



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 22, 1997

Ms. Phoebe Knauer
Director, Information Release
Texas Employment Commission
101 E. 15th Street, Room 651
Austin, Texas 78748

OR97-1669

Dear Ms. Knauer:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 30938.

The Texas Employment Commission ("TEC") received a request for documents submitted in response to solicitation for bids for TEC's voice response system. Documents submitted by two different companies--Computer Controls, Inc. and Periphonics Corporation--are at issue. The bid response by Computer Controls contains a general notice indicating that the data in the proposal shall not be duplicated or disclosed.

Pursuant to section 552.305(c) of the Government Code, TEC takes no position as to whether the information at issue should be withheld from public disclosure. You have, however, notified Periphonics Corporation that substantial portions of its bid proposals have been requested and asked whether the company considers any of the information confidential. Periphonics requested that the commission withhold the following portions of its proposal: a) customer references - Section II, Pages III-3 through III-9, b) personnel information - Section III, Pages III-14 through III-24, c) brochure entitled "Corporate Profile," and d) optional features information - Pages IV-2 and IV-2. You have submitted these documents for our review.¹

¹We note that Periphonics has made arguments to this office regarding documents in addition to those which were identified to TEC as confidential and forwarded to us for review. This ruling addresses *only* those documents provided to this office for our review.

Pursuant to section 552.305 of the Government Code, we notified both Computer Controls and Periphonics of the request for information and of their opportunity to claim that each of their proposals is excepted from disclosure. Periphonics submitted arguments seeking to withhold some of the requested documents, apparently claiming that the information should be excepted from public disclosure pursuant to section 552.110.²

Section 552.110 of the Government Code excepts from required public disclosure

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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. (Emphasis added.)

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

²Periphonics has not clearly asserted that they intend to claim that the information at issue constitutes trade secrets. We have concluded that this is their claim from the use of key phrases outlined in the Restatement of Torts in its discussion of trade secret information.

- 1) the extent to which the information is known outside of [the company's] business;
- 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 to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information; and
- 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 No. 232 (1979). This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

Periphonics Corporation asserts that its document entitled "Employment Services Application References" constitutes a customer list and therefore, should be excepted from public disclosure as a trade secret. This office has previously held that customer lists *may* constitute trade secrets under section 552.110. However, the affected party must still make a prima facie case under the six criteria of the Restatement of Torts. Open Records Decision No. 552 (1990). Periphonics has not made the required showing that its customer reference list constitutes a trade secret excepted from disclosure pursuant to section 552.110. Thus, the list may not be withheld as a trade secret..

Periphonics claims that employee educational and work experience contained in documents entitled "Equipment Installation Team Members" is excepted from disclosure as a trade secret. Resumes listing the experience of employees of bidders do not come within the section 552.110 exception. Open Records Decision No. 175 (1977). You must release this information.³

³Periphonics has made no arguments to this office as to why information contained in its corporate profile brochure and optional features information (categories c and d of documents submitted to TEC) is excepted from public disclosure. Therefore, you must release this information.

Computer Controls, Inc. did not respond to our notification and consequently has not established that the requested information can be withheld pursuant to 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), 542 (1990) at 3. The requested information relating to Computer Controls, Inc. must be released.

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.⁴ If you have questions about this ruling, please contact this office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/LMM/ch

Ref.: ID# 30938

⁴We are issuing this ruling based on the information and arguments provided at the time you sought a request for a ruling from this office. This file may contain "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision" encompassed by the second prong of section 552.110 of the Government Code. In February, 1996, this office issued Open Records Decision No. 639 (1996), in which this office overruled the test set out in Open Records Decision No. 592 (1991) for this type of information and adopted the test federal courts have used when interpreting exemption 4 to the federal Freedom of Information Act. For information to be withheld as "commercial or financial information obtained from a person and privileged or confidential by statute," the information must be such that

disclosure of the information is likely . . . either . . . (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

National Parks & Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

As section 552.110 is designed to protect third party interests, a claim under this exception may overcome the conclusion that this type of information should be released to the public. See Open Records Decision No. 552 (1990). However, a governmental body may not withhold this information without a ruling from this office.

Enclosures: Submitted documents

cc: Mr. Mike Russell
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(w/o enclosures)

