



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 3, 2006

Ms. Paula J. Alexander
General Counsel
Metropolitan Transit Authority of Harris County
P.O. Box 61429
Houston, Texas 77208-1429

OR2006-04540

Dear Ms. Alexander:

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# 247813.

The Metropolitan Transit Authority of Harris County (the "authority") received a request for copies of the winning proposal and contract for eight specified projects. You state that you have made copies of the requested contracts available but state, and provide documentation showing, that you notified the following interested third parties of the authority's receipt of the request for information and of the right of each company to submit arguments to this office as to why the requested information should not be released to the requestor: APM & Associates ("APM"); Archi*Technics/3, Inc. ("ArchiTechnics"); Binkley & Barfield, Inc. ("Binkley"); Cobb, Fendley & Associates, Inc. ("Cobb"); DMJM+HARRIS, Inc. ("DMJM"); ESPA Corp. ("ESPA"); Gilbreath Communications, Inc. ("Gilbreath"); Hicks & Company ("Hicks"); Houston Medical Testing Services, Inc. ("Houston Medical"); Hovis Surveying Company ("Hovis"); JNS Consulting Engineers, Inc. ("JNS"); Jones & Stokes ("Jones"); KM Chng ("KM"); Knudson & Associates ("Knudson"); KPMG, L.L.P. ("KPMG"); Landtech Consultants, Inc. ("Landtech"); Linda J. Meadows & Associates ("Meadows"); LopezGarcia Group ("LopezGarcia"); Manuel Padron & Associates ("Padron"); MAQ, Inc. ("MAQ"); Mercer Human Resource Consulting, Inc. ("Mercer"); Orthon, Inc. ("Orthon"); PBS&J; Sirus Engineers, Inc. ("Sirus"); SYSTRA Consulting, Inc. ("SYSTRA"); TERRA

Surveying Company ("TERRA"); Turner, Collie & Braden, Inc. ("Turner"); URS Corporation ("URS"); and Zarinkelk Engineering Services, Inc ("Zarinkelk"). See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You indicate that the submitted information may be excepted under section 552.110 of the Government Code, but take no position as to whether this information is excepted under that section. We have reviewed 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(c) to submit its reasons, if any, as to why requested information relating to it should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, only JNS has submitted arguments asserting that its information should not be released. Therefore, we have no basis to conclude that the release of the requested information will harm the proprietary interests of APM, ArchiTechnics, Binkley, Cobb, DMJM, ESPA, Gilbreath, Hicks, Houston Medical, Hovis, Jones, KM, Knudson, KPMG, Landtech, Meadows, LopezGarcia, Padron, MAQ, Mercer, Orthon, Sirrus, SYSTRA, Terra, Turner, URS, or Zarinkelk. Accordingly, the authority may not withhold any portion of the information on the basis of the proprietary interests of these third parties. See 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), 542 at 3 (1990).

JNS asserts that its information should be withheld 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) "[a] trade secret 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(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); *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 party’s claim for exception as valid under that component if that party establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law.¹ *See Open Records Decision No. 552 at 5 (1990)*. The private party must provide information that is sufficient to enable this office to conclude that the information at issue qualifies as a trade secret under section 552.110(a). *See Open Records Decision No. 402 at 3 (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).

Upon review of JNS’s arguments and the submitted information, we find that JNS has failed to demonstrate that any portion of the submitted information meets the definition of a trade secret under section 552.110(a). Furthermore, JNS has failed to establish by specific factual evidence that any of the submitted information constitutes commercial or financial information the release of which would cause the company substantial competitive harm under section 552.110(b). *See RESTATEMENT OF TORTS § 757 cmt. b (1939)* (information is generally not trade secret unless it constitutes “a process or device for continuous use in the operation of the business”); *see also, e.g., Open Records Decision No. 661 (1999)* (for information to be withheld under commercial or financial information prong of section

¹ 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)*.

552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue). Accordingly, no portion of the submitted information may be withheld under section 552.110 of the Government Code. As no other exceptions are claimed and the submitted information is not otherwise confidential, it 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, 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,



L. Joseph James
Assistant Attorney General
Open Records Division

LJJ/sdk

Ref: ID# 247813

Enc. Submitted documents

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