



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 1, 1998

Mr. Alberto J. Peña
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR98-2080

Dear Mr. Peña:

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# 117747.

The City of San Antonio (the "city") received two requests for a copy of the bid proposal submitted by the current provider for billing and collection of EMS service fees. You explain that the requested information may be proprietary in nature and protected from disclosure by the Government Code. Gov't Code § § 552.007, 552.305. You raise no exception to disclosure on behalf of the city and make no arguments regarding the proprietary nature of the requested information. You have submitted the requested information for our review.

Since the property and privacy rights of a third party may be implicated by the release of the requested information, this office notified the current provider, Business and Professional Services, Incorporated ("BPS") about the request. *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). BPS responded to our notice by arguing that portions of its proposal are protected from disclosure by sections 552.104 and 552.110 of the Government Code.

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104

is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990). Section 552.104 does not, however, protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. The city does not indicate, nor does it appear, that the requested proposal relates to a competitive bidding situation. *See* Open Records Decision No. 592 (1991). Accordingly, we conclude that the city may not withhold the requested proposal under section 552.104 of the Government Code.

Section 552.110 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.

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 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. *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 its arguments, we conclude that BPS has not demonstrated that the requested information is protected by the second prong of section 552.110. Open Records Decision No. 639 at 4 (1996) (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).

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 at 5 (1990).¹

BPS has established that certain portions of its proposal constitute a trade secret in that those portions reveal a methodology that is continually used in its business operations. Therefore, the city must withhold the “Functional Requirements of Contractor’s Approach,” pages 1-3, the “Collector’s System, Software, Methods, and Personnel,” page 8, pages 13-27, pages 34-38, pages 40-43, and the bracketed portion of page 45 under the trade secret prong of section 552.110.

We note that some of the requested information is confidential by law. Section 552.101 of the Government Code excepts from required public disclosure information considered confidential by statutory law. Section 12.003(a) of the Human Resources Code states as follows:

Except for purposes directly connected with the administration of the department’s assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [Texas]

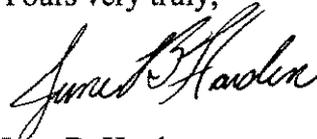
¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: “(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company’s] business; (3) the extent of 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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

[d]epartment [of Human Services] or acquired by employees of the department in the performance of their official duties.

Except for purposes directly connected with the administration of the assistance programs administered by the Texas Department of Human Services, this statute forbids disclosure of "any information" about clients of assistance programs of the department, including Medicaid clients, not just the clients' names and addresses. *See* Open Records Decision No. 584 (1991). Therefore, we have marked the information in Section 5 that must be withheld under section 552.101 of the Government Code in conjunction with section 12.003(a) of the Human Resources Code. The remaining information must be released to the requestors.

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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref.: ID# 117747

Enclosures: Marked documents

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