



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 21, 1995

Mr. Edward H. Perry  
Assistant City Attorney  
City of Dallas  
City Hall  
Dallas, Texas 75201

OR95-965

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 31912.

The City of Dallas (the "city") received several requests under the Open Records Act for proposals submitted to it by Texas Sports Partners, Ltd. (TSP), and Sonic Financial Corporation for the construction of a motor speedway. The city claims that the requested information is excepted from required public disclosure by sections 552.104 and 552.110 of the Open Records Act, and TSP has submitted a brief claiming that those provisions except their proposal from disclosure.

Section 552.104 protects a governmental body's purchasing interests by preventing a competitor or bidder from gaining an unfair advantage over other competitors or bidders for the same governmental contract. Open Records Decision No. 541 (1990) at 4. It requires a showing of some specific actual or potential harm in a particular competitive situation. Open Records Decision Nos. 593 (1991), 541 (1990), 232 (1979). Where only one person is seeking a contract from a governmental body, there are no "competitors" for purposes of section 552.104, and the governmental body may not claim the exception. Open Records Decision No. 331 (1982).

Sonic Financial Corporation has withdrawn its proposal, and now only one proposal, the one submitted by TSP, remains under consideration by the City of Dallas. The briefs argue that the North Central Texas area probably cannot support two motor speedway tracks, and that Dallas is in competition with Fort Worth and possibly other cities to be the site of the motor speedway. Thus, the City of Dallas does not seek to

preserve competition among bidders for a contract it plans to award. Instead, Dallas argues that it is in competition with Fort Worth and other cities in North Central Texas to locate the motor speedway within its boundaries. Although this office has concluded that a governmental body may under some limited circumstances claim section 552.104 of the Government Code when in competition with private entities, we are aware of no authority providing that section 552.104 applies where one governmental body competes with another to secure a particular facility in its area. *See generally* Open Records Decision Nos. 604 (1992), 593 (1991) (limited circumstances under which a governmental body may claim section 552.104 to protect its position in competition with private entity). Neither the City of Dallas nor TSP has brought any such authority to our attention. Section 552.104 of the Government Code does not permit you to withhold the requested information.

We next address the argument under section 552.110 of the Government Code, which protects from disclosure “[a] trade secret . . . obtained from a person and privileged or confidential by statute or judicial decision.” We accept a private person’s claim for exception as valid under the trade secret branch of section 552.110 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 (1990) at 5; *see* Open Records Decision No. 542 (1990) (under former section 7(c) of article 6252-17a, V.T.C.S., now section 552.305 of the Government Code, governmental body may rely on third party to show why information is excepted from disclosure). Accordingly, we wrote to TSP and Sonic Financial Corporation, informing them of their responsibility to identify exceptions that applied to their information and to explain why the exception applied. We received no response from Sonic Financial Corporation. Its proposal is therefore open to the public. *See* Open Records Decision No. 363 (1983) (duty to establish how and why an exception protects particular information).

TSP has submitted a brief claiming that its proposal<sup>1</sup> is a trade secret within section 552.110 of the Government Code. The Texas Supreme Court has adopted the definition of the term “trade secret” from the Restatement of Torts, section 757 (1939), 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. . . .

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<sup>1</sup>It states that the proposal includes information about cost, location, financial return to the city, neighborhood acceptance and environmental impact.

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 or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939);<sup>2</sup> *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

TSP has not shown that the proposal it submitted to Dallas consists of "any formula, pattern, device or compilation of information which is used in one's business." Its proposal consists of information relevant to the specific project it wishes to undertake. The brief does not identify any formula or body of information that is used repeatedly by TSP. Accordingly, it has not shown that section 552.110 applies to the proposal. The information may not be withheld under section 552.110 and must be released to the requestors.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Susan L. Garrison  
Assistant Attorney General  
Open Records Division

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<sup>2</sup>The 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'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 [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, *supra*, *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

SLG/rho

Ref.: ID# 31912

Enclosures: Submitted documents

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