



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 21, 1998

Mr. John Dahill
Advisory Chief
Dallas County
411 Elm Street
Dallas, Texas 75202

OR98-1288

Dear Mr. Dahill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 115588, 115673, and 115900.

Dallas County has received four requests for information concerning the Request for Proposals for the operation of a 96 bed, secure residential placement facility for juveniles, RFP number 98-052. You state that you have released to the requestors information regarding the names and affiliations of the selection committee, the score sheets of the proposals, the mechanism used to score the proposals, "the total 'start-up' cost figure and per diem rates submitted by each respondent," and the proposal submitted by the Dallas County Juvenile Department. You ask, however, whether the requested proposals submitted by the remaining eleven companies must be withheld as confidential proprietary information. Gov't Code § 552.007; Gov't Code § 552.305. You raise no exception to disclosure on behalf of the county, and make no arguments regarding the proprietary nature of the requested information. You have submitted a copy of the requested information for our review.

Since the property and privacy rights of third parties may be implicated by the release of the requested information here, this office notified the eleven companies whose proposals were 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 received responses from Children's Comprehensive Services, Inc. (CCS), Correctional Services Corporation (CSC), and Rebound. Each company asserts that portions of their proposal are protected from disclosure under section 552.110 of the Government Code. CSC also claims that its information is protected by section 552.101 of the Government Code.

Eight of the companies involved did not respond to our notice; therefore, we have no basis to conclude that these companies' information is excepted from disclosure. 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 proposals submitted by Community Corrections, Inc., Concerned Citizen's of Dallas, Cornell Corrections, Inc., Secured Crisis Center, Inc., Securicor New Century, Texas Serenity Counseling Services, Texson Management Group, and Youth Services International, must therefore, be released.

Section 552.110 of the Government Code protects the property interests of private 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 the Restatement of Torts, section 757, 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 of 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). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹

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 for commercial and financial information. 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. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). 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. *Id.* After reviewing the arguments of each of the responding companies, we do not believe that they have established the applicability of section 552.110. Open Records Decision Nos. 639 (1996) at 4, 552 (1990) at 5, 542 (1990) at 3; *see* Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 145-147, n. 200 (competitive harm prong denied when prospect of injury too remote or when information is too general in nature), 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 319 (1982), 306 (1982).

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." After reviewing the submitted materials and arguments, we do not believe that the requested information must be withheld based on a right of privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (common-law privacy); Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)) (constitutional privacy and corporation or business entity may not claim common-law privacy). Moreover, we do not find nor does any party point to a statute that would deem the information confidential. The

¹The 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 other 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.

information may not be withheld based on section 552.101. Consequently, the proposals submitted by CCS, CSC, and Rebound must also 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 upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID#s 115588, 115673, 115900

Enclosures: Submitted documents

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