



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 11, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2011-09812

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# 423381.

The Texas Department of Transportation (the "department") received one request from two requestors for information pertaining to road work on FM 2766.¹ You state you are releasing some of the requested information. You claim some of the submitted information is excepted from disclosure under section 552.111 of the Government Code and section 409 of title 23 of the United States Code. Additionally, you state that the proprietary interests of McGray & McGray Land Surveyors, Inc. ("McGray") might be implicated. Accordingly, you provided notice to McGray of the request and its right to submit arguments to this office explaining why its information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have received comments from McGray. We have considered the submitted arguments and reviewed the submitted information, a portion of

¹You state and provide documentation demonstrating the department sought and received clarification for portions of the request. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); *City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date the request is clarified or narrowed).

which consists of a representative sample.² We have also received and considered comments submitted by the requestors and an interested third party. *See id.* § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we note the submitted information includes safety evaluation reports and information used to estimate the need for or expenditure of public funds or taxes, that are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Id. § 552.022(a)(1), (5). The information subject to section 552.022(a)(1), which we have marked, must be released unless it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. *See id.* § 552.022(a)(1). The information subject to section 552.022(a)(5), which we have marked, must be released unless it is expressly made confidential under other law. *See id.* § 552.022(a)(5). You seek to withhold the information subject to section 552.022 under section 552.111 of the Government Code. However, section 552.111 is discretionary in nature and does not constitute “other law” for purposes of section 552.022. *See Open Records Decision Nos. 470 at 7 (1987) (statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (discretionary exceptions generally).* Thus, the department may not withhold the marked information under section 552.111 of the Government Code. However, you also contend the information at issue is excepted from disclosure under section 409 of title 23 of the United States Code. We note section 409 is “other law” for purposes of section 552.022(a). *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *see also Pierce County v. Guillen*, 537 U.S. 129 (2003) (upholding constitutionality of section 409,

²We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988).* This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

relied on by county in denying request under state's Public Disclosure Act). Accordingly, we will consider your argument under section 409 for the information subject to subsections 552.022(a)(1) and 552.022(a)(5). We will also consider your argument under section 552.111 for the information not subject to section 552.022.

You contend the information subject to section 552.022 is excepted from disclosure under section 409 of title 23 of the United States Code. Section 409 provides:

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409. Federal courts have stated section 409 excludes from evidence data compiled for purposes of highway and railroad crossing safety enhancement and construction for which a state receives federal funding, in order to facilitate candor in administrative evaluations of highway safety hazards and to prevent federally required record-keeping from being used for purposes of private litigation. *See Harrison v. Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *see also Pierce*, 537 U.S. 129.

You state FM2766 is part of the National Highway System under section 103 of title 23 of the United States Code, and is therefore a federal-aid highway within the meaning of section 409. You contend the information subject to section 552.022 would be privileged from discovery in civil litigation under section 409 of title 23 of the United States Code. Based on your representations and our review, we conclude the information subject to section 552.022 is excepted under section 409 of title 23 of the United States Code.

We now address your argument under section 552.111 of the Government Code for the remaining information not subject to section 552.022. Section 552.111 excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses information protected by civil discovery privileges. *See Open Records Decision Nos. 647 at 3 (1996), 251 at 2-4 (1980)*. You claim the remaining information is excepted from disclosure under section 552.111 because it would be privileged from discovery under section 409 of title 23 of the United States Code. Furthermore, you indicate the remaining information was created for highway safety purposes. Based on your

representations and review, we find the remaining information at issue may be withheld under section 552.111 of the Government Code.

McGray raises section 552.110 for its fee information contained in the submitted contract. 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. 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.” Gov’t Code § 552.110(a). 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 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 must accept a private person’s claim for exception as valid under section 552.110 if that person establishes

³The following are the six factors that the Restatement gives 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 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).

a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. ORD 552 at 5-6. However, we cannot conclude section 552.110(a) applies unless it has been shown 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) excepts 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 requested information. *See* 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).

Upon review, we find McGray has failed to establish a *prima facie* case that any of its information is a trade secret protected by section 552.110(a). *See* ORD 402 (section 552.110(a) does not apply unless information meets definition of trade secret and necessary factors have been demonstrated to establish trade secret claim). We further note pricing information pertaining to a particular proposal or contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” *See* RESTATEMENT OF TORTS § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; ORDs 319 at 3, 306 at 3. Thus, the department may not withhold any of the information at issue under section 552.110(a) of the Government Code.

McGray also contends portions of its information are excepted from disclosure under section 552.110(b) of the Government Code. Upon review, we find McGray has failed to make the specific factual or evidentiary showing required by section 552.110(b) that release of any of its information would cause McGray substantial competitive harm. Additionally, this office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Therefore, the department may not withhold any of the information at issue under section 552.110(b) of the Government Code.

In summary, the information subject to section 552.022, which we have marked, is excepted under section 409 of title 23 of the United States Code. The department may withhold the remaining information it has indicated under section 552.111 of the Government Code. The remaining submitted information must be released.

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eb

Ref: ID# 423381

Enc. Submitted documents

cc: Requestor
(w/o enclosures)

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