



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 24, 2004

Ms. Carol Longoria
The University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2004-1350

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196574.

The University of Texas System (the "system") received a request for information related to the requestor's previous request for information regarding a specified bid offer, specifically that the system "research our request further and provide us with copies of all related documents." The requestor also requested a particular "excel form list" provided by two named entities and currently in the possession of a named individual. You state that you do not have much of the requested information. We note that the Public Information Act (the "Act") does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request for information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Additionally, the Act does not require a governmental body to answer factual questions or to perform legal research. Open Records Decision Nos. 563 (1990), 555 (1990), 379 (1983), 347 (1982). Likewise, the Act does not require a governmental body to obtain information that is not in its possession, provided that no other individual or entity holds such information on its behalf. *See Gov't Code 552.002(a)*; Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. *See Open Records Decision*

No. 561 at 8-9 (1990). You state that the information you have submitted is the only information the system has responsive to this request.

Although you take no position with respect to the release of this information, you state, and provide documentation showing, that you have notified Hensel Phelps Construction Company ("Hensel") and ThyssenKrupp Elevator Corporation ("ThyssenKrupp") of this request and of their right to submit arguments to this office as to why information pertaining to each third party should not be released. *See* Gov't Code § 552.305(d); *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 to disclosure under Act in certain circumstances). We have received correspondence from ThyssenKrupp. We have reviewed their arguments and the submitted information.

Initially, we note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Hensel has not submitted any comments to this office explaining how release of the requested information would affect its proprietary interests. Thus, we have no basis to conclude that Hensel has a protected proprietary interest in any of the submitted information. *See* Gov't Code § 551.110(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. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, the submitted information related to Hensel must be released.

ThyssenKrupp argues that portions of the requested information are excepted from disclosure pursuant to section 552.104 of the Government Code. We note, however, that 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). Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). The system has not argued that the release of any portion of the requested information would harm its interests in a particular competitive situation under section 552.104. Accordingly, because the system does not raise section 552.104, none of the submitted information is excepted under section 552.104 of the Government Code.

Next, ThyssenKrupp argues that its pricing schedule, wage rates, and timeline are excepted under section 552.110(a) of the Government Code. This section protects the property interests of private persons by excepting from disclosure trade secrets obtained from a person

and privileged or confidential by statute or judicial decision. 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.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that 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). 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. *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.¹ Open Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) applies 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. See Open Records Decision No. 402 (1983).

¹The 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 also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Having reviewed ThyssenKrupp's arguments, we find that the company has not established that any portion of its information constitutes a trade secret pursuant to section 552.110(a). Accordingly, the system may not withhold any information related to ThyssenKrupp under section 552.110 of the Government Code.

Finally, ThyssenKrupp asserts that portions of its information are excepted from disclosure under section 552.131 of the Government Code. This exception relates to economic development information and provides as follows:

(a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(1) a trade secret of the business prospect; or

(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.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

(c) After an agreement is made with the business prospect, this section does not except from [required public disclosure] information about a financial or other incentive being offered to the business prospect:

(1) by the governmental body; or

(2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. Section 552.131(a) excepts from disclosure only "trade secrets" 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." This aspect of section 552.131 is co-extensive with section 552.110. *See* Gov't Code § 552.110(a)-(b). Section 552.131(b) protects information

about a financial or other incentive that is being offered to a business prospect by a governmental body or another person. We find, however, that ThyssenKrupp has not established that any of its information constitutes a trade secret under section 552.131(a) or that any of this information relates to a financial or other incentive that is being offered to a business prospect by a governmental body or another person. We also find that ThyssenKrupp has failed to demonstrate that the submitted information constitutes commercial or financial information the release of which would cause substantial competitive harm to the person from whom the information was obtained. Accordingly, none of the submitted information is excepted from disclosure under section 552.131 of the Government Code. Thus, the submitted information must be released to the requestor.

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,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 196574

Enc. Submitted documents

c: Mr. Hoss Fahmy
G&Z Contracting
P. O. Box 58863
Nassau Bay, Texas 77258
(w/o enclosures)