



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 4, 1995

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

OR95-1350

Dear Mr. Cosentino:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 28218.

The City of Austin (the "city") received a request for all papers submitted to the City of Austin in response to the city's "Request for Information: Telecommunications Infrastructure," RFI number LI94300204. You claim that the city has released some of the requested information. However, the city claims that the remainder of the requested information is excepted from disclosure under sections 552.102, 552.110, and 552.106 of the Government Code. You state that some of the companies who submitted proposals in response to the request for information considered them to be confidential.<sup>1</sup> You therefore conclude that the companies may claim that the requested information is excepted from disclosure under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, this office informed these companies of the request and of their obligation to claim the exceptions to disclosure they believe apply to the requested information, together with their arguments as to why they believe the claimed exceptions apply. Two of the companies, Alexander Utility Engineering and American Communications, did not respond. The remaining three companies, Fincher, Inc. ("Fincher"), MFS-Network Technologies ("MFS"), and InfoStructure ("InfoStructure"), responded, claiming that sections 552.104 and 552.110 of the Government Code except their proposals, either in whole or in part, from disclosure. We

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<sup>1</sup>We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.,* Open Records Decision No. 180 (1977).

have considered the exceptions you and these three companies claimed and have reviewed the documents at issue.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Found. v. Texas Indust. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), cert. denied, 430 U.S. 931 (1977) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the act. None of the submitted information appears to be information from a government employee's personnel file. Therefore, section 552.102 does not except any of the requested information from disclosure.

Fincher, MFS, and InfoStructure claim that section 552.104 excepts their proposals or parts thereof from disclosure. Section 552.104 excepts from disclosure information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 (1991), 463 (1987), 453 (1986). As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. See Open Records Decision No. 592 (1991) at 8. The governmental body here, the city, did not claim that section 552.104 excepts any of the requested information from disclosure. Further, the city did not claim any specific harm in a particular competitive situation. Therefore, the city may not withhold the requested information under section 552.104.

Section 552.110 excepts from disclosure (1) trade secrets, and (2) financial information obtained from a person and confidential by statute or judicial decision. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, 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 . . . . 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 Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). 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 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 (1990) at 5.<sup>2</sup>

Although InfoStructure contends that its proposal contains trade secrets, it has not made a *prima facie* case that its information is a trade secret. Therefore, the city may not withhold InfoStructure’s proposal under the trade secret portion of section 552.110. Fincher contends that sections I, II, and IV of its proposal are trade secrets. We conclude that Fincher has made a *prima facie* case that sections II and IV of the proposal contain trade secrets. Therefore, the city must withhold these sections. We conclude that section I, the introduction, does not contain “formula[e], pattern[s], device[s] or [a] compilation of information” set out in the Restatement’s definition of a trade secret. Therefore, the city may not withhold section I of InfoStructure’s proposal.

MFS claims that section 1B.2, including exhibits B-3.1 and B-3.2, sections 1C-D, 2A, 2B1, 2B2, 2B3, 2C, 2D, 2E, and exhibit B.3-1 of its proposal are trade secrets. With the exception of the identities of customers, exhibits B-3.1 and B-3.2, and a portion of section 1B.2, we conclude that the proposal does not contain trade secrets. Most of the information does not fall within the definition of a trade secret: it is not a “process or device for continuous use in the operation of the business.” Rather, the information is related to a “single or ephemeral event:” the possible construction of a telecommunications network for the city. Similarly, information regarding the company’s financial status, its employees, and past projects is not a trade secret for this same reason. Therefore, with the exception of information that identifies MFS’s customers and the other technical information we have marked in the proposal, the city may not withhold MFS’s proposal under the first part of section 552.110.

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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]; (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 also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

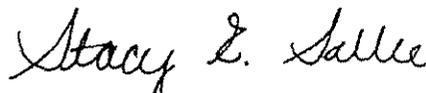
Fincher asserts that sections III, VI, VII, VIII, and IX of its proposal are commercial or financial information that is excepted from disclosure under the second part of section 552.110. Similarly, MFS claims that the portions of its proposal it seeks to withhold are also excepted under the second prong of section 552.110. To fall within the second part of section 552.110, the information must be made confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. As neither Fincher nor MFS has demonstrated that a statute or judicial decision excepts this information from disclosure other than those parts of the proposals that we have concluded are trade secrets, this information is not excepted by the second part of section 552.110 of the Government Code.

The city claims that fifteen of the requested proposals are excepted under section 552.106. Section 552.106 protects drafts and working papers involved in the preparation of proposed legislation. The purpose of the exception is similar to that of section 552.111: to encourage frank discussion on policy matters between the subordinates or advisors of a legislative body and the legislative body and to thereby protect the internal "deliberative" or policy-making processes of a governmental body. Open Records Decision No. 460 (1987). Section 552.106 does not except purely factual material; rather, it excepts only policy judgments, recommendations, and proposals involved in the preparation of proposed legislation. Section 552.106 applies only to drafts and working papers prepared by persons with some official responsibility to prepare them for the legislative body. *Id.*

In this instance, the proposals were submitted by persons who do not have an official responsibility to prepare them for the legislative body. The information was prepared by outside companies in the hopes of possible participation in a future bidding process. See Open Records Decision No. 429 (1985). Therefore, the city may not withhold any of the proposals under section 552.106.

In summary, the city must withhold sections II and IV of Fincher's proposal and the marked portions of MFS's proposal under section 552.110. The city may not withhold the remainder of the requested information. 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,



Stacy E. Sallee  
Assistant Attorney General  
Open Records Division

Ref.: ID# 28218

Enclosures: Marked documents

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