



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 17, 1997

Mr. John T. Patterson
Assistant City Attorney
City of Waco
Legal Services
P.O. Box 2570
Waco, Texas 76702-2570

OR97-2775

Dear Mr. Patterson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 111029.

The City of Waco (the "city") received two open records requests for, among other things, proposals submitted to the city in connection with an RFP for auctioneering services. You have not raised any of the act's exceptions to required public disclosure with regard to the requested proposals, but have requested an open records decision from this office pursuant to section 552.305 of the Government Code.

Pursuant to section 552.305 of the Government Code, this office notified the four parties whose proprietary interests were implicated by these requests. We have received a response from only one of the companies: René Bates Auctioneers, Inc. ("Bates"). The other three companies did not respond to our section 552.305 notice. When an agency or company fails to provide relevant information regarding factors necessary to determine whether information is excepted from required public disclosure, this office has no basis for concluding that the information is excepted from public disclosure under the Open Records Act. *See* Open Records Decision No. 402 (1983) at 2. Accordingly, the city may not withhold the proposals of the companies that did not respond.

Although Bates did not raise any of the act's specific exceptions to required public disclosure, Bates claims that its proposal contains proprietary information that should not be released to the public. We therefore infer that Bates seeks to have certain portions of its proposal withheld from the public pursuant to section 552.110 of the Government Code, which protects

[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. 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.¹ 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). In this instance, Bates has not demonstrated that any of the information at issue constitutes a trade secret. Consequently, none of the information at issue may be withheld on these grounds.

As noted above, however, section 552.110 also protects "commercial or financial information obtained from a person." Some of the requested material is clearly commercial or financial information. To fall within section 552.110, however, the information must be "privileged or confidential by statute or judicial decision." Section 552.110 is patterned after section 552(b)(4) of the federal Freedom of Information Act, 5 U.S.C. section 552 *et. seq.* Open Records Decision Nos. 309 (1982), 107 (1975). The test for determining whether commercial or financial information is confidential within the meaning of section 552(b)(4) is as follows:

a commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have *either* of the following effects: 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. (Emphasis added.)

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

¹These six factors are

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 comment b (1939); *see also* Open Records Decision No. 232 (1979).

The governmental body that maintains requested information is in the best position to determine whether disclosure will impair its ability to obtain similar information in the future. The city has expressed no opinion on this subject. If the second test is satisfied, the information may be withheld. To show substantial harm, a business enterprise cannot succeed by a mere conclusory assertion of a possibility of commercial harm, but 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. *See* Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985)). In this instance, Bates has not adequately demonstrated how the release of this information would result in "substantial competitive injury." The city therefore must release the Bates proposal in its entirety.

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/RWP/glg

Ref.: ID# 111029

Enclosures: Submitted documents

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