



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 30, 2009

Ms. Sharon Alexander  
Texas Department of Transportation  
125 E. 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR2009-16834

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# 362607.

The Texas Department of Transportation (the "department") received a request for information relating to Zachry Construction Company ("Zachry"). You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.136 of the Government Code. You also explain some of the submitted information may contain Zachry's proprietary information subject to exception under the Act. Accordingly, you have notified Zachry of this request for information and of its 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); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have considered the exceptions you claim and reviewed the submitted information, a portion of which is a representative sample.<sup>1</sup> We have also considered comments received from Zachry.

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<sup>1</sup>We assume that the "representative 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.

Initially, Zachry asserts the request has been withdrawn by operation of law under section 552.2615 of the Government Code. Zachry states the department provided the requestor with a cost estimate and the requestor has failed to respond. Section 552.2615(b) states

A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 days after the date the statement is sent to the requestor that:

- (1) the requestor will accept the estimated charges;
- (2) the requestor is modifying the request in response to the itemized statement; or
- (3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of the public information.

Gov't Code § 552.2615(b). We note, however, the department informs us it only sought a cost estimate in regard to the information it is providing to the requestor. The cost estimate does not apply to the information provided to our office. Accordingly, in regard to the information submitted to our office, we conclude the request was not withdrawn by operation of law, and we will address the submitted arguments against disclosure.

We note that some of the submitted information consists of completed reports and investigations. Thus, this information is subject to section 552.022(a)(1) of the Government Code, which provides:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Accordingly, the department may withhold the information at issue only if it is expressly confidential under other law or excepted from disclosure under section 552.108. You do not raise section 552.108. Although you raise section 552.103 of the Government Code for the information subject to section 552.022(a)(1), this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76

(Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold the information subject to section 552.022(a)(1) which we have marked under section 552.103. Zachry claims section 552.110 for the information subject to section 552.022(a)(1). Because section 552.110 is considered “other law” for purposes of section 552.022, we will consider Zachry’s arguments for this information, as well as Zachry’s and the department’s arguments for the information that is not subject to section 552.022.

Section 552.110 of the Government Code protects the proprietary interests of private parties with respect to 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.” 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). This office will accept a private person’s claim for exception as valid under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> Open

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<sup>2</sup>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];

Records Decision No. 552 at 5-6 (1990). However, we cannot conclude that section 552.110(a) is applicable unless the party claiming this exception has shown that the information at issue meets the definition of a trade secret and has demonstrated the necessary factors to establish a trade secret claim. *See* 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).

After reviewing the information at issue and Zachry's arguments, we determine that Zachry has failed to demonstrate that any portion of the information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. We note that pricing information pertaining to a particular contract is generally not a trade secret because it is "simply information as to single or ephemeral events in the conduct of business," rather than "a process or device for continuous use in the operation of the business." *See* Restatement of Torts § 757 cmt. b (1939); *Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Accordingly, no portion of the information at issue may be withheld under section 552.110(a).

Zachry also seeks to withhold portions of its information under section 552.110(b) of the Government Code. Upon review, we find Zachry has demonstrated that release of a portion of its submitted information, pertaining to private financial transactions, would cause it substantial competitive harm, and thus, this information must be withheld under section 552.110(b).<sup>3</sup> However, we find that Zachry has made only conclusory allegations that release of the remaining information at issue would cause the company substantial competitive injury, and has provided no specific factual or evidentiary showing to support such allegations. Furthermore, we note that a portion of the information relates to a contract between Zachary and the department. This office considers the prices charged in government

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- (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).

<sup>3</sup> As our ruling is dispositive, we need not address the department's arguments for the information at issue.

contract awards to be a matter of strong public interest; thus, the 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). Accordingly, the department may not withhold any of the remaining information at issue under section 552.110(b).

You assert that portions of the remaining information are excepted from disclosure under section 552.103 of the Government Code, which provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has long held that for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum

of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* Open Records Decision No. 588 (1991).

We understand you to assert that the department anticipates litigation with Zachry in multiple situations. You state Zachry sent the department, prior to receipt of the request, notices of claims regarding project numbers NH 2002(80)/CSJ 0039-07-186, TTA 2002(97)/CSJ 3136-01-126, and STP 2006(457)MM/CSJ 0521-04-187. You state these claims are pending and the claim procedure provides that the contractor may file a case with the State Office of Administrative Hearings ("SOAH"). You further state the department received a petition, prior to the request for information, for a formal hearing at SOAH in regard to project number NH 2004(255)/CSJ 255-08-094. Furthermore, you state the cases are governed by the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. This office has concluded that a contested case under the APA constitutes litigation for purposes of the statutory predecessor to section 552.103. Open Records Decision No. 588 (1991). Accordingly, we find the department is involved in anticipated and pending litigation in regard to these claims. We also find the remaining information you have marked under section 552.103 relates to the anticipated and pending litigation. As a result, we find section 552.103 is generally applicable to the information you have marked.

We note, however, the opposing party appears to have seen or had access to some of the marked information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* ORD 551 at 4-5. Thus, when the opposing party has seen or had access to information relating to pending litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the anticipated or pending litigation has seen or had access to any portion of the marked information, such information is not protected by section 552.103 and may not be withheld on that basis. We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim section 552.111 for portions of the remaining information. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Gov't Code § 552.111. This exception encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5. A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. *See id.*; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that:

a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204; ORD 677 at 7.

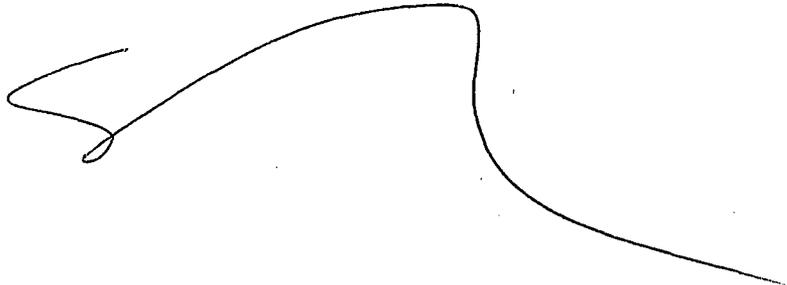
You inform us that the department is involved in several contract claims filed by Zachry. As noted above, these claims are either pending before SOAH or the department anticipates litigating the claims before SOAH. You state the information you have marked under section 552.111 represents the department's work product created in response to the contract claims. Based on your representations and our review, we find that the department may withhold the information you have marked under the attorney work product exception of section 552.111 of the Government Code.

In summary, the department must withhold the information we have marked under section 552.110. With the exception of the information subject to section 552.022(a)(1) and the information the opposing party has already seen, the department may withhold the information you marked under section 552.103. The department may withhold the information you marked under section 552.111. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/cc

Ref: ID# 362607

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)

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