



December 21, 2001

Ms. Jana Doyle
Open Records Coordinator
Texas Turnpike Authority
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 E. 11th Street
Austin, Texas 78701-2483

OR2001-6069

Dear Ms. Doyle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156584.

The Texas Department of Transportation (the "department") received a written request for the following categories of information:

- All records in the possession of [the department] that mention or refer in any way to a possible toll road, toll road proposal(s) or other kind of road that might be built in southern Travis County and known as a portion of SH 45 South and which were received and/or generated from October 1, 2000 to the present.
- All correspondence, records of correspondence, or other documents concerning the recent study of the traffic effects of the proposed Loop 1 North extension, received or generated since January 1, 2001.
- All contracts with and information pertaining to the company that performed the Loop 1 traffic study.

You have submitted to this office as responsive to the request various draft documents, e-mail communications, and memoranda, which you contend are excepted from public disclosure pursuant to sections 552.104, 552.107(1), and 552.111 of the Government Code. Additionally, with regard to certain information submitted to the department by a third party,

you have requested a decision from this office pursuant to section 552.305 of the Government Code, which allows governmental bodies to rely on third parties having a privacy or property interest in the information to submit their own arguments as to why the requested information is excepted from public disclosure.¹

We will first address the applicability of the exceptions you raise for the department's internal documents. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either client confidences to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). After reviewing the documents for which you raise the attorney-client privilege, we conclude that the department may withhold Exhibits 1, 2, and 3 in their entirety, as well as the handwritten portions of Exhibit 8, pursuant to section 552.107(1) of the Government Code.²

Section 552.111 of the Government Code protects from required public disclosure interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the policymaking process. Open Records Decision No. 615 at 5 (1993); *see also Austin v. City of San Antonio*, 630 S.W.2d 391 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615 at 5 (1993). After reviewing the remaining internal documents, we conclude that the department may withhold Exhibits 4, 5, 7, 9, 10, and 11 in their entirety, as well as the handwritten portions of Exhibit 6 pursuant to section 552.111 of the Government Code.³

Finally, we address whether the documents submitted to the department by Zachry Construction Corporation ("Zachry") are excepted from public disclosure. Zachry contends that certain of its records fall under the protection of section 552.110 of the Government

¹We assume the department has released to the requestor any other responsive information. If it has not, it must do so at this time. *See Gov't Code §§ 552.301, .302.*

²Because you contend that only the handwritten portion of Exhibit 8 is excepted from public disclosure, the department must release the underlying document to the requestor.

³As with Exhibit 8, because you argue only that the handwritten portions of Exhibit 6 are excepted from public disclosure, the underlying document must be released to the requestor.

Because we resolve this aspect of your request under sections 552.107(1) and 552.111, we need not address the applicability of section 552.104 to the information at issue.

Code, which protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision, and (2) 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.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *See Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). 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.⁴ *See id.* 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. *See* Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999); *see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

After reviewing Zachry's arguments and the documents at issue, we conclude that Zachry has demonstrated the applicability of section 552.110 to most of the information contained in their records. However, we do not believe that Zachry has demonstrated how some of the pricing information contained in its Exhibit 9 is a trade secret or commercial or financial information the release of which would cause them substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988) (stating that 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 was entirely too speculative), 319

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(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).

(1982) (finding information relating to pricing not excepted under section 552.110 and that pricing proposals are entitled to protection under section 552.104 only during bid submission process), 184 (1978); *cf.* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). In this instance, we conclude that Zachry has demonstrated that only the "Quantity" and "Unit Price" information contained in its Exhibit 9 comes under the protection of section 552.110. The remaining information in this document 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, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, 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); *Tex. 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 Texas Building and Procurement Commission 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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/RWP/sdk

Ref: ID# 156584

Enc: Submitted documents

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