



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 14, 1997

Ms. Lavergne Schwender
Assistant County Attorney
Harris County
1001 Preston, Suite 634
Houston, Texas 77002-1891

OR97-0354

Dear Ms. Schwender:

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# 104040.

The Harris County Purchasing Agent (the "county") received a request for information relating to a bid proposal submitted to the county in response to a request for proposals regarding lithotripsy services for the Harris County Hospital District. You request our decision whether the information pertaining to the proposal submitted by Gulf Coast Lithotripsy Associates, L.P. ("Gulf Coast"), which was awarded the contract, is excepted from disclosure under section 552.110 of the Government Code. You have informed us that portions of the proposal that were not marked "confidential" have been made available for public inspection in accordance with Local Government Code section 262.030(c).¹ You have submitted portions of the proposal that Gulf Coast has claimed as confidential.

Pursuant to section 552.305 of the Government Code, we notified Gulf Coast of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. Gulf Coast responded by asserting that the information requested contains trade secrets and confidential commercial and financial information which should

¹Section 262.030(c) provides that "[a]ll proposals that have been submitted 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." Local Gov't Code § 262.030(c). This section makes specifically public all information in these types of proposals except for information that is a trade secret or is otherwise confidential by law. Thus, section 262.030 is essentially coextensive with section 552.110 of the Government Code and does not provide any exception to disclosure over and above that provided by section 552.110 of the Government Code.

be excepted from disclosure under section 552.110. Gulf Coast argues that its competitive position would be substantially harmed if its customer list, price breakdown, bank account information, personnel information, and quality assurance and risk management policies are released.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act, 5 U.S.C. § 552, when 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).

Except for the bank account information, we conclude that the remainder of the information (customer list, price breakdown, personnel information, and quality assurance and risk management policies) is commercial or financial information, and thus, the county must withhold this information from disclosure.² Gulf Coast has failed to establish that disclosure of its banking information will likely cause substantial harm to its competitive position.

Gulf Coast also asserts that the banking information is excepted from disclosure under the trade secret prong of 552.110. The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

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.

²Having concluded that this information is excepted from disclosure as confidential commercial or financial information under section 552.110, we need not determine whether this information constitutes a trade secret.

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 single or ephemeral events 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. *Id.*³ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Gulf Coast argues that its business would suffer serious harm if the identification of its banks and corporate account numbers were released and misused. Although there is a security concern in protecting one's bank account numbers, this is not the type of trade secret information that gives a business an advantage over its competitors. Accordingly, we conclude that Gulf Coast's banking information does not satisfy the trade secret prong of section 552.110. Because the banking information is not covered by either branch of section 552.110 or any other exceptions to disclosure, the county must release the banking information.

³The 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.

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

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Ref.: ID# 104040

Enclosures: Submitted documents

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