffines*, 314 S.W.2d at 776. 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.³ RESTATEMENT OF TORTS § 757 cmt. b (1939). 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) 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 *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Having considered ASCOM's arguments and reviewed the information at issue, we conclude that ASCOM has failed to make a *prima facie* case that the information at issue constitutes its trade secrets. Furthermore, we also conclude that ASCOM has made only conclusory allegations that release of this information would cause it substantial competitive injury and has provided no specific factual or evidentiary showing to support its allegations with regard to the information at issue. See Gov't Code § 552.110; see also 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), 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

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).

future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Accordingly, none of ASCOM's information may be withheld under section 552.110.

We note that portions of the remaining information include notices of copyright protection. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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 (1990).

In summary, METRO may withhold the information it seeks to withhold under section 552.103 of the Government Code under that exception. The remaining submitted information must be released; however, in releasing information that is protected by copyright, METRO 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); *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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 258648

Enc. Submitted documents

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JAN 03 2008

At 8:40 A. M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GN-06-003914

METROPOLITAN TRANSIT AUTHORITY	§	IN THE DISTRICT COURT OF
OF HARRIS COUNTY, TEXAS, AND ACS	§	
TRANSPORT SOLUTIONS, INC.,	§	
Plaintiffs,	§	
	§	TRAVIS COUNTY, TEXAS
V.	§	
	§	
GREG ABBOTT, AS ATTORNEY	§	
GENERAL OF THE STATE OF TEXAS,	§	
Defendant.	§	53 rd JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiffs Metropolitan Transit Authority of Harris County, Texas (METRO) and ACS Transport Solutions, Inc. (ACS Transport) and Defendant Greg Abbott, Attorney General of Texas, announce to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), the requestor, Daniel Hayes, was sent reasonable notice of this setting and of the parties' agreement that METRO must withhold some of the information he requested; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The highlighted text in ACS Transport's Technical Offer, specifically, in sections

3.2.1 (page 6), 3.2.2 (pages 7-11), 3.2.3 (pages 12-14), 3.2.4.1 (page 16), 3.2.5.2 (page 17), 3.2.5.3 (page 18), 3.2.5.4.1 (page 19), 3.3.1(diagram) (page 24), 4.1.4 (page 34), 4.2.4 (page 37), 5.1.3 (pages 41-42), 5.2.2.1.2 (diagram) (page 55), and 8.1 (page 96), and the highlighted text in ACS Transport's Pricing Matrix is excepted from disclosure by Tex. Gov't Code § 552.110(a).¹

2. METRO must withhold from the requestor the information described in Paragraph 1 of this Agreed Final Judgment.

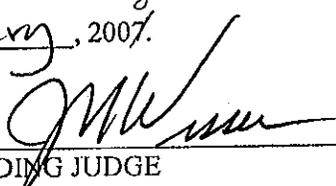
3. As ACS Transport no longer contests the disclosure of the remaining information that is responsive to item 1 of Mr. Hayes' request for information, METRO shall release to the requestor all information pertaining to ACS Transport that is responsive to item one of the request for information and that was not held excepted from disclosure by Paragraph 1 of this Judgment.

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Plaintiffs and Defendant and is a final judgment.

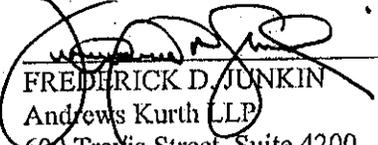
SIGNED this the 3 day of January, 2007.⁸



PRESIDING JUDGE

¹The parties stipulate that the reference to highlighted text refers to text in the Technical Offer and Pricing Matrix that were submitted to the Attorney General, on or about May 11, 2007 and June 11, 2007.

AGREED AND APPROVED:


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Andrews Kurth LLP

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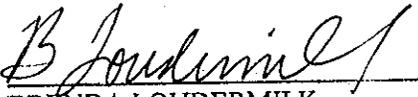
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