



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 18, 1996

Ms. Sandra Hatchem  
Harris County  
101 Preston, Suite 634  
Houston, Texas 77002-1891

OR96-1716

Dear Ms. Hatchem:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100657.

Harris County (the "county") received requests for information related to a request for proposal. You state that contracts were awarded to three vendors. The requestor asked for information concerning the proposals submitted, including copies of the winning contractors' proposals and pricing matrices. You indicate that the majority of information was provided to the requestor. However, the county withheld some of the information at issue because the companies submitting the information marked it as confidential. You assert that the information at issue is excepted from disclosure pursuant to section 262.030(c) of the Local Government Code and section 552.110 of the Government Code.

Section 262.030(c) of the Local Government Code provides, in pertinent part, that submitted proposals "shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such." Section 552.110 of the Government Code provides an exception from disclosure for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." You identified two companies as having information that might be protected from disclosure. As provided by section 552.305, this office provided those companies the opportunity to submit reasons as to why the information at issue should be withheld from disclosure.

One of the companies, EarthQuest Research, Inc. ("EarthQuest") did not submit reasons as to why information in their proposal should be withheld from disclosure. Thus, this office has no basis on which to conclude that the EarthQuest information at issue is protected from disclosure as a trade secret or as confidential commercial or financial information. *See* Open Records Decision No. 363 (1983) (third party duty to establish how and why trade secret exception protects particular information); *see also* Open Records Decision No. 639 (1996) (regarding showing that must be made for confidentiality of commercial or financial information).

The other company, Community Education Partners, LLC ("Community Education") argued that sections 552.104 and 552.110 of the Government Code except from disclosure certain portions of their proposal. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a *governmental body's interests* in a particular commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, generally neither the contract nor information submitted with a bid is excepted under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5. As the county has awarded contracts and told this office that section 552.104 is inapplicable in this situation, the Community Education proposal is not excepted from disclosure pursuant to section 552.104.

Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure if a *prima facie* case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). 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. . . . 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); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner's business]; (2) the extent to which it is known by employees and others involved in [the owner's] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be property acquired or duplicated by others.

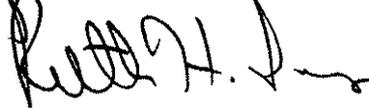
*Id.*; *see also* Open Records Decision No. 522 (1989).

Community Education has met its burden of showing that most of the information in the executive summary, pages 3 through 5, and that all of the information in section D of its proposal, pages 28 through 52, and in questionnaires 2B and 3 of Attachment A, pages 16 and 20 through 24, are trade secrets. We have marked several paragraphs in the executive summary portion that is not the type of information that would be protected under section 552.110 as a trade secret.

Neither is the marked information protected from disclosure as commercial or financial information. To show that information is protected commercial or financial information, a company must show that disclosure is likely to either impair the governmental body's ability to obtain information in the future or that it will cause substantial harm to the competitive position of the company. Open Records Decision No. 639 (1996). "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted), "the party seeking to prevent disclosure 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." Except for the marked paragraphs, you must withhold from disclosure the information Community Education asserts is excepted from disclosure under section 552.110. The county must withhold the remaining portions of the executive summary, section D, and questionnaires 2B and 3 of Attachment A.

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Ruth H. Soucy", with a horizontal line extending to the right.

Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 100657

Enclosures: Submitted documents

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