KEN PAXTON
ATTORNEY GENERAL OF TEXAS

This ruling has been modified by court action.
The ruling and judgment can be viewed in PDF
format below.

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2005

Ms. Cheree Kinzie
Law Offices of Davidson & Troilo
7550 W. IH-10, Suite 800
San Antonio, Texas 78229-5815

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2005-11107

Dear Ms. Kinzie:

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# 237973.

The Greater Kelly Development Authority (the "GKDA"), which you represent, received a request for the lease agreement between GKDA and The Boeing Company ("Boeing"). You take no position with respect to the requested information, but believe that the information you have submitted implicates the proprietary interests of Boeing. You notified Boeing of this request for information and of its right to submit arguments to this office as to why Boeing's information should not be released.[1] We also received correspondence from an attorney for Boeing. We have considered Boeing's arguments and reviewed the submitted information.

Initially, we address GKDA's obligations under section 552.301 of the Government Code. This section prescribes procedures that must be followed in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written

[1] *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 public disclosure under certain circumstances).

comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)- (D).

Although you do not inform us when the GKDA received the request for information, we note that it is dated May, 21, 2005. *See* Gov't Code § 552.301(e)(1)(C) (a governmental body is required to submit to this office within fifteen business days of receiving an open records request a signed statement or sufficient evidence showing the date the governmental body received the written request). However, you did not request a decision from or submit the required information to this office until October 5, 2005. Thus, we find that the GKDA failed to comply with the procedural requirements of section 552.301 of the Government Code.

Pursuant to section 552.302, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Here, because third party interests are implicated, we will consider whether any of the requested information must be withheld to protect third party interests.

Initially, we note that Boeing seeks to withhold certain information that the GKDA has not submitted for review.[2] We do not reach Boeing's argument with regard to information that has not been submitted for our review by GKDA. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting a decision from Attorney General must submit a copy of the specific information requested, or representative sample if voluminous amount of information was requested).

Next, we note that Boeing argues the requested information is excepted from disclosure because GKDA agreed to maintain the confidentiality of this information. However, information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words,

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[2]Boeing informs us that it seeks to withhold the following: Amendment 1 D.1.4.2.1.; Amendment 1 D.2.5.1.1; Amendment 1 Appendix "A"; Amendment 3 C.1.4.3.1; Amendment 3 C.2.7.3.B; Amendment 3 C.4.14.5; and Amendment 3 C.7.

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 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 does not satisfy requirements of statutory predecessor to section 552.110). Consequently, unless the requested information falls within an exception to disclosure, it must be released, notwithstanding any expectations or agreement specifying otherwise.

Boeing argues that portions of its information are excepted under section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties 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. *See* Gov't Code § 552.110.

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. 1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is the following:

> 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.[3] *Id.* This office has held that if a

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[3]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are the following: (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. *Id.*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

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. 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).

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." Gov't Code § 552.110(b). 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 requested information. *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).

Having considered Boeing's arguments, we find that Boeing has not presented a *prima facie* claim that any of the company's information qualifies as a trade secret. Additionally, we find that Boeing has not made the showing required by section 552.110(b) that the release of any of the remaining information would be likely to cause Boeing any substantial competitive harm. We therefore conclude that none of the information at issue is excepted from disclosure under section 552.110.[4] *See* Open Records Decision Nos. 509 at 5 (1988) (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 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

Next, Boeing claims that some of the submitted information pertains to critical infrastructure that is vulnerable to an act of terrorism. We note that effective November 19, 2001, Congress enacted the Aviation and Transportation Security Act ("ATSÀ"), which created the

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[4]We note that pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988).

United States Transportation Security Administration ("TSA"), a new agency within the United States Department of Transportation ("DOT") headed by the Under Secretary of Transportation for Security (the "Under Secretary"). *See* 49 U.S.C. § 114(a), (b)(1). The ATSA provides that, by November 19, 2002, the responsibility for inspecting persons and property carried by aircraft operators and foreign air carriers will be transferred from the Federal Aviation Administration (the "FAA") Administrator to the Under Secretary as head of the TSA. These responsibilities include carrying out the requirements of chapter 449 of title 49 of the United States Code, which pertain to civil aviation security. *See* 49 U.S.C. § 114(d)(1). Section 40119 of title 49, a provision that formerly applied to the FAA Administrator, now states:

> Notwithstanding [the Federal Freedom of Information Act (the "FOIA"),] the Under Secretary shall prescribe regulations prohibiting disclosure of information obtained or developed in carrying out security or research and development activities. . . if the Under Secretary decides disclosing the information would-
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> (A) be an unwarranted invasion of personal privacy;
>
> (B) reveal a trade secret or privileged or confidential commercial or financial information; or
>
> (C) be detrimental to the safety of passengers in transportation.

49 U.S.C. § 40119(b)(1). The language of this provision authorizes TSA's Under Secretary to prescribe regulations "prohibiting disclosure of information obtained or developed in carrying out security or research and development activities." It authorizes the Under Secretary to prescribe regulations that prohibit disclosure of information requested not only under the FOIA, but also under other disclosure statutes. *Cf. Pub. Citizen, Inc. v. Fed. Aviation Administration*, 988 F.2d 186, 194 (D.C. Cir. 1993) (former section 40119 authorized FAA Administrator to prescribe regulations prohibiting disclosure of information under other statutes as well as under the FOIA). Thus, the Under Secretary is authorized by section 40119(b)(1) to prescribe regulations that prohibit disclosure of information requested under the Act.

Pursuant to the mandate and authority of section 40119, the DOT's FAA and TSA jointly published new regulations pertaining to civil aviation security, which are found in title 49 of the Code of Federal Regulations and which took effect February 17, 2002. *See* 67 Fed. Reg. 8340. Section 1520.1(a) of these regulations explains that the regulations govern the release, by the TSA "*and by other persons*, of records and information that has [sic] been obtained or developed during security activities or research and development activities." 49 C.F.R. § 1520.1(a) (emphasis added). Such "other persons" to which these regulations apply include local governmental entities such as GKDA. *See* 49 U.S.C. § 40102(a)(32) ("person"

includes "a governmental authority"); *see also* 67 Fed. Reg. at 8342 (definition of "person" is based on 49 U.S.C. § 40102). Thus, the regulations in title 49 of the Code of Federal Regulations apply to GKDA.

Section 1520.3(a) of title 49 provides in part that, "notwithstanding the [FOIA] or other laws," records that meet the definition in section 1520.7 are not available for public inspection or copying, nor is information contained in those records to be released to the public. 49 C.F.R. § 1520.3(a). Such information is defined to include "[a]ny information that TSA has determined may reveal a systemic vulnerability of the aviation system, or a vulnerability of aviation facilities, to attack." *Id.* § 1520.7(h). This information includes, but is not limited to, "details of inspections, investigations, and alleged violations and findings of violations." *See id.*

As to the release of information by persons other than the TSA, section 1520.5 provides that those covered by the regulation, which, among others, includes airport and aircraft operators, their employees, contractors, and agents, "must restrict disclosure of and access to sensitive security information. . .to persons with a need to know *and must refer requests by other persons for such information to TSA* or the applicable DOT administration[.]" *Id.* § 1520.5(a) (emphasis added).

Based upon the above-described statutory and regulatory scheme, we thus conclude that the decision to release or withhold the information Boeing has marked as critical infrastructure is not for this office or GKDA to make, but rather is a decision for the Under Secretary as head of the TSA. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (noting that state law is preempted to extent it actually conflicts with federal law); *see also La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Consequently, we conclude GKDA may not release the information at issue at this time under the Act, and instead must refer the information request to the TSA for its decision concerning disclosure of that information.[5]

In summary, the GKDA must refer the information request to the TSA for its decision concerning disclosure of the information Boeing has marked under section 418.181 of the Government Code. The remaining 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

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[5]Thus, we do not address Boeing's arguments under section 418.181 of the Government Code.

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).

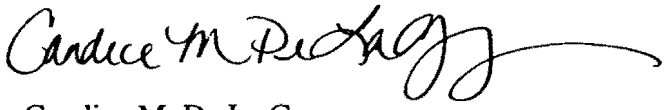
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Candice M. De La Garza
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CMD/krl

Ref: ID# 237973

Enc. Submitted documents

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IN THE SUPREME COURT OF TEXAS

No 12-1007

THE BOEING COMPANY AND THE GREATER KELLY DEVELOPMENT AUTHORITY N/K/A THE PORT AUTHORITY OF SAN ANTONIO, PETITIONERS,

v

KEN PAXTON, ATTORNEY GENERAL OF TEXAS RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on petition for review from the Court of Appeals for the Third District, and having considered the appellate record, briefs and counsels argument concludes that the court of appeals judgment should be reversed

IT IS THEREFORE ORDERED in accordance with the Court's opinion that

1) The court of appeals' judgment is reversed,

2) Judgment is rendered sustaining The Boeing Company's objection to the mandatory release of the information redacted from the lease provided the requestor and

3) The Boeing Company et al shall recover, and the Attorney General shall pay, the costs incurred in this Court and in the court of appeals.

Copies of this judgment and the Court s opinion are certified to the Court of Appeals for the Third District and to the District Court of Travis County Texas for observance.

Opinion of the Court delivered by Justice Devine, joined by
Chief Justice Hecht, Justice Green, Justice Willett, Justice Guzman
Justice Lehrmann, and Justice Brown

Dissenting opin on filed by Justice Boyd

Justice Johnson did not participate in the decision

June 19 2015

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