



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 11, 1996

Ms. Cathy Cunningham
Senior Assistant City Attorney
City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

OR96-2361

Dear Ms. Cunningham:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 36546.

The City of Irving (the "city") received a request for information relating to a request for proposals relating to a "Radio System Upgrade," No. 226-95F. The city claims that certain requested information is excepted from disclosure under section 552.108. You state that third parties may have an interest in this information. Therefore, pursuant to section 552.305 of the Government Code, this office informed the companies whose information was requested of the request and of their obligation to submit to this office arguments as to why any claimed exceptions to disclosure apply to their information. We received responses from Trott Communications Group ("Trott"), Ericsson, Inc. ("Ericsson"), and Metroplex Mobile Data, Inc. ("Metroplex"). All of these companies claimed that section 552.110 of the Government Code applies either to all or portions of their proposals.

Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision. Ericsson argues that portions of its proposal are protected under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, 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." *Sharyland Water Supply Corp. v. Block*, 755

F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

We have reviewed Ericsson's documents and arguments and conclude that the city must withhold the information outlined on Exhibit "A" hereto under the second prong of section 552.110. We have reviewed Metroplex's arguments and conclude that the city must withhold the following information within Metroplex's submitted materials, E0460-E0662, under the second prong of section 552.110: components of Metroplex's system, the configuration of Metroplex's system, including diagrams of the system and specifications of the system, prices or costs of Metroplex's system components, and the names of Metroplex's customers. The city may not withhold the remainder of Metroplex's information under section 552.110. As Ericsson and Metroplex have claimed that these same portions of their submitted information are also excepted from disclosure under the trade secret prong of section 552.110, we need not discuss Ericsson's or Metroplex's trade secret arguments at this time.

However, we must address Trott's trade secret arguments. Section 552.110 excepts from disclosure trade secrets or 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 5.¹

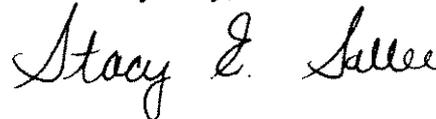
¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures

After reviewing the information submitted by the three companies, we conclude that Trott has not met its burden of establishing that a portion of its request is a trade secret. Therefore, the city may not withhold Trott's information from required public disclosure.

Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108; *see Holmes v. Morales*, 924 S.W.2d 920 (Tex. 1996). You claim that the information labeled Exhibit "C" falls within this exception because the information, if released, "could give an opportunity for sabotage and other engineering details . . . all of which could place the system in danger of sabotage and endanger public safety." Some of this information has been addressed under section 552.110. To the extent that the requested information has been addressed under that exception, we do not address it under section 552.108. We conclude that section 552.108 of the Government Code excepts some of the information in Exhibit "C" from required public disclosure. We have marked the information that may be withheld under section 552.108. With the exception of that information we concluded must be withheld under section 552.110, the remaining information in Exhibit "C" may not be withheld.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 36546

Enclosures: Marked documents

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.

cc: Mr. Larry Miller
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EXHIBIT "A"

Withhold the following pages of Ericsson's material under the second prong of section 552.110 of the Government Code:

E0004-E0005

E0007-E0082

E0101-E0118

E0123-E0216

E0298-E0300

E0314, with the exception of the first two lines of text on the page, which must be released

E0712-E0754

E0787-E0788

E0794-E0796

E0865

E0867-E0875

E0909

E0914-E0948

E0990-E0991

E1003

E1012

E1014-E1017