



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 5, 1997

Ms. Melissa Winblood
Assistant City
Office of the City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR97-1023

Dear Ms. Winblood:

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# 105583.

The City of El Paso (the "city") received a request for:

1. All Qualification Statements turned in for the Pavo Real Senior Citizen project;
2. All policies and procedures used in the evaluation process;
3. All criteria used for the evaluation process; and
4. All evaluation sheets, comments and minutes associated with the qualification review process.

You have submitted to this office the responsive documents and request our decision whether the records identified as Exhibits "D-1" and "D-2," are excepted from disclosure under section 552.111 of the Government Code. You also advise that the city declines at this time to release the remainder of the requested documents, submitted as Exhibits "B-1," "B-2," and "C-2" through "C-11," because this information may be proprietary or financial.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Since the property and privacy rights of third parties may be implicated by the release of most of the requested information, this office notified the ten architecture/engineering firms whose company information was requested. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). This office has received responses to the notice from The Mijares Group and from SMS Architects. The following firms did not respond to our notice: Acosta Engineering; Dimensions in Architecture; Prestidge, Smith, Razloznic Architects, Inc.; Garland & Gilles AIR Architects; The Architectural Practice of Brajas & Bustamante, McCormick Associates Architecture; ASS Gossen Livingston Architects Engineers; and Alvidrez Associates, Inc. Therefore, we have no basis to conclude that these eight companies' information contained in the submitted records is excepted from disclosure by section 552.110. *See* Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party 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), 552 (1990) at 5 (party must establish prima facie case that information is trade secret).

Both SMS Architects and the Mijares Group argue that sections 552.104 and 552.110 of the Government Code except the requested information from disclosure. We first consider the applicability of section 552.104 to the requested information. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the city did not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). The requested information may not be withheld pursuant to section 552.104.

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 Association 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. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. "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).

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. 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.*² 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

²The 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.

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.

The Mijares Group indicates that the information responsive to the request is found in its "Statement of Qualifications" ("Exhibit C-2"). The Mijares Group argues that this document contains sections which reveal unique project knowledge of team members, unique knowledge and experience, and research and compiled information that give The Mijares Group an advantage over its competitors, and must therefore be withheld from disclosure. The Mijares Group further states that disclosure of information regarding past experience would require the release of client lists.

SMS Architects states that the information responsive to the request is found in sections I through III of its "Statement of Qualifications" ("Exhibit C-11"). SMS Architects argues that these sections contain specific information about the structure of its office, specific project assignments of staff members, descriptions of unique staff capabilities, the educational background and specialties of staff members, descriptions of individual work histories, statements about the size and overall capacity of the firm, and SMS Architect's current position in the professional market, which if publicly disclosed, would result in substantial harm to its competitive position, and must therefore be withheld from disclosure. SMS Architects further asserts that disclosure of work history and other information contained in Standard Form 254 located in section III of C-11 reveals "historical financial" information, and its disclosure would therefore result in substantial harm to its competitive position. Additionally, SMS Architects asserts a common-law right to financial privacy.³

We have reviewed the arguments of The Mijares Group and SMS Architects. We conclude that neither The Mijares Group nor SMS Architects has met its burden under the trade secret prong of section 552.110. Nor has either of these two companies shown by "specific factual or evidentiary material" that substantial competitive harm would likely result from disclosure. See *Sharyland Water Supply Corp.*, 755 F.2d at 399. "Conclusory and generalized allegations" of competitive harm have been held insufficient to satisfy the requirements for non-disclosure. See *National Park*, 547 F.2d at 680. Therefore, the city must release the information contained in Exhibits C-2 and C-11.

Regarding the information in Exhibit B, we note that these audiotapes contain essentially the same type of information which we have already determined must be disclosed to the requestor. Neither the city nor The Mijares Group nor SMS Architects has demonstrated that the information in Exhibit B constitutes information protected by section 552.110. Therefore, the city may not withhold the information in Exhibit B under section 552.110.

³Because section 552.110 requires that excepted information be made confidential by statute or judicial decision, it is redundant with section 552.101; we therefore need not consider SMS Architect's claim of common-law right of privacy in conjunction with section 552.101 of the Government Code. Attorney General Opinion H-258 (1974) at 6. See generally Open Records Decision No. 592 (1991) at 4-8.

We now consider the city's claim that section 552.111 excepts from public disclosure the documents submitted in Exhibits D-1 and D-2. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. After reviewing the submitted information, we conclude that it does not contain advice, recommendations, and opinions reflecting the *policymaking* processes of the city and, therefore, may not be withheld from required public disclosure under section 552.111 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 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,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/ glg

Ref.: ID# 105583

Enclosures: Submitted documents

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