



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

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Ms. Paula J. Alexander
General Counsel
Metropolitan Transit Authority of Harris County, Texas
1201 Louisiana, 16th Floor
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OR2003-5746

Dear Ms. Alexander:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185876.

The Metropolitan Transit Authority of Harris County ("METRO") received two requests for the technical and price proposals submitted in response to a particular RFP and the evaluation matrix reflecting scores in relation to the proposals. You advise that METRO is releasing the requested evaluation matrix. You state that the remaining requested information may be confidential under section 552.110 of the Government Code, but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office and provide documentation showing that you have notified five interested third parties (ARINC, Innovations in Transportation, Inc. ("INIT"), BBN, GE Transportation Systems Global Signaling ("GE"), and Siemens Transportation Systems, Inc. ("Siemens")), whose proprietary interests may be implicated by the request, of the requests for information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act (the "Act") in certain circumstances). As of the date of this ruling, this office has received responses from ARINC, INIT, and Siemens. We have considered the exceptions claimed and have reviewed the information submitted as responsive.¹

¹ We note that ARINC appears to make arguments to withhold certain information in Volume II of its proposal that METRO has not submitted. Therefore, this ruling does not address this information, and is limited to the information submitted as responsive by METRO. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the remaining third parties have not submitted to this office their reasons explaining why their information should not be released. Therefore, BBN and GE have provided us no basis to conclude that their information is excepted from disclosure. *See, e.g.*, Gov't Code § 552.110(b) (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); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, the information of these parties must be released, except as noted below.

In response to Siemens' arguments, we note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. Attorney General Opinion JM-672 (1987); Open Records Decision No. 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."). *See also* Open Records Decision No. 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke predecessor to section 552.110). Consequently, unless the information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement specifying otherwise.

Next, we note that INIT claims that its technical and price proposals are excepted under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." INIT has not directed our attention to any law, nor are we aware of any law, under which any of the submitted information is deemed to be confidential. *See, e.g.*, Open Records Decision Nos. 600 at 4 (1992) (constitutional privacy), 478 at 2 (1987) (statutory confidentiality), 611 at 1 (1992) (common-law privacy). Therefore, none of the submitted information pertaining to INIT may be withheld from disclosure under section 552.101 of the Government Code. *See also* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public).

requested, or representative sample if voluminous amount of information was requested).

Siemens also argues that some information related to its personnel is excepted under Exemption 6 of the federal Freedom of Information Act ("FOIA") and section 552.102 of the Government Code. However, FOIA only applies to federal agencies. Therefore, its provisions are not applicable to records held by a governmental body of the State of Texas. *See Open Records Decision No. 561 at 7 (1990)*. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). However, we find that none of Siemens' information consists of personnel records for purposes of the Act. Therefore, section 552.102 is inapplicable, and none of Siemens' information may be withheld on that basis.

Siemens further claims that its information is excepted from disclosure under section 552.104 because release would give advantage to a competitor or bidder. Section 552.104 states that information is excepted from required public disclosure if release of the information would give advantage to a competitor or bidder. However, the purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. *See Open Records Decision No. 592 (1991)*. Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See Open Records Decision No. 592 at 8-9 (1991)*. Therefore, we do not consider Siemens' claim under section 552.104, and because METRO does not contend that the requested information is excepted under section 552.104, none of it may be withheld on this basis.

All of the responding parties claim that their proposal information is excepted under section 552.110 of the Government Code. This exception protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "[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[.]" *See Gov't Code § 552.110(a)-(b)*.

The Texas Supreme Court 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 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) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If the governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that 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* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that section 552.110(a) is applicable 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. 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 No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm); *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). With regard to ARINC’s and Siemens’ arguments, we note that in construing section 552.110(b), this office has looked to *National Parks*, which established the standard for applying the correlative exception in FOIA. Open Records Decision No. 639 at 3 (1996). Under the *National Parks* test, commercial or financial information is confidential under Exemption Four of FOIA “if disclosure of the information is likely . . . either . . . (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Nat’l Parks*, 498 F.2d at 770 (footnote omitted). Seventeen years later, the same court reconsidered the *National Parks* standard in *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871 (D.C. Cir. 1992), *cert. denied*, 507

² 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 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).

U.S. 984 (1993). While reaffirming the two-pronged test set out in its previous ruling for situations in which information was submitted to the government under compulsion, the Court of Appeals for the District of Columbia established a different test for determining whether commercial or financial information is confidential under Exemption Four when information is provided to the government on a voluntary basis. *Critical Mass*, 975 F.2d 879. The court concluded that “financial or commercial information provided to the Government on a voluntary basis is ‘confidential’ for the purpose of Exemption 4 if it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” *Id.*

However, pursuant to a decision by the Third Court of Appeals and a change made to section 552.110 by the Texas Legislature in 1999, this office no longer applies the federal test in determining whether commercial or financial information is excepted from disclosure under section 552.110. *See* Act of May 25, 1999, 76th Leg., R.S., ch. 1319, § 7, 1999 Tex. Gen. Laws 4500, 4503; *Birnbaum v. Alliance of American Insurers*, 994 S.W.2d 766 (Tex. App.--Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied to commercial and financial information and requires that the third party whose information is at issue make a specific factual or evidentiary showing that disclosure of its information would likely result in substantial competitive injury to itself. *See* Gov’t Code § 552.110(b); Open Records Decision No. 661 at 5-6.

Upon review of the submitted arguments and the relevant information, we find that ARINC, INIT, and Siemens have each demonstrated that portions of the information that each seeks to withhold are excepted from disclosure under section 552.110. We have noted this information within the submitted documents. None of the parties have demonstrated that any of the remaining portions of its information constitute either trade secret information under section 552.110(a) or commercial or financial information the release of which would cause substantial competitive harm under section 552.110(b). *See, e.g.*, Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor). Therefore, none of the remaining information may be withheld under section 552.110.

However, some of the submitted documents contain personal e-mail addresses of private individuals that must be withheld under section 552.137 of the Government Code. Section 552.137 requires a governmental body to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. *See* Gov’t Code § 552.137(a), (b). Section 552.137 does not apply to a general e-mail address or website address of a business, or to a government employee’s work e-mail address. None of the parties inform us that a member of the public has affirmatively consented to the release of any of the personal e-mail addresses contained in the submitted

materials. Therefore, these e-mail addresses must be withheld under section 552.137. We have marked the types of e-mail addresses that must be withheld.

Finally, we note that portions of the submitted proposals are copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person 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. *See* Open Records Decision No. 550 (1990).

In summary, we have marked the information that METRO must withhold under section 552.110. We have marked the types of e-mail addresses that must be withheld under section 552.137. The remaining submitted information must be released in accordance with the applicable copyright laws.

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 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. 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 185876

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