



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 23, 1997

Mr. Charles L. Dunlap
Teacher Retirement System of Texas
1000 Red River Street
Austin, Texas 78701-2698

OR97-1426

Dear Mr. Dunlap:

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# 106645.

The Texas Retirement System of Texas ("TRS") received a request for "documentation regarding the Benefits Reengineering project. Specifically, we request a copy of the proposal selected for the project, dated October 31, 1996, the proposal evaluation criteria and other evaluation materials, and a copy of the resulting contract." The contract has been awarded. However, TRS seeks to withhold the requested information based on section 552.110 of the Government Code. You enclose representative samples of the information TRS seeks to withhold.¹

Pursuant to section 552.305 of the Government Code, we notified the third party, BDM Technologies ("BDM"), of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. BDM responded to our notification. It asserts that some information in the winning proposal submitted to TRS is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 excepts from disclosure trade secrets and commercial or financial information obtained from a person and confidential by statute or judicial decision. Section 552.110

¹In reaching our conclusion here, we 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) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). 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.

is divided into two parts: (1) trade secrets and (2) commercial or financial information, and each part must be considered separately.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 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 assists in determining 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.

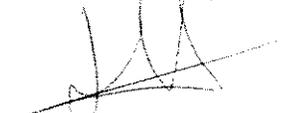
Id.; *see also* Open Records Decision No. 522 (1989).

However, this office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). Facts sufficient to show the applicability of these factors have not been provided. See Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information).

Nor has TRS or BDM shown that the submitted information comes within the commercial or financial aspect of section 552.110. A "mere conclusory assertion of a possibility of commercial harm" is insufficient to show that the applicability of section 552.110. Open Records Decision No. 639 (1996) at 4. "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." In this situation, section 552.110 has not been shown to be applicable to the information at issue. The requested information must, therefore, be released.

We are resolving this matter with this 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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/glg

Ref.: ID# 106645

Enclosures: Submitted documents

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Mr. Charles L. Dunlap - 4

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