



February 10, 1999

Mr. John Schneider, Jr.  
First Assistant City Attorney  
City of Pasadena  
P.O. Box 672  
Pasadena, Texas 77501

OR99-0417

Dear Mr. Schneider:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122123.

The City of Pasadena (the "city") received a request for "proposals, policies, and additional information submitted by the bid responders other than" the requestor in connection with the city's request for proposals regarding certain insurance coverage. You seek to withhold information responsive to the request under sections 552.104 and 552.110 of the Government Code.

Section 552.104 protects from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). Governmental bodies may withhold this type of information while the governmental officials are in the process of interpreting the proposals and the competitors are free to furnish additional information. *Cf.* Open Records Decision No. 170 (1977). Section 552.104 is a permissive exception; it does not require withholding information. Section 552.104 does not except bids or proposals from disclosure once the bidding is over and the contract is in effect, Open Records Decision Nos. 306 (1982); 184 (1978), or where no contract is awarded. Open Records Decision No. 201 (1978).

In invoking section 552.104, you state only that the requested information is "related to competition or bidding." In our opinion, you have not demonstrated the applicability of section 552.104 to the information at issue. The city therefore may not withhold any of the requested information under section 552.104.

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.

In connection with your section 552.110 claim, we have notified the four entities which submitted proposals in the bidding to which the request relates in order to give them an opportunity to show why the requested information is subject to section 552.110. *See Gov't Code §552.305.* Only one of these entities – McGriff, Seibels & Williams of Texas, Inc. (“MSW”) -- responded to our notice.

Section 552.110 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939). *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:

- 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 at 5 (1990). 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).

MSW argued that portions of its proposal constitute trade secrets. In our opinion, MSW has not demonstrated that any portions of its proposal is protected by the trade secrets branch of section 552.110. Because neither MSW nor any of the other entities has demonstrated that the information at issue constitutes trade secrets, none of the information may be withheld on these grounds.

You also contend that the information is protected from disclosure by the second prong of section 552.110 as “commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision,” although MSW has not made such a claim.

This aspect of 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 Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). We do not believe that you have demonstrated that the release of the information at

issue would either impair the city's ability to obtain information in the future or cause substantial harm to the entities from which the information was obtained. Therefore, the city must release the requested information.<sup>1</sup>

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,



William Walker  
Assistant Attorney General  
Open Records Division

WMW/ch

Ref: ID# 122123

Enclosures: Submitted documents

cc: Ms. Daisy Palmer, Ph.D.  
Texas Municipal League Intergovernmental Risk Pool  
P.O. Box 149194  
Austin, Texas 78714-9194  
(w/o enclosures)

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<sup>1</sup>You also argue that the information in question was "voluntarily" submitted and is thus subject to the test for withholding set out in *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 872 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Under *Critical Mass*, the test for withholding is that the information voluntarily submitted be of a kind that the provider would not customarily make available to the public. *Id.* In our opinion, the proper test for withholding the information at issue here under the commercial or financial branch of section 552.110 is that set out in *National Parks v. Morton*, *supra*. See *McDonnell Douglas Corp. v. National Aeronautics and Space Administration*, 895 F. Supp. 316, 318 (D.D.C. 1995) (information submitted to win a government contract is not "voluntarily" submitted).