



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 31, 1994

Ms. Suzanne Schwartz
General Counsel
Texas Water Development Board
P.O. Box 13231
Austin, Texas 78711-3231

OR94-159

Dear Mr. Schwartz:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552. We assigned your request ID# 23118.

The Texas Water Development Board (the "board") has received a request for certain information submitted to the board in response to a request for proposals. Specifically, the requestor seeks "the criteria used to evaluate the proposals and . . . copies of the proposals that were submitted by" 19 specified companies. You do not object to release of some of the requested information, namely, the criteria used to evaluate the proposals. You object, however, to release of the remaining information, which you have submitted to us for review. You seek to withhold the submitted information under sections 552.104 and 552.110 of the act.

We first address your claim that section 552.104 excepts the requested information from required public disclosure. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to prevent one competitor or bidder from gaining an unfair advantage over others. Open Records Decision No. 541 (1990). Ordinarily, section 552.104 may not be claimed to protect a governmental body's "competitive advantage" because it cannot be regarded as being in competition with private enterprise. Open Records Decision No. 463 (1987). *But see* Open Records Decision No. 593 (1991) (holding that the Teacher Retirement System may be deemed to be a "competitor" in the marketplace for purposes of section 552.104 because it is authorized by law to invest in securities). Section 552.104 may protect information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. Open Records Decision Nos. 593 at 2; 541 at 4; 463.

You advise us that the competitive bidding situation at issue here has been concluded. You nonetheless seek to withhold the requested information under section 552.104, claiming that its release will undermine the board's efforts to solicit future bids. You have not demonstrated, however, how release of the requested information will cause potential harm to the board's interests in a *particular* competitive situation. Accordingly, we conclude that you may not withhold the requested information under section 552.104 of the act.

Next we address the applicability of section 552.110 of the act. Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Pursuant to section 552.305 of the Government Code, we have notified the parties whose proprietary interests are implicated by this request. Collectively, the respondents claim that the information submitted to us for review constitutes "trade secrets" and "commercial or financial information." We first address the "trade secrets" branch of section 552.110.

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, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. 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 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, . . . [but] 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. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" 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 one

submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.¹

We have examined the information and arguments submitted to us for review. We conclude that none of the respondents has made a *prima facie* case that the requested information constitutes trade secrets. Accordingly, we conclude that the requested information may not be withheld from required public disclosure under the trade secrets branch of section 552.110 of the act.

Next, we address the "commercial or financial information" branch of section 552.110. "Commercial or financial information" may be withheld from required public disclosure under section 552.110 if it is privileged or confidential by statute or judicial decision. Neither the board nor the respondents has cited any statute or judicial decision as authority that makes the requested information privileged or confidential, nor is this office aware of any such law. Accordingly, we conclude that the requested information may not be withheld from required public disclosure under section 552.110 of the act and must be released in its entirety.

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 this office.

Yours very truly,



Susan Garrison
Assistant Attorney General
Open Government Section

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

- (1) the extent to which the information is known outside of [the company];
- (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, 306 at 2 (1982); 255 (1980) at 2. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2.

SLG/GCK/rho

Ref.: ID# 23118
ID# 23367
ID# 23373
ID# 23383
ID# 23522
ID# 23556
ID# 23764
ID# 23830
ID# 23920
ID# 23921
ID# 24139

cc: Mr. Robert G. Rodriguez
President
Southwestern Capital Markets, Inc.
1100 N.W. Loop 410, Suite 613
San Antonio, Texas 78213
(w/o enclosures)

Attn: Ms. Suzanne Hickey
Vice President
Artemis Capital Group, Inc.
1445 Ross Avenue, Suite 3500
Dallas, Texas 75201
(w/o enclosures)

Attn: Ms. Robbie J. Jones
Sr. Vice President, Investment Banking
Berean Capital, Inc.
3050 Post Oak Boulevard, Suite 400
Houston, Texas 77056
(w/o enclosures)

Attn: Mr. Riley Simmons, II
Vice President, Public Finance
Chapman Company
12001 North Central Expressway, Suite 520
Dallas, Texas 75243
(w/o enclosures)

Attn: Mr. Robert A. Estrada
Estrada Hinojosa & Company, Inc.
Bank One Center
1717 Main Street
4th Floor, LB-47
Dallas, Texas 75201-4605
(w/o enclosures)

Attn: Mr. Barry L. Friedman
Friedman, Luzatto & Company
14755 Preston Road, Suite 424
Dallas, Texas 75240
(w/o enclosures)

Attn: Ms. Rebecca J. Heflin
Grigsby Brandford & Company
4140 Office Parkway
Dallas, Texas 75204
(w/o enclosures)

Attn: Mr. Leopoldo E. Guzman
Guzman & Company
701 Brickell Avenue, 11th Floor
Miami, Florida 33131-2822
(w/o enclosures)

Attn: Mr. Howard V. Gary
Howard Gary & Company
3050 Biscayne Boulevard, Suite 603
Miami, Florida 33137-4163
(w/o enclosures)

Attn: Mr. Bernard B. Beal
CEO
M.R. Beal & Company
366 Madison Avenue, 5th Floor
New York, New York 10017-3122
(w/o enclosures)

Attn: Ms. Muriel Siebert
Muriel Siebert & Company, Inc.
444 Madison Avenue
New York, New York 10022
(w/o enclosures)

Attn: Mr. Les Browne
Pryor, McClendon, Counts & Company, Inc.
210 West Sixth Street, Suite 704
Fort Worth, Texas 76102
(w/o enclosures)

Attn: Mr. Steven A. White
Reinoso & Company, Inc.
30 Broad Street
New York, New York 10004-2304
(w/o enclosures)

Attn: Ms. Colleen Dwyer
Samuel A. Ramirez & Company, Inc.
61 Broadway
New York, New York 10006
(w/o enclosures)

Attn: Ms. Tracy A. Silverstone
Smith Mitchell Investment Group, Inc.
1901 Avenue of the Stars, Suite 615
Los Angeles, California 90067
(w/o enclosures)

Attn: Mr. Anthony Bullett
Sturdivant & Company
223 Gibbsboro Road
Clementon, New Jersey 08021
(w/o enclosures)

Attn: Mr. Thomas M. Mead, Jr.
W.R. Lazard, Laidlaw & Mead, Inc.
14 Wall Street, 18th Floor
New York, New York 10005-2101
(w/o enclosures)

Attn: Mr. Alfred Johnson
Walton, Johnson & Company
2911 Turtle Creek Boulevard, Suite 1140
Dallas, Texas 75219-6241
(w/o enclosures)

Attn: Mr. Byron Johnson
Ward Bradford & Company
191 Peachtree Street, Suite 3560
Atlanta, Georgia 30303
(w/o enclosures)

Attn: Mr. Tifton Simmons
William E. Simon & Sons Municipal Securities
599 Lexington Avenue, 29th Floor
New York, New York 10022
(w/o enclosures)