



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 18, 1996

Ms. Ylise Janssen  
Corpus Christi Independent School District  
801 Leopard  
P. O. Drawer 110  
Corpus Christi, Texas 78403-0110

OR96-1177

Dear Ms. Janssen:

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# 40388.

The Corpus Christi Independent School District (the "district") received a request for four categories of information relating to the district's Energy Conservation and Operational Efficiency Program and the selection of Control Systems International ("CSI") for implementation of the program. You indicate that you have provided to the requestor the first three categories of the requested information. However, you contend that the records requested in category 4, which relate to CSI's proposal to the district, are excepted from required public disclosure. You submitted a copy of the requested information to this office and assert that this information is excepted from required public disclosure pursuant to sections 552.104 and 552.110 of the Government Code.

The district asserts that the requested information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104 protects from required public disclosure "information which, if released, would give advantage to competitors or bidders." This exception to disclosure protects a governmental body's interest, does not make information "confidential," and may be waived by a governmental body. Open Records Decision No. 592 (1991) at 8. The purpose of this exception is to protect the purchasing interests of a governmental body, usually in competitive bidding situations prior to the awarding of a contract.<sup>1</sup> Open Records Decision No. 593 (1991) at 2.

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<sup>1</sup> Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. See Open Records Decision No. 592 (1991).

Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision 541 (1990) at 4.

Although governmental bodies that properly raise this exception may withhold bidding information while the governmental officials are in the process of evaluating the proposals, section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect. Open Records Decision Nos. 306 (1982), 184 (1978). In your letter to this office, it appears that a proposal has been selected and a contract has been or will soon be executed. Based on this information, we find that the district has no valid section 552.104 claim and may not withhold any of the requested information under this exception.

In addition to section 552.104, you assert that it is "[t]he District's position this [requested] information is proprietary information," and excepted from disclosure under section 552.110 of the Government Code. Because section 552.110 may require you to withhold this information beyond the date that the contract is awarded, we still must address this exception.

Section 552.110 of the Government Code excepts from disclosure:

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

You indicate that the district notified CSI of the request for information and solicited arguments regarding whether the information requested is confidential. Pursuant to section 552.305, we also notified CSI whose proprietary interests may be implicated by this request. See Gov't Code § 552.305; Open Records Decision No. 542 (1990). CSI responded, arguing that its proposal is excepted from disclosure under section 552.110 of the Government Code. Thus, we will consider whether CSI has established that the requested information is excepted from disclosure under section 552.110.

Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately. 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 third party claim that information is excepted from disclosure if that party establishes a prima facie case that the information is a trade secret and no one submits an argument that rebuts the claim as a matter of law.<sup>2</sup> Open Records Decision No. 552 (1990) at 5.

We conclude that CSI has failed to establish that its proposal constitutes a trade secret, since it failed to adequately address the Restatement’s six trade secret factors. Accordingly, the proposal may not be withheld under the trade secret portion of section 552.110.

To fall within the second part of section 552.110, the information must be commercial or financial information obtained from a person and made privileged or confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. In Open Records Decision No. 639 (1996), the Attorney General held that the case of *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which interprets exemption four of the federal Freedom of Information Act (“FOIA), is a “judicial decision” for purposes of section 552.110.<sup>3</sup> Consequently, if a governmental body or other entity can meet the test established in *National Parks* for protection under exemption four, the information may be withheld from disclosure.

Commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from

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

<sup>3</sup>Therefore, when applying the “commercial or financial information” branch of section 552.110, this office follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *Id.*

whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). To establish that the public release of information is likely to cause substantial competitive harm, a business must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *See Open Records Decision No. 639* (1996) at 4 (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985)).

We have reviewed CSI's arguments under section 552.110 as well as the submitted documents. CSI asserts that "[o]ur industry is a very competitive one and the release of this information would most certainly effect [sic] our future success," however, the arguments made are general and conclusory. We believe that CSI has failed to establish that substantial harm to its competitive position could result from the release of the information in its proposal to the district. Consequently, we conclude that CSI may not withhold the information under section 552.110 of the Government Code.

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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/ch

Ref.: ID# 40388

Enclosures: Submitted documents

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