



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

July 17, 2012

Ms. Jacqueline E. Hojem  
Public Information Coordinator  
Metropolitan Transit Authority of Harris County  
P.O. Box 61429  
Houston, Texas 77208-1429

OR2012-11063

Dear Ms. Hojem:

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# 459237 (MTA# 2012-0235).

The Metropolitan Transit Authority of Harris County, Texas (the "authority") received a request for information involving CAF USA, Inc. ("CAF"), including (1) documents showing major system suppliers for the CAF vehicle; (2) records of meetings with CAF during a specified time period; and (3) communications between the authority and CAF during a specified time period. Although you take no position on the public availability of the requested information, you believe the information may implicate the proprietary interests of CAF. You inform us CAF was notified of the present request for 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 an attorney for CAF. We also received comments from

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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).

the requestor.<sup>2</sup> We have considered all the submitted arguments and reviewed the information you submitted. We assume the authority has released any other information to which the requestor seeks access, to the extent any such information existed when the authority received his request. If not, then any such information must be released immediately.<sup>3</sup> See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Initially, we address CAF's statement that the information at issue was submitted to the authority with the understanding it would not be disclosed to third parties. We note information is not confidential under the Act simply because the party that submitted the information anticipated or requested confidentiality. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act by agreement or contract. 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 did not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Therefore, the submitted information must be released unless it falls within the scope of an exception to disclosure, notwithstanding any expectation or agreement to the contrary.

CAF also generally contends the submitted information “could be used against public safety” if released. However, CAF has not cited any law and or otherwise demonstrated how the information at issue is excepted from disclosure. See Gov't Code 552.305(d)(2)(B). Thus, we have no basis to conclude the authority must withhold any of the submitted information on that basis.

Next, we consider CAF's claims under section 552.110 of the Government Code. This exception 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.” *Id.* § 552.110(a)-(b).

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<sup>2</sup>See Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

<sup>3</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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.<sup>4</sup> *See* Open Records Decision No. 552 at 5 (1990). We cannot conclude section 552.110(a) is applicable, however, 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) 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* Open Records Decision 661 at 5-6 (1999) (business

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<sup>4</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* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

enterprise must show by specific factual evidence that release of information would cause substantial competitive harm).

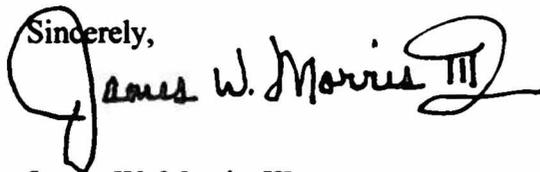
CAF asserts all of the submitted information is confidential technical information the authority should withhold under section 552.110. CAF generally contends technical information, specifications, and design drawings contained in the information at issue constitute trade secrets under section 552.110(a). Under section 552.110(b), CAF also contends release of the technical information, specifications, and design drawings would cause CAF substantial competitive harm. Having considered CAF's arguments and reviewed the submitted information, we have marked design drawings the authority must withhold under section 552.110(a). *See Taco Cabana Int'l v. Two Pesos, Inc.*, 932 F.2d 1113, 1123-25 (5th Cir. 1991), *aff'd*, 505 U.S. 763 (1992); *see also Ecolaire Inc. v. Crissman*, 542 F. Supp. 196, 206 (E.D. Pa. 1982) (drawings, blueprints and lists constitute trade secrets because such information could be obtained, through other than improper means, only with difficulty and delay); *American Precision Vibrator Co. v. Nat'l Air Vibrator Co.*, 764 S.W.2d 274, 278 (Tex. App.—Houston [1st Dist.] 1988, no writ) (blueprints, drawings, and customer lists constitute trade secrets). We find CAF has not sufficiently demonstrated any of the remaining information at issue constitutes a trade secret of CAF for purposes of section 552.110(a). We also find CAF has not made the specific factual or evidentiary showing required by section 552.110(b) that release of any of the remaining information would cause CAF substantial competitive harm. We therefore conclude the authority may not withhold any of the remaining information under section 552.110 of the Government Code. *See Gov't Code* § 552.110(a)-(b); ORD 552 at 5, 402, 661 at 5-6. Thus, as neither CAF nor the authority claim any other exception to disclosure, the remaining information must be released.

We note some of the remaining information appears to be protected by copyright law. 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 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 authority must withhold the information we have marked under section 552.110(a) of the Government Code. The authority must release the rest of the submitted information, but any information protected by copyright may only be released in accordance 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](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,  


James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/bhf

Ref: ID# 459237

Enc: Submitted information

c: Requestor  
(w/o enclosures)

Mr. Greg R. Wehrer  
Squire Sanders (US) LLP  
6200 Chase Tower  
600 Travis Street  
Houston, Texas 77002  
(w/o enclosures)

Ms. Virginia Verdeja  
CAF USA, Inc  
1401 K. Street, North West, Suite 803  
Washington, DC 20005  
(w/o enclosures)