



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 16, 1994

Mr. Michael J. Cosentino
Deputy City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR94-440

Dear Mr. Cosentino:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 26149.

The City of Austin (the "city") has received a request for all applications and qualifying questionnaires filed with the city for the fiber optic competitive access services franchise. The city asserts that one of the applicants, Metro Access Networks, Inc., objects to the release of portions of its application because it considers this information proprietary or confidential. Thus, you ask us to determine whether this information is excepted from required public disclosure under section 552.110. The company also asserts that the information is excepted from disclosure under sections 552.101, 552.104 and 552.105, exceptions not raised by the city.

Section 552.110 protects trade secrets from required public disclosure. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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. . . . A trade

secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

(1) the extent to which the information is known out side 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 the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. See Open Records Decision No. 552 (1990) at 5.

The company asserts that responses 5, 7, 12-15, 17 and 18 constitute a trade secret for the following reasons:

Responses 5 and 7 contain a map showing the proposed location of Metro Access' proposed cable route This route is based upon Metro Access' analysis of Austin and Austin's telecommunication market needs. Such information and analysis are the result of extensive effort and expense by Metro Access, and are, therefore, carefully protected. Disclosure to a competitor would allow the competitor to easily, but unfairly, acquire information which such competitor could otherwise only acquire properly through doing their own study and analysis of the Austin Market.

Response 12 contains Metro Access' strategic plans with respect to services for which it has determined it can successfully market to Austin-area customers. This confidential information is specific and highly technical, and is of substantial value to Metro Access, as it would be to competitors.

Response 13 identifies the specific industry groups which Metro Access has identified as having need for these types of telecommunication services, based upon its thorough evaluation of the Austin market. This confidential information is of significant value both to Metro Access and its competitors. Such competitors would have to expend the same amount of costly resources expended by Metro Access in its market analysis in order to properly acquire this information.

Response 14, including Exhibit B, includes a summary of a confidential analysis of the incremental costs for channel termination and mileage. Metro Access invested significant resources in developing this analysis, and it of value to Metro Access, as it would be to a competitor, who would otherwise have to develop such an analysis independently and at significant expense.

Response 15 details the results of Metro Access' financial analysis and feasibility study of the Austin market. The Response includes revenue and expense estimates, as well as estimated capital requirements. As stated in the Response itself, disclosure of this information would adversely affect Metro Access by giving advantage to competitors. This highly confidential information should not be disclosed.

Response 17 contains information regarding Metro Access long-term strategies in this rapidly developing new market. In a volatile and highly competitive atmosphere such as today's telecommunication markets, the companies that correctly identify and respond to trends and changes will be the ones to survive. This Response contains the strategic thinking of Metro Access' experts in this industry. This is confidential information [that was] gathered at substantial expense, and is therefore of great value both to Metro Access and its competitors. Expensive efforts, such as retaining telecommunications consultants, would be required for others to properly acquire this confidential information. . . .

Finally, Response 18 details the performance standards which Metro Access proposed to offer its customers. This confidential information about Metro Access' system which is not known outside the business and not widely known within the company. This technical information about the capabilities of Metro Access' system could not be properly acquired by its competitors. . . .

With the exception of response 13, we conclude that the company has established a prima facie case that these responses constitute a trade secret and that its assertions have not been rebutted as a matter of law. *See* Open Records Decision No. 552 at 5. Response 13, however, contains such general information that we cannot accept, without further explanation, that "competitors would have to expend the same amount of costly resources expended by Metro Access in its market analysis in order to properly acquire this information." Thus, we conclude that the company has not established a prima facie case that response 13 constitutes a trade secret. Therefore, with the exception of response 13, the foregoing responses must be withheld under section 552.110 of the act. Response 13 must be released with the remainder of the application.¹

If you have questions about this ruling, please contact our office.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/SLG/rho

Ref.: ID# 26149

Enclosures: Submitted documents

cc: Mr. Jerald W. Epps
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(w/o enclosures)

¹It is not clear whether the act permits an entity, other than the governmental body that has received a request, to raise sections 552.104 and 552.105 if they have not been not raised by the governmental body. *See* Gov't Code § 552.305; Open Records Decision No. 542 (1990). Of course, this office will raise section 552.101 if a governmental body fails to do so. Open Records Decision No. 325 (1982). We note, however, that the very general information contained in response 13 would not be excepted from required public disclosure under these provisions. As noted above, the company has not demonstrated that response 13 is a trade secret or otherwise confidential under law. Section 552.104 and section 552.015 protect the interests of governmental bodies, not the interests of private parties. *See* Open Records Decision Nos. 592 (1991); 564 (1990). There is no suggestion that the release of response 13 would affect the city's interests.

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(w/o enclosures)