



March 8, 1999

Ms. Judy Ponder
General Counsel
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR99-0647

Dear Ms. Ponder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 122563.

The General Services Commission (the "commission") received a request for a copy of SCC Communications Corporation's ("SCC") response to the commission's request for offer for 9-1-1 Database and AIN Network Services. Without taking a position on the release of the information, you state that SCC's proprietary interest is implicated. Pursuant to section 552.305 of the Government Code, this office notified SCC of the request. SCC contends that portions of its proposal are excepted from disclosure under section 552.110 of the Government Code.

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. SCC has made arguments against disclosure under both prongs of section 552.110.

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

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 at 4 (1996). 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.*

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).

First, any pricing terms in the bid proposal that are incorporated into the commission's contract with SCC are not excepted from disclosure under section 552.110 and must be released to the requestor. *See* Open Records Decision Nos. 514 (1988) (not clear whether general terms of contract with state agency could ever constitute trade secret), 494 (1988) (application of commercial or financial information prong of section 552.110 requires balancing of public interest in disclosure with competitive injury to company in question); see generally Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). For example, if the pricing information in section 2.5 of the proposal is incorporated into the commission's contract with SCC, it must be released to the requestor.²

After a review of SCC's arguments and the submitted information, we have marked portions of sections 2.2, 2.4.1.G, and 4.2 that are not excepted from disclosure under section 552.110. The marked information in section 4.2 consists of historical information about SCC and information about its qualifications. SCC has not demonstrated that either prong of section 552.110 applies to the marked information. *See* Open Records Decision No. 319 (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information). In addition, neither section 4.4 or 4.7 is excepted from disclosure under section 552.110. The commission must, therefore, release the marked information to the requestor. SCC has established that the release of the remaining portions of its bid proposal, which it contends are excepted from disclosure under section 552.110, would cause it to suffer substantial competitive harm. Thus, with the exception of the marked information, any pricing information incorporated in the commission's contract with SCC, and information for which SCC has not asserted the protection of section 552.110, the commission must withhold the following sections of the bid proposal from disclosure under section 552.110 as commercial or financial information: 2.2 (unmarked information), 2.3.1, 2.3.3, 2.3.4, 2.3.7, 2.3.11, 2.3.15, 2.3.17, 2.3.20, 2.3.22, 2.4.1.G (unmarked information), 2.4.2, 3.2, 3.3.5, 3.3.12, 3.4, 3.5, and 4.2 (unmarked information).³ Lastly, you did not submit section 6.0 of the bid proposal; therefore, we are unable to rule on section 6.0.

SCC also contends that section 552.105 excepts certain information from public disclosure. Section 552.105 protects the interests of governmental bodies, not third parties. *Cf.* Open Records Decision No. 592 (1991) (section 552.104). As the commission does not raise section 552.105, this section is not applicable to the requested information. Therefore, the requested information may not be withheld under section 552.105.

²We note that you have submitted two versions of section 2.5. One was submitted on May 7, 1998, and the other was submitted on November 13, 1998.

³Because we conclude that the commission must withhold this information from disclosure as commercial or financial information, we do not reach the issue of whether this information also constitutes a trade secret.

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 any questions about this ruling, please contact our office.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/nc

Ref: ID# 122563

Enclosures: Marked documents

cc: Ms. Dineen J. Majcher
Smith, Majcher & Mudge, L.L.P.
816 Congress Avenue, Suite 1270
Austin, Texas 78701
(w/o enclosures)

Mr. Eric H. Drummond
Casey, Gentz & Sifuentes, L.L.P.
919 Congress Ave., Ste. 1060
Austin, Texas 78701
(w/o enclosures)