



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 10, 2011

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport Board
P.O. Box 619428
DFW Airport, Texas 75261-9428

OR2011-03380

Dear Ms. Constantine:

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# 411180.

The Dallas/Fort Worth International Airport Board (the "board") received requests from two requestors for information relating to a specified solicitation number, including the board's award documentation and the bid submission packages of EMR Elevator, Inc. ("EMR"), KONE Elevators and Escalators, Inc. ("KONE"), and ThyssenKrupp Elevator Corporation ("ThyssenKrupp"). You state some of the requested information either has been or will be released. Although you take no position on the public availability of the rest of the requested information, you believe the remaining information may implicate the interests of EMR, KONE, and ThyssenKrupp. You inform us EMR, KONE, and ThyssenKrupp were notified of these requests for information and their right to submit arguments to this office as to why the information at issue should not be released.¹ An attorney for ThyssenKrupp has submitted arguments under sections 552.101 and 552.110 of the Government Code. We have considered the submitted arguments and reviewed the information you submitted.

We note an interested third party is allowed ten business days from the date of its receipt of the governmental body's notice under section 552.305 of the Government Code to submit its reasons, if any, as to why information relating to the party should not be released. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this decision, this office has received no correspondence from EMR or KONE. Therefore, because EMR and KONE have not demonstrated any of the information at issue is proprietary for purposes of the Act, the board may not withhold any of the submitted information on the basis of any interest EMR or

¹See 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).

KONE may have in the information. *See id.* § 552.110(a)-(b); Open Records Decision Nos. 552 at 5 (1990), 661 at 5-6 (1999).

Next, we consider ThyssenKrupp's claims 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: "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision" and "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." Gov't Code § 552.110(a)-(b).

The Supreme Court of Texas 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 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 [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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.² *See* ORD 552 at 5. We cannot

²The 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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

conclude that section 552.110(a) is applicable, however, 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* ORD 661 at 5-6 (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

ThyssenKrupp claims section 552.110(a) for information described as the company's "Labor Analysis and Overhead Model" (the "Model"). The company explains, and has provided an affidavit stating, that the Model "contains, among other things, ThyssenKrupp's labor analysis, scope of work and overhead breakdown and allocations." The company states that the Model "comprises a comprehensive assessment and the work product of ThyssenKrupp pertaining to and containing cost and pricing structures; labor, staffing and other technical allocations and systems; financial, accounting and cost analysis approaches; and other allocations, structures and overall concepts and programs developed by ThyssenKrupp . . . over many years of operation and competition in the industry." ThyssenKrupp also explains that the Model "is not merely specific to the project in question but constitutes analyses and systems developed by ThyssenKrupp for use in other bids and projects and for use in the industry and in competition with other companies." The company states that "[t]his information will continue to be utilized and implemented by ThyssenKrupp for future purposes in the industry, particularly in future competitive bid processes and in formulating the pricing of contracts and of goods and services provided to ThyssenKrupp's customers[.]" The company asserts that the Model "is unique to ThyssenKrupp and is a device for continuous use in the operations of ThyssenKrupp's business." Based on the company's representations and affidavit, we conclude ThyssenKrupp has demonstrated that the Model constitutes a trade secret under section 552.110(a) of the Government Code.³ We have received no arguments that rebut ThyssenKrupp's trade-secret claim as a matter of law. We therefore conclude the board must withhold the Model, which we have marked, under section 552.110. Although the board has submitted other information relating to ThyssenKrupp, the company does not claim any of the other information at issue constitutes a trade secret under section 552.110(a) or that section 552.110(b) is applicable to any of the other information. We therefore conclude the board may not withhold any of the other submitted information that relates to ThyssenKrupp under section 552.110 of the Government Code.

We note some of the remaining information at issue appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *See* Open Records Decision No. 180 at 3 (1977); *see also* Open Records Decision No. 109 (1975). A custodian of public records also must comply with

³As we are able to make this determination, we need not address ThyssenKrupp's other arguments against disclosure of the Model.

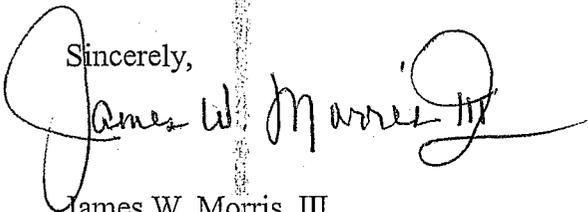
copyright law, however, and is not required to furnish copies of records that are copyrighted. See ORD 180 at 3. A member of the public who wishes to make copies of copyrighted materials must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

In summary, the board must withhold the information we have marked under section 552.110 of the Government Code. The board must release the rest of the submitted information to the extent it is responsive to each request, but any copyrighted information may only be released in compliance with copyright law.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General
Open Records Division

JWM/em

Ref: ID# 411180

Enc: Submitted documents

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