



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 13, 1998

Ms. Katherine Tilson  
Contract Counsel  
City Public Service Board  
P.O. Box 1771  
San Antonio, Texas 78296

OR98-0118

Dear Ms. Tilson

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 111588.

The Public Service Board of the City of San Antonio (the "board") received two requests for copies of bids submitted in response to the board's request for proposals. Pursuant to section 552.305 of the Government Code, you have asked this office to determine whether the requested bid information is confidential. You state that at least some of the companies have asserted that the bids should be withheld, although the board has not taken a position as to whether the bids are confidential. There were six companies that submitted bids: AEA Technology Engineering Services, Inc. ("AEA"); Thielsch Engineering, Inc. ("Thielsch"); G.E. Power Systems Americas ("G.E."); Westinghouse Electric Corp. ("Westinghouse"); Reinhart & Associates, Inc. ("Reinhart"); and Northeast Inspection Services, Inc. ("Northeast"). As provided by section 552.305 of the Open Records Act, this office notified these companies of the requests for information and provided opportunity for the companies to submit reasons as to why the bids should be withheld from disclosure.

Thielsch notified the board that it has no objections to release of its bid proposal. Because neither the board nor Thielsch asserts that the Thielsch bid information is private, the Thielsch proposal must be disclosed.

AEA submitted a letter to the board stating that AEA considers its proposal to be proprietary information. Reinhart also sent a letter to the board identifying parts of its bid proposal that it considers to be proprietary information. Westinghouse asked that the board maintain as confidential "all technical aspects of the proposal." However, none of these companies provided explanations as to why their bid proposals would be protected from public disclosure under the Open Records Act. Since the board takes no position on the release of the bid information, and these companies did not provide specific arguments as

to what exceptions might be applicable to protect their bid proposals from disclosure, the AEA, Reinhart, and Westinghouse bid proposals must be disclosed. *See* Open Records Decision No. 542 (1990) (responsibility of third party to show why information is excepted from disclosure).

Northeast argues that its client list and reference list of clients are protected under section 552.104 of the Government Code. Northeast also argues that other specific portions of its bid proposal are excepted from disclosure under section 552.110. GE argues that its pricing information is protected from disclosure under section 552.110. Since GE and Northeast made specific arguments against disclosure of their bid proposal information, we will address those arguments.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a *governmental body's interests* in a particular commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, generally neither the contract nor information submitted with a bid is excepted under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5. As the board has not asserted that section 552.104 is applicable and the contract has been awarded, the bid proposals may not be withheld from disclosure under section 552.104. Thus, Northeast's client list and reference list may not be withheld from disclosure under section 552.104.

Section 552.110 protects the property interests of third parties 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. 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) (emphasis added). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> 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.

Northeast asserts that a portion of the "Support Requirements" section of its proposal and also Appendix A.1 of the proposal are trade secrets. Northeast has provided details explaining that the information it seeks to withhold is technical information that is not known outside the company and release would harm its competitive position. Northeast asserts that some of the information took two years and 25% of staff resources to develop. One process took the company a year and the time of two staff members devoted exclusively to the project to develop the process. We agree that these portions of the proposal must be withheld from disclosure under section 552.110 as trade secrets. We have marked the portions that must be withheld.

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 when applying the second prong of section 552.110. In *National Parks and 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

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<sup>1</sup>The 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

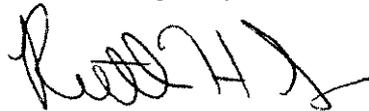
factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure.  
*Id.*

Northeast asserts that Exhibit D of its proposal is excepted from disclosure under the commercial or financial aspect of section 552.110. Northeast argues that disclosure would put the company at a competitive disadvantage "because other companies would be able to adjust their pricing accordingly." GE asserts that release of its bid pricing information would put its competitors in an advantageous situation for future bids. Thus, both Northeast and GE have made conclusory and generalized arguments that if their commercial or financial information is disclosed, the companies would be at a competitive disadvantage.

However, neither company provided specific facts or information to show that substantial competitive injury would likely result from disclosure. Thus, Northeast has not shown the applicability of section 552.110 to Exhibit D. Except for the portions of the Northeast proposal that must be withheld as protected trade secrets, as discussed previously, the Northeast proposal must be disclosed. Since GE has not shown the applicability of section 552.110 to its pricing information, and has not otherwise argued against disclosure of the remaining portion of its proposal, the GE proposal must be disclosed.

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. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref.: ID# 111588

Enclosures: Submitted documents

cc: Mr. Eugene Reinhart  
Reinhart & Associates, Inc.  
2032 Centimeter Circle  
Austin, Texas 78758  
(w/o enclosures)

Mr. Robert Mullens  
AEA Technology Engineering Services, Inc.  
13245 Reese Boulevard, West  
Campbell Bldg, Suite 100  
Huntersville, North Carolina 28078  
(w/o enclosures)

Mr. Matthew Dowling  
Thielsch Engineering Inc.  
195 Frances Avenue  
Cranston, Rhode Island 02910-2211  
(w/o enclosures)

Ms. Diane Donovan  
G.E. Power Systems Americas  
8800 Wallisville Road  
Houston, Texas 77029  
(w/o enclosures)

Mr. Randy Faller  
Westinghouse Electric Corporation  
10777 Westheimer, Suite 140  
Houston, Texas 77042  
(w/o enclosures)

Mr. John R. Porter  
Northeast Inspection Services, Inc.  
Agnes Avenue  
Schenectady, New York 12303  
(w/o enclosures)