



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 6, 2014

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

OR2014-09767

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# 525136.

The Texas Department of Transportation (the "department") received a request for 1) a specified exhibit to a specified agreement, 2) the Initial Senior Loan Agreement (the "ISLA") for segments 5 and 6 of the State Highway 130 project (the "project"), and 3) the Texas statute that provides that for a road to be tolled a non-toll alternative must be available. You indicate item three of the request requires the department to answer questions or perform legal research.<sup>1</sup> Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary and privacy interests of a third party. Accordingly, you state, and provide documentation showing, you notified SH 130 Concession Company, L.L.C. ("SH 130 CC") of the request for information and of its right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). The Act also does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the department has made a good faith effort to do so.

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). We have received comments from an attorney for Cintra Infrastructures, S.A. and its affiliated entities and holding companies, including SH 130 CC (collectively, "Cintra").<sup>2</sup> We have considered the submitted arguments and reviewed the submitted information.

Initially, we note the department states some of the submitted information is not responsive to the request for information. This ruling does not address the public availability of non-responsive information, and the department need not release non-responsive information to the requestor.

Cintra contends the responsive information is not subject to the Act. The Act applies to "public information," which is defined in section 552.002(a) of the Government Code as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body:
  - (A) owns the information;
  - (B) has a right of access to the information; or
  - (C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
- (3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and is subject to the Act. *See id.*; Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act can also encompass information that a governmental body does not physically possess. Information that is written, produced, collected, assembled, or maintained by a third party, including an individual officer or employee of a governmental body in the officer or employee's official capacity, may be subject to disclosure under the Act if a governmental body owns, has a right

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<sup>2</sup>Cintra informs this office it is the majority owner of SH 130 CC.

of access, or spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information. Gov't Code § 552.002(a); *see* Open Records Decision No. 462 at 4 (1987); *cf.* Open Records Decision No. 499 (1988). Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." Gov't Code § 552.002(a-1). Moreover, section 552.001 of the Act provides it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

Cintra contends the responsive information, which consists of the ISLA, is not subject to the Act because it "represents Cintra's private financial arrangements" and "relates to the conduct of internal financial affairs of the SH 130 CC." Cintra explains that, in March 2007, SH 130 CC and the department entered into a comprehensive development agreement for the project that included, among other items, a Facility Concession Agreement (the "FCA"). Cintra states the FCA governs the relationship between SH 130 CC and the department and "provides the framework for the development, financing, operation and maintenance of the [p]roject." Cintra informs us that pursuant to the FCA, SH 130 CC was responsible for obtaining and repaying all financing related to the project, and the ISLA is the document that evidences the financing structure developed by Cintra.

Cintra explains that the department is not a party to the ISLA, and the department's access to the ISLA is strictly limited under the terms of the FCA, which provides for the creation of an intellectual property escrow account. Cintra states that pursuant to section 4.1.4.2 of the FCA, the ISLA was deposited in the escrow account rather than delivered to the department. However, section 22.1.2 of the FCA provides that SH 130 CC "shall make all its books, records, and documents available for inspection by [the department] . . . pursuant to the Intellectual Property Escrow at all times during normal business hours, without charge." The FCA further provides in section 22.2.1 that the department "shall have such rights to review and audit [SH 130 CC], its [c]ontractors and their respective books and records as and when [the department] deems necessary for purposes of verifying compliance with the FCA [d]ocuments and applicable [l]aw." Further, as Cintra acknowledges, authorized representatives of the department have a right to inspect the ISLA pursuant to provisions of the Intellectual Property Escrow. Although Cintra may maintain the ISLA for its own purposes, the FCA provides for the responsive information to be made available to the department for purposes of verifying compliance with the FCA. Accordingly, the information at issue is collected, assembled, or maintained in connection with the official business of the department, and we find that, pursuant to the provisions of the FCA and the Intellectual Property Escrow, the department has a right of access to it. *See* ORD 462; *see also* *Baytown Sun v. City of Mont Belvieu*, 145 S.W.3d 268, 271 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2004, no pet.) (governmental body entitled to inspect books and records of contracting party had right of access to its payroll account records).

Additionally, we note section 22.3.1 of the FCA provides that SH 130 CC “acknowledges and agrees that, except as provided by Section 223.204 of the Texas Transportation Code, all [s]ubmittals, records, documents, drawings, plans, specifications and other materials in [the department’s] possession, including material submitted by [SH 130 CC] to [the department], are subject to the provisions of the [Act], including the exceptions to disclosure of information thereunder.” Although Cintra states that it believed the department’s only access to the ISLA was through the escrow account, Cintra acknowledges that the department obtained and maintained a copy of the ISLA outside of the escrow account, and the department submitted it to this office as being subject to the Act. We therefore conclude the information at issue constitutes public information under section 552.002 and the department must release it unless the information falls within an exception to public disclosure under the Act. *See* Gov’t Code §§ 552.006, .021, .301, .302.

Next, Cintra asserts the responsive information is confidential because it is subject to confidentiality agreements between Cintra and the department. We note information is not confidential under the Act simply because the party that submits the information anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976). In other words, a governmental body cannot overrule or repeal provisions of the Act through an agreement or contract. *See* Attorney General Opinion JM-672 (1987); Open Records Decision Nos. 541 at 3 (1990) (“[T]he obligations of a governmental body under [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 information at issue falls within an exception to disclosure, it must be released, notwithstanding any expectation or agreement to the contrary.

Next, Cintra argues the responsive information is excepted under section 552.110 of the Government Code.<sup>3</sup> Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov’t Code § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of 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

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<sup>3</sup>Although Cintra also raises section 552.101 of the Government Code in conjunction with section 552.110 of the Government Code, we note section 552.101 does not encompass other exceptions in the Act.

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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). 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.<sup>4</sup> This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5* (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. *Open Records Decision No. 402* (1983).

Section 552.110(b) of the Government Code 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. *Id.*; *see also Open Records Decision No. 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).

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<sup>4</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];
- (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 Open Records Decision Nos. 319 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

Cintra contends the responsive information consists of commercial or financial information, the release of which would cause the company substantial competitive harm. As noted above, Cintra states the ISLA represents the private financing arrangements developed by Cintra for the project. Cintra explains that during the proposal process for the project, “[e]ach developer’s creativity with regard to the financing aspect was the most critical and differentiating factor in the process” and Cintra’s “unique arrangement was achievable solely due to financing methods developed by Cintra and Cintra’s long-standing and mature relationships with a variety of banks.” Cintra further explains that the ISLA details not only “the project financial model and processes used by Cintra in its global business” but also its “heavily negotiated financing terms developed over a number of years in conjunction with the lenders with whom Cintra has established relationships.” Cintra argues “[i]f a competitor had access to the [ISLA], it would allow the competitor to replicate Cintra’s unique and proprietary method of financing projects for use in the procurement of other transportation projects.” Cintra states it is currently engaged in the procurement process for such projects, which involve a small group of competitors. Based on these representations and our review, we find Cintra has established most of the responsive information consists of commercial or financial information, the release of which would cause the company substantial competitive injury. However, we find Cintra has failed to make the specific factual or evidentiary showing required by section 552.110(b) that release of Annex D to the ISLA, which consists of the FCA and is available on the department’s website, would cause the company substantial competitive harm. Accordingly, the department may not withhold Annex D under section 552.110(b). With the exception of Annex D, the department must withhold the responsive information under section 552.110(b) of the Government Code.<sup>5</sup>

Upon review, we find Cintra has failed to demonstrate the remaining responsive information meets the definition of a trade secret, nor has it demonstrated the necessary factors to establish a trade secret claim for this information. Accordingly, the department may not withhold the remaining responsive information on the basis of section 552.110(a) of the Government Code.

We note some of the remaining information may 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. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; see Open Records Decision No. 109 (1975). 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.

In summary, with the exception of Annex D of the ISLA, the department must withhold the responsive information under section 552.110(b) of the Government Code. The department

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<sup>5</sup>As our ruling is dispositive for this information, we need not address Cintra’s remaining arguments against its disclosure.

must release Annex D; however, the department may only release any information subject to copyright in accordance with copyright law.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Kristi L. Wilkins  
Assistant Attorney General  
Open Records Division

KLW/tch

Ref: ID# 525136

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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