



**Office of the Attorney General  
State of Texas**

**DAN MORALES**  
ATTORNEY GENERAL

January 31, 1994

Ms. Barbara Stephen  
Contracts Manager  
Collin County  
Office of the County Purchasing Agent  
McKinney, Texas 75069

OR94-035

Dear Ms. Stephen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code.<sup>1</sup> Your request was assigned ID# 21990.

Collin County (the "county") received an open records request for certain information pertaining to the county's Request for Proposals [RFP] for an "800 Mhz Trunked Radio Project." Specifically, the requestor seeks the following:

1. All non-proprietary information submitted by Motorola to Collin County in response to the above listed Request For Proposals, including all pricing information submitted with Motorola's initial proposal and best and final offer;
2. The evaluation plan, if any, utilized by the County which reviewed and evaluated the proposals and best and final offers submitted by Motorola and EGE [Ericsson GE Mobile Communications Inc.] in response to the above-referenced RFP.
3. All notes, records, memoranda and other written information prepared and/or utilized by Collin County in evaluating and scoring

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<sup>1</sup>The Seventy-third Legislature repealed the Open Records Act as formerly codified, article 6252-17a, V.T.C.S. (1925), and adopted it without substantive change as chapter 552 of the Government Code. Acts 1993, 73d Leg., ch. 268, §§ 1, 46, 47.

the proposals and best and final offers submitted by Motorola and EGE, including but not limited to, the evaluation sheets used to record the technical notes, comments and scores awarded by the Evaluation committee; and

4. The final executed contract document.

You do not contend that any of the requested records are protected from required public disclosure, but have requested an open records decision pursuant to section 552.305 of the Government Code (former section 7(c), V.T.C.S. article 6252-17a) with regard to items 1-3 above (hereinafter "the proposal information"). You have accordingly informed representatives of Motorola of the open records request for this information and Motorola has submitted to this office its objections to the public disclosure of the proposal information, which Motorola claims is protected by sections 552.101, 552.104, and 552.110 of the Government Code (former sections 3(a)(1), 3(a)(4), and 3(a)(10), V.T.C.S. article 6252-17a).

As an initial matter, Motorola states that:

it is our understanding that the only documents under consideration for production are those documents provided to us, and . . . [the Office of the Attorney General], by Barbara Stephens, Contracts Manager of Office of County Purchasing Agent, under cover letter dated August 23, 1993. To the extent other documents exist, and are in the possession of Collin County, we assume such documents will not be produced insofar as Motorola has not had an opportunity to review them. Motorola reserves its right to object to the release of other documents which have not been provided to us. If such other documents exist, Motorola requests an opportunity to review and respond accordingly.

Section 552.305(a) of the Government Code provides:

In a case in which information is requested under this chapter and a third party's privacy or property interests may be involved, . . . a governmental body *may* decline to release the information for the purpose of requesting an attorney general decision. [Emphasis added.]

Thus, a governmental body that receives an open records request is authorized to make the initial decision whether to release or withhold the requested information. If the county possesses records that come within the ambit of the request but, in the county's best belief, do not contain proprietary information, it is within the county's discretion to

release those records to the public without first requesting an open records decision from this office. *But see* Open Records Decision No. 575 (1990) at 4 (if a third party's property or privacy interest may be injured by disclosure, governmental body is advised to use former section 7(c) procedure, now section 552.305(a)).

We now turn to Motorola's objections to the public disclosure of the proposal information. Motorola first contends that these documents are made confidential in their entirety by section 262.030 of the Local Government Code and thus come under the protection of section 552.101 of the Open Records Act. Section 262.030 of the Local Government Code authorizes counties to use a competitive proposal procedure to purchase insurance or "high technology items."<sup>2</sup> Section 262.030(b) of the code provides:

If provided in the request for proposals, proposals shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, *except for trade secrets and confidential information contained in the proposals and identified as such.* [Emphasis added.]

Motorola contends that, since all of the documents are identified as confidential, they are all exempt from disclosure pursuant to section 262.030(b) of the Local Government Code and section 552.101 of the Government Code. Motorola apparently reads the exception in section 262.030(b) as authorizing it to make information confidential merely by identifying it as confidential. We believe that this is a strained reading of section 262.030(b). The exception applies to "trade secrets" and "confidential information" that are "contained in the proposals and identified as such." Thus, the information must be confidential according to some source of law other than section 262.030(b).

Moreover, a similar provision applicable to cities makes it clear that information does not become "confidential information" merely by declaration of the offeror of a proposal. Section 252.049 of the Local Government Code provides as follows:

If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, *but trade*

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<sup>2</sup>A "high technology item" is "a service, equipment, or good of a highly technical nature, including . . . telecommunications, radio, and microwaves systems." Local Gov't Code § 262.022(3)(B).

*secrets and confidential information in the proposals are not open for public inspection.* [Emphasis added.]

This provision, which protects the same kinds of information as does section 262.030, does not require the offeror to identify the trade secrets or confidential information. The initial versions of both section 252.049 and section 262.030 of the Local Government were adopted by the same legislature, by bills that addressed the bidding procedures of cities and counties. Acts 1985, 69th Leg., ch. 505 (Senate Bill 802, applicable to cities), ch. 641 (Senate Bill 807, applicable to counties). Certain competitive bidding provisions of each bill were made contingent on the adoption or non-adoption of provisions of the other bill. *Id.* ch. 505, §§ 4, 5; ch. 641, § 12. Because section 252.049(b) and section 262.030(b) relate to the same subject matter and were adopted at the same session of the legislature, they are statutes in pari materia, and they will be read together. *See Garrett v. Mercantile Nat. Bank at Dallas*, 168 S.W.2d 636 (Tex. 1943). Section 262.030(b) does not by itself accord confidentiality to any information, but rather only acknowledges that "trade secrets" or other information made confidential by *other* law must be withheld, unless the company submitting the information waives such confidentiality by not identifying it as confidential. Because the county has awarded the contract for the radio system, Motorola's proposals are now open for public inspection except for information that is 1) a trade secret or is otherwise confidential information and 2) has been identified by Motorola as such. Motorola claims that various exceptions in the Open Records Act apply to the documents, but it has not raised any other provisions of law that would accord confidentiality to its proposals, nor are we aware of any.

Motorola contends that section 552.104 of the Government Code, formerly section 3(a)(4) of article 6252-17a, V.T.C.S., protects its proposals from public disclosure. Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the government's interests when it is involved in commercial transactions, *see, e.g.*, Open Records Decision Nos. 593 (1991); 463 (1987), and not to protect the interests of business entities that compete in the private sector. Moreover, under section 552.305 of the Government Code, private entities may assert only their own interests in the non-disclosure of information. Consequently, Motorola lacks standing to assert the protection of this section on behalf of Collin County. *See* Open Records Decision No. 541 (1990) at 5.

Finally, we address Motorola's contentions regarding section 552.110 of the Government Code, formerly section 3(a)(10) of article 6252-17a, V.T.C.S. Section 552.110 excepts from required public disclosure:

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision . . . .

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. Motorola contends that the proposal information constitutes trade secrets that must be withheld under section 552.110. 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.

*Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958) (quoting RESTATEMENT OF TORTS, § 757 cmt. b (1939)); *see also* Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978). There are six factors to be assessed in determining whether information qualifies as a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 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 to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 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 No. 232. This office must accept a claim that information is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is provided we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

Although Motorola generally contends that the proposal information constitutes trade secret information in its entirety, Motorola has demonstrated how the six factors listed above apply to only certain specified portions of the information. We have marked those sections of the proposal information that constitute trade secrets and thus come under the protection of section 552.110.<sup>3</sup> The county must release all remaining portions of the requested information to the requestor.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Susan L. Garrison  
Assistant Attorney General  
Open Government Section

SG/RWP/rho

Ref: ID# 21990  
ID# 22029  
ID# 22380  
ID# 22634  
ID# 22688

Enclosures: Submitted documents

cc: Mr. Don Bath  
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(w/o enclosures)

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<sup>3</sup>We note that Motorola contends that information revealing its pricing proposals constitute trade secrets. In Open Records Decision No. 306 (1982), this office held that while technical material which relates to the substance of a proposal is generally excepted from disclosure by former section 3(a)(10), now section 552.110, pricing proposals are not. *See also* Gov't Code § 552.022(3) (information in any contract dealing with the expenditure of public funds by governmental bodies is public information).

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