



November 10, 1999

Mr. Jack Ingram
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR99-3191

Dear Mr. Ingram:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128341.

The Texas Department of Transportation (the "department") received a written request for, among other things, copies of all proposals submitted to the department in connection with RFP Q44 1999 029736 000. You do not contend that the requested proposals are excepted from required public disclosure, but rather have requested a decision from this office pursuant to section 552.305 of the Government Code, which authorizes governmental bodies to rely on the arguments of interested third parties as to why the requested information should not be released.

Because you sought an open records decision from this office pursuant to section 552.305 of the Government Code, this office notified representatives of ACS Image Solutions, Inc. ("ACS") and Spectrum Data Inc. ("Spectrum") that we received your request for an open records decision regarding their proposals. In our letter to these companies, this office requested an explanation as to why portions of their respective proposals were excepted from public disclosure, with the caveat that their failure to do so within a reasonable time would result in this office instructing you to disclose the information.

Both companies have timely responded to our notice. Both ACS and Spectrum contend that portions of their respective proposals are excepted from required public disclosure under section 552.110 of the Government Code. 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.”

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.” RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *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 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).

Spectrum contends that four pages from its proposal that outline its imaging service processes constitute trade secret information. After reviewing its arguments and the records at issue, we conclude that Spectrum has made a prima facie case that these four pages may be withheld as trade secrets under section 552.110. ACS has argued that a list of its customers and employees may be withheld as trade secret information. ACS, however, has not demonstrated that these lists constitute “trade secrets.” *See* Open Records Decision No. 319 (1982) (information relating to organization, personnel, qualifications, and experience not ordinarily trade secret information). Consequently, ACS may not withhold its customer and employee lists under this theory.

ACS also contends that the customer and employee lists constitute confidential “commercial or financial information.” To be withheld as “commercial or financial information” for purposes of section 552.110, however, the information must be “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 of the federal Freedom of Information Act when applying the second prong of section 552.110 for commercial and financial information. Thus, this office relied on *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as a judicial decision

¹These six factors are

- 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.

and applied the standard set out in *National Parks* to determine whether information is excepted from public disclosure under the commercial and financial prong of section 552.110. However, the Third Court of Appeals recently held that *National Parks* is not a judicial decision within the meaning of section 552.110. *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App. - Austin 1999, pet. filed). ACS has not cited to a statute or judicial decision that makes the information privileged or confidential. The department, therefore, may not withhold any of the ACS information under either prong of section 552.110; the ACS information must 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.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/RWP/ch

Ref: ID# 128341

Encl. Submitted documents

cc: Mr. John A. Riley
Jackson Walker, L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Mr. Elvin "Bo" Bowman
Executive Vice President
Spectrum Data, Inc.
628 West Sunset Road
San Antonio, Texas 78216
(w/o enclosures)

Mr. John Cannaday
Vice President
ACS Image Solutions, Inc.
2828 North Haskell Avenue, Building 5
Dallas, Texas 75204
(w/o enclosures)