The ruling you have requested has been modified pursuant to a court order. The court judgment has been attached to this document.

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2006

Ms. Mary D. Marquez
Capital Metro Transportation Authority
2910 East Fifth Street
Austin, Texas 78702

OR2006-13622

Dear Ms. Marquez:

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# 264840.

The Capital Metro Transportation Authority ("Capital Metro") received four requests for the proposals received for RFP No. 104913 Intelligent Transit Systems. You claim that portions of the submitted information are excepted from disclosure under sections 552.136 and 552.139 of the Government Code. You also indicate that release of some of the submitted information may implicate the proprietary interests of INIT Innovations in Transportation, Inc. ("INIT"), Orbital Sciences Corporation ("Orbital"), Siemens VDO Automotive Corporation ("Siemens"), and Trapeze Software Group ("Trapeze"). Accordingly, you inform us, and provide documentation showing, that you notified INIT, Orbital, Siemens, and Trapeze of the request and of their right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d) (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 to disclosure in certain circumstances). We have considered the exceptions claimed and reviewed the submitted information.[1]

[1] We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Siemens raises exceptions under the federal Freedom of Information Act ("FOIA"). *See* 5 U.S.C. § 552. We note, however, that FOIA is applicable to information held by an agency of the federal government. In this instance, the information at issue was created for, and is maintained by Capital Metro, which is subject to the state laws of Texas. *See* Attorney General Opinion MW-95 (1979) (FOIA exceptions apply to federal agencies, not to state agencies); Open Records Decision Nos. 496 (1988), 124 (1976); *see also* Open Records Decision No. 561 at 7 n 3 (1990) (noting that federal authorities may apply confidentiality principles found in FOIA differently from way in which such principles are applied under Texas open records law). Accordingly, Capital Metro may not withhold any of the submitted information under FOIA.

Siemens also raises section 552.102 of the Government Code. Section 552.102(a) excepts from public 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). This exception is applicable only to information that relates to public officials and employees. *See Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.—Austin 1983, writ ref'd n.r.e.) (addressing statutory predecessor to Gov't Code § 552.102). Because the submitted information relates to employees of private entities, Capital Metro may not withhold any information under section 552.102(a) of the Government Code.

Siemens also raises section 552.104 of the Government Code. Section 552.104(a) excepts from public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). This exception protects the competitive interests of governmental bodies, not the proprietary interests of private parties such as Siemens. *See* Open Records Decision No. 592 at 8 (1991) (discussing statutory predecessor). Thus, because Capital Metro does not claim this exception, Capital Metro may not withhold any information under section 552.104 of the Government Code.

INIT, Orbital, Siemens, and Trapeze all claim that portions of their information are excepted from disclosure pursuant to 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: trade secrets and commercial or financial information the release of which would cause a third party substantial competitive harm. Gov't Code § 552.110.

Section 552.110(a) of the Government Code excepts from disclosure "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision." Gov't Code § 552.110(a). 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

> 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 rom 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); *see also Huffines*, 314 S.W.2d at 776. 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.[2] RESTATEMENT OF TORTS § 757 cmt. b (1939). 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. 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) protects "[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). This exception to disclosure 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. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

---

[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 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 considered the arguments submitted by INIT, Orbital, Siemens, and Trapeze and reviewed the information at issue, we conclude that INIT, Orbital, Siemens, and Trapeze have all failed to make a *prima facie* case that any of the submitted information constitutes a trade secret. However, we find that INIT, Siemens, and Trapeze have demonstrated that release of portions of the information at issue would cause those companies substantial competitive harm. Accordingly, we have marked the submitted information that must be withheld under section 552.110(b). However, we conclude that INIT, Orbital, Siemens, and Trapeze, have made only conclusory allegations and have provided no specific factual or evidentiary showing to support their allegations that release of the remaining information at issue would cause substantial competitive injury. *See* Gov't Code § 552.110; *see also, e.g.*, Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 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 is too speculative), 319 at 3 (1982) (information relating to organization and personnel, market studies, qualifications, and pricing not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Further, 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).

You generally raise section 552.136 of the Government Code, which provides as follows:

> (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:
>
> > (1) obtain money, goods, services, or another thing of value; or
> >
> > (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.
>
> (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. However, you have failed to establish that any of the submitted information constitutes an access device number for purposes of section 552.136. Accordingly, none of the submitted information may be withheld under 552.136 of the Government Code.

You also generally raise section 552.139(a) of the Government Code for some of the submitted information. Section 552.139(a) provides the following:

> (a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

Gov't Code § 552.139(a). Upon review, however, we find that you have not provided any arguments demonstrating that any of the submitted information relates to computer network security or to the design, operation, or defense of a computer network, nor have you identified any of the information to which this exception might apply. *See id.* §§ 552.301(e)(1) (requiring the governmental body to explain the applicability of the raised exception), 552.301(e)(2) (requiring the governmental body to "label the submitted information to indicate which exceptions apply to which parts of the copy"). Accordingly, Capital Metro may not withhold any of the submitted information under section 552.139. *Id.*

Finally, we note that portions of the remaining information appear to be protected by copyright. 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, the information we have marked pursuant to section 552.110 of the Government Code must be withheld. The remaining submitted information must be released; however, in releasing information that is protected by copyright, Capital Metro must comply 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, 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,

Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/eb

Ref: ID# 264840

Enc. Submitted documents

c: Mr. Rob Bryans
Trapeze Software Group
5800 Explorer Drive, 5th Floor
Mississauga, Ontario
L4W 5L4 Canada
(w/o enclosures)

Mr. Gregory W. Tomsic
Trapeze Software Group
5800 Explorer Drive, 5th Floor
Mississauga, Ontario
L4W 5L4 Canada
(w/o enclosures)

Mr. Mark Dennison
Trapeze Software Group
5800 Explorer Drive, 5th Floor
Mississauga, Ontario
L4W 5L4 Canada
(w/o enclosures)

Mr. Roland Staib
INIT Innovations in Transportation, Inc.
1400 Crossways Blvd., Suite 110
Chesapeake, Virginia 23320
(w/o enclosures)

Mr. Lawerence G. Cohen
Vandeventer Black, L.L.P.
500 World Trade Center
Norfolk, Virginia 23510
(w/o enclosures)

Ms. Ann Nicklas
Orbital Sciences Corporation
7160 Riverwood Drive
Columbia, Maryland 21046
(w/o enclosures)

Ms. Jane Webre
Scott, Douglass & McConnico, L.L.P.
One American Center
600 Congress Avenue, 15th Floor
Austin, Texas 78701-2589
(w/o enclosures)

Mr. Christian Seller
Siemens VDO Automotive Corporation
5625 Rockwell Drive, NE
Cedar Rapids, Iowa 52402
(w/o enclosures)

Mr. Gregory B. Erbe
Siemens VDO Automotive Corporation
5265 Rockwell Drive NE
Cedar Rapids, Iowa 52405
(w/o enclousres)

CAUSE NO. D-1-GN-06-004501

ORBITAL SCIENCES CORPORATION, Plaintiff,	§ § §	IN THE DISTRICT COURT OF
V.	§ §	TRAVIS COUNTY, TEXAS
GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS, Defendant.	§ § §	201ST JUDICIAL DISTRICT

Filed in The District Court of Travis County, Texas
NOV 13 2008
At 1:50 P.M.
Amalia Rodriguez-Mendoza, Clerk

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for agreed final judgment. Plaintiff Orbital Sciences Corporation (Orbital)and Defendant Greg Abbott, Attorney General of Texas, by and through their respective attorneys, announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code Ann. ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code Ann. § 552.325(c), requestors Rob Bryans, Roland Staib, and Gregory Erbe were sent reasonable notice of this setting and of the parties' agreement that Capital Metro Transportation Authority must withhold the information at issue; that the requestors were also informed of their right to intervene in the suit to contest the withholding of this information; and that the requestors have not informed the parties of their intention to intervene. Neither has any requestor filed a motion to intervene or appeared today. After considering the agreement of ACS Transport Solutions, Inc., successor to Orbital, and the Attorney General and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, specifically, the text or figures in yellow highlights and approved for redaction by the Attorney General, in Orbital's proposal for Capital Metro's RFP No.

104913 Intelligent Transit Systems, is excepted from disclosure under Tex. Gov't Code § 552.110(b), as follows: Figure D-3, Proposed Architecture (entire page D-24); D.2.4.1.2.3, Long-term Database Server (page D-25); D.2.4.1.2.4 WLAN File Servers (page D-26); D.2.4.1.2.5, Data Communications Controllers (DCC) (page D-26); D.2.5, Vehicle Subsystem (page D-26); Figure D-4 (page D-27); D-2.5.1.2, Magnetic Card Reader and Smart Card Reader (page D-28); Figure D-5 (page D-29); D.2.6.1.1, SmartStop Fixed End-Efficiency and Service Improvement (page s D-31-32); D.2.7.1, Overview (page D-33); D.2.7.2, System Design (pages D-33-34); D.2.8, J1708 Drivetrain Monitoring (page D-34); D.2.9 Farebox Interface (page D-35); D.2.10, OrbCAD Video Monitoring Subsystem-Rail Cars Only (pages D-36-37);D.2.11.1, Benefits in Realtime (page D-38);D.2.11.2, Seamless Vendor (page D-38); D.2.11.4, Paratransit SmartMDT-DCM (page D-40);D.2.12, Road Supervisor Subsytem (page D-41); D.2.13.1, Smart Traveler Introduction (page D-41); D.2.13.2, System Architecture (page D-42); D.2.13.3, Operational Overview (page D-42); D.2.13.3.1, System Console operation (page D-43); D.2.13.3.2, Sign Operation (pages D-43-44); D.2.14.1, Communications Subsystem, System Overview (pages D-44-45); D.2.14.3, Fixed-End Equipment (page D-45); Figure D-15 (page D-46); ; D.2.14.3.1.1, Data Communications Controller (DCC) (pages D-46-47); D.2.14.3.1.3, Modem keying Module (MKM), including Figure D-16 (page D-47); D.2.14.3.1.5, Optional Motorola Data Base Stations (page D-48); D.2.14.4, Redundancy, Reliability, and Maintenance (pages D-48-49); D.2.14.5, System Communication Modes (pages D-49-50); and D.2.14.6, Voice Call Setup and Termination (page D-50).

2. Capital Metro Transportation Authority must withhold from the requestors the information described in Paragraph 1 of this Agreed Final Judgment.

3. All costs of court are taxed against the parties incurring the same;

4. All relief not expressly granted is denied; and

5. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 13 day of November, 2008.

PRESIDING JUDGE

APPROVED:

JANE WEBRE
Scott, Douglass & McConnico, L.L.P.
600 Congress Avenue, Suite 1500
Austin, Texas 78701-2589
Telephone: 495-6300
Fax: 474-0731
State Bar No. 21050060
ATTORNEY FOR PLAINTIFF

BRENDA LOUDERMILK
Chief, Open Records Litigation
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: 475-4292
Fax: 320-0167
State Bar No. 12585600
ATTORNEY FOR DEFENDANT