



December 6, 1999

Ms. Judy Ponder
General Counsel
General Services Commission
1711 San Jacinto
P.O. Box 13047
Austin, Texas 78711-3047

OR99-3517

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# 129496.

The General Services Commission (the "commission") received a request for "RFI - Tex-AN-2000 (Purchase Order: Evaluation: Letter of Award) (Copy of RSP)." You assert no position regarding any exception to disclosure that may apply to the responsive information. You indicate that the interests of a third party, AT&T, are implicated by the release of this information. You have informed AT&T of the request for information and they have provided comments to this office. AT&T identifies seven categories of responsive information and contends that items in each of these categories are excepted from disclosure by section 552.110 of the Government Code. We have considered the exception claimed and reviewed the submitted information.

The Seventy-sixth Legislature amended section 552.110 of the Government Code, which now reads as follows:

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision is excepted from the requirements of Section 552.021.
- (b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained is excepted from the requirements of Section 552.021.

This section protects the property interests of those supplying information to governmental entities by excepting from disclosure two types of information: (1) trade secrets and (2)

commercial or financial information. For Public Information Act purposes, "trade secret" has the meaning specified in section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). To wit:

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). A claim for the "trade secrets" exception will be accepted by this office when a third party making the claim asserts *factual* allegations sufficient to present a *prima facie* case for the exception, provided that a governmental body takes no position on the claim and no one submits an argument that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990).

The following criteria determines if information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (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 [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, *supra*; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

AT&T's argument for excepting the responsive information as trade secrets does not address any of the above listed criteria other than item (3), "the extent of measures taken by [the company] to guard the secrecy of the information." AT&T alleges that the measures taken to safeguard the subject information include a security policy which requires proprietary information to be marked and secured in locked offices and contract provisions that require contractors to restrict disclosure. As some of those contractors are apparently governmental

bodies, we note that information is not made confidential under the Public Information Act because the party submitting the information anticipates or requests that it be kept confidential. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977). Further, a governmental body cannot, through a contract, overrule or repeal provisions of the Public Information Act. Attorney General Opinion JM-672 (1987). Thus, the Public Information Act's provisions for access to information held by a governmental body cannot be restricted by contract. Also, the general terms of a contract with a state agency are not trade secrets. Open Records Decision No. 514 (1988). Further, pricing information in commercial transactions with a governmental body are not considered trade secrets. Open Records Decision No. 319 (1982). We conclude that AT&T has not provided sufficient factual allegations to establish a *prima facie* case that the submitted information may be withheld as a "trade secret" under Government Code section 552.110(a).

Government Code section 552.110(b) excepts commercial or financial information from disclosure. Information not otherwise made public may be withheld under this provision on a specific factual demonstration that its disclosure would cause substantial competitive harm to the supplier of the information. As regards the information specified in categories 7 and 8, AT&T states that it is currently and actively engaged in specific arenas of competition for delivery of services similar to those addressed in its request for offer responses. AT&T further states that the information in these responses will be used in subsequent competitive bids and that the requestor is a direct competitor for that business. From our review of the information specified in AT&T's categories 7 and 8, we conclude that the following items of information may be withheld as commercial or financial information: Response to Request for Offer sections 4.2, 4.3, 4.4.1.2.16, 4.4.2, 4.4.2.2.12, 4.4.2.2.13, 4.4.2.2.25, 4.5, 4.6, 4.7, 4.8.4, 4.8.5, 4.9, 4.9.2.2.5 - 4.9.3, 4.9.5.1; tables 5.4.2-1, 5.4.2-2, 5.4.2-3, 5.4.2-4; section 5.4.2.2; tables 5.4.3-1, 5.4.3-2; section 5.4.4.1; tables 5.4.4-1, 5.4.4-2, 5.4.4-3; sections 5.6 and 5.7; the table in section 5.8.3.1 (AT&T's response); table 5.9.1.1-1, section 5.9.1.3.1, the dollar figures in section 5.9.3.1; tables 5.9.3-1, 5.9.3-2, 5.9.3-3, 5.9.3-4, 5.9.3-5, 5.9.3-6, 5.9.3-7; the "example" on page 5-66; AT&T's response in section 5.9.3.2; the portion of page 5-68 beginning at the top of the page and ending at the bottom of table 5.9.3-9; the concluding portion of AT&T's response on page 5-72 beginning with the fourth line, the sentence beginning "Therefore, we are also pleased..."; Response to Best and Final Offer sections 4.2.1.2, 4.3.2, 4.4.1.2, 4.8.5.3, 4.8.7.2, 4.8.7.3, and 4.9. Note that except for section 4.2.1.2 of the Best and Final Offer, you must release the remainder of section 4.2.1.

Categories 1, 2, 3, 4, 5 and 6 identify information contained in a contract with the State of Texas. The Seventy-sixth Legislature amended section 552.022 of the Government Code to provide several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section now reads

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body

Unlike trade secrets, commercial or financial information is not confidential under other law. That is, section 552.110(b) is not other law that makes commercial or financial information confidential, and there is no judicial decision that makes this information confidential. Thus, pursuant to Government Code section 552.022(a)(3), no part of the subject contract may be withheld under section 552.110(b) of the Government Code. As no provision of the subject contract has been demonstrated to be protected as a trade secret, we conclude that this contract, including those provisions identified by AT&T in categories 1 through 6, must be released.

Finally, At&T argues that the responsive materials should not be released because it is copyrighted. The copyright law gives the copyright holder the exclusive right to reproduce his work, subject to another person's right to make fair use of it. 17 U.S.C. §§ 106, 107. A governmental body must allow *inspection* of copyrighted materials where no exception to required public disclosure otherwise applies. Attorney General Opinion JM-672 at 2-3 (1987). Also, the requestor may make copies of copyrighted materials unassisted by the state. Attorney General Opinion MW-307 (1981). "Of course, one so doing assumes the risk of a copyright infringement suit." *Id.* at 2. Thus, assuming the requested material is in fact copyrighted, and in light of our discussion above, the commission must allow the requestor to view the requested information that has not been found to be excepted from disclosure, and also allow him to reproduce the material without the commission's assistance, so long as such reproduction would not unreasonably disrupt the commission's working conditions. *See* Attorney General Opinion JM-757 (1987). It will be the requestor's responsibility to adhere to the federal copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited

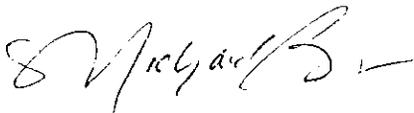
from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael J. Burns
Assistant Attorney General
Open Records Division

MJB/ch

Ref: ID# 129496

Encl. Submitted documents

cc: Mr. John H. Burnett
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(w/o enclosures)