



October 14, 2002

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

OR2002-5826

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170588.

The Dallas/Fort Worth International Airport Board (the "board") received a request for copies of the proposals and best and final offers of Ascom Transport Systems, Inc. ("Ascom") and Federal APD/Federal Signal Corporation ("Federal APD") that were submitted to the board for purposes of the Automated Parking System Phase III, Contract #7003295. Although the board does not take a position with respect to the release of the requested information, you indicate that some of the requested information pertaining to Ascom may be excepted from disclosure pursuant to section 552.110 of the Government Code.¹ Pursuant to section 552.305(d) of the Government Code, the board notified Ascom of the board's receipt of the request and of Ascom's right to submit arguments to this office as to why its information should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). Ascom responded to the board's section 552.305 notice and forwarded comments to our office as to why its information should not be released to the requestor. We have also considered comments submitted by the requestor. *See Gov't Code § 552.304* (providing that person may submit comments stating why information should or

¹ You note that the requested information pertaining to Federal APD was previously requested by another requestor and was forwarded to our office for an opinion regarding whether any portion of that information was subject to disclosure. Accordingly, this particular ruling does not address the portions of the request as it relates to Federal APD.

should not be released). We have considered all arguments and have reviewed the submitted information.

Ascom claims that portions of its information are excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110(a) protects trade secrets of private parties. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 a single or ephemeral event 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we will 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 one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990).

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." An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial

²The 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 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).

competitive injury would likely result from disclosure of the requested information. *See* 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).

Ascom argues that portions of the submitted information are excepted from disclosure under section 552.110 because they were marked confidential and proprietary and because the board agreed that they would be maintained by the board in confidence. We note that information is not confidential under the Act simply because the party submitting the information to the governmental body anticipates or requests that it be kept confidential. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977); *see also* Open Records Decision No. 180 (1977). Furthermore, governmental bodies may not enter into agreements to keep information confidential except where specifically authorized to do so by statute. *See* Open Records Decision Nos. 605 (1992), 585 (1991), 514 (1988). Accordingly, the board may not withhold from disclosure any portion of Ascom's information under section 552.110 on this basis.

However, Ascom also argues that portions of the submitted information should be withheld from disclosure under section 552.110(a) as trade secret information. *See* Gov't Code § 552.110(a). Based on our review of Ascom's arguments and this information, we conclude that Ascom has demonstrated that portions of this information constitute Ascom's trade secrets and we have received no arguments that rebut Ascom's claim as a matter of law. Therefore, we conclude that the board must withhold from disclosure the information that we have marked pursuant to section 552.110(a). *See* Open Records Decision No. 552 at 5 (1990). Furthermore, Ascom also argues that portions of the submitted information should be withheld from disclosure under section 552.110(b) as information the release of which would cause Ascom substantial competitive harm. Based on our review of Ascom's arguments and this information, we conclude that Ascom has demonstrated that portions of this information constitute information the release of which would cause Ascom substantial competitive harm. Therefore, we conclude that the board must withhold from disclosure the information that we have marked pursuant to section 552.110(b). However, Ascom has not sufficiently demonstrated how the remaining submitted information constitutes Ascom's trade secret information or information the release of which would cause Ascom substantial competitive harm. Accordingly, we conclude that the board may not withhold from disclosure any portion of the remaining submitted information under section 552.110 of the Government Code. *See* Open Records Decision Nos. 319 (1982) (finding information relating to organization, personnel, market studies, professional references, qualifications, and experience not excepted under section 552.110).

However, we note that portions of the information not excepted from disclosure under section 552.110 are subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Accordingly, unless the members of the public whose e-mail addresses are contained within the remaining information have affirmatively consented to the release of their respective e-mail addresses, the board must withhold from disclosure the email addresses that we have marked pursuant to section 552.137 of the Government Code.

Finally, we note that a portion of the remaining submitted information appears to be protected by copyright law. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. *See* Attorney General Opinion JM-672 (1987). However, a governmental body must allow inspection of copyrighted materials, unless an exception to disclosure applies to the information. *See id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. We note that in making such copies the member of the public assumes a duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the board must withhold from disclosure the information that we have marked pursuant to section 552.110(a) of the Government Code. The board must also withhold from disclosure the information that we have marked pursuant to section 552.110(b). The board must also withhold from disclosure the email addresses that we have marked pursuant to section 552.137 of the Government Code, unless the members of the public to whom these addresses belong have affirmatively consented to the release of their respective e-mail addresses. The board must release the remaining submitted information to the requestor in compliance 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, 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); *Texas Department of Public 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg