



March 22, 2000

Mr. Duncan R. Fox
Assistant Chief
Legal Services
Texas Department of Public Safety
Box 4087
Austin, Texas 78773-0001

OR2000-1135

Dear Mr. Fox:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 133143.

The Texas Department of Public Safety (the “department”) received a request for all bid proposals submitted in connection with a Terrorism Consequence Management Exercise project. You state that the department has released one of the bid proposals to the requestor. You also inform us that two of the companies that responded to the department’s request for bids indicated their desire to limit disclosure of the information that they submitted. Although the department takes no position as to whether any of the requested information is excepted from required public disclosure, you believe that those two companies, Michael Baker, Jr., Inc. (“Baker”) and EAI Corporation (“EAI”), may claim that portions of their proposals are excepted from disclosure under section 552.110 of the Government Code.

Pursuant to section 552.305 of the Government Code, the department notified Baker and EAI of the request for release of their respective bid proposals. *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 to disclosure under Public Information Act in certain circumstances). You also submitted representative samples of the requested information to this office for our review.¹ Both Baker and EAI have responded to the department’s notice. We have considered the briefs submitted by Baker and EAI and have reviewed the information that the department submitted.

¹We assume that the “representative sample” submitted to this office is truly representative of the requested information as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This letter ruling does not address any information that substantially differs from that submitted for our review.

Baker claims that its bid proposal is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the doctrine of common law privacy. We do not believe that Baker's bid proposal contains any information that must be withheld from disclosure based on a right of privacy. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977) (common law privacy); Open Records Decision No. 600 at 4 (1992) (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)) (constitutional privacy). Common law privacy protects the rights of individuals, not corporate entities. See Open Records Decision No. 620 at 3-4 (1993). Corporations do not have a right to privacy. See *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (cited in *Rosen v. Matthews Constr. Co., Inc.*, 777 S.W.2d 434, 436 (Tex. App.--Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990)); see also Open Records Decision No. 192 at 4 (1978) (stating that the right of privacy is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business, or other pecuniary interests). Section 552.101 also encompasses information made confidential by statute. Statutory confidentiality under section 552.101 generally requires express language making certain information confidential or prohibiting its release to the public. See Open Records Decision No. 478 at 2 (1987). We are not aware of, and Baker has not referred us to, any statute outside the Public Information Act that would make any of the contents of its bid proposal confidential. Therefore, we conclude that Baker's bid proposal is not excepted from public disclosure under section 552.101.

Although EAI does not raise section 552.101, we note that its bid proposal contains a social security number that may be confidential under section 552.101 in conjunction with federal law. A social security number or related record is confidential under section 552.101 of the Government Code in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii)(I), if it was obtained or is maintained pursuant to any provision of law enacted on or after October 1, 1990. See Open Records Decision No. 622 at 2-3 (1994). Although we have no basis for concluding that the social security number in EAI's bid proposal is confidential under the federal law, we caution the department that chapter 552 of the Government Code prescribes criminal penalties for the release of confidential information. See Gov't Code § 552.352. Therefore, prior to releasing the social security number in EAI's bid proposal, the department should ensure that it was not obtained and is not maintained under any provision of law enacted on or after October 1, 1990.

Both Baker and EAI claim that their respective bid proposals are excepted from public disclosure under section 552.110 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 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. See Gov't Code § 552.110(a), (b). Both Baker and EAI argue that their bid proposals are trade secrets that should be withheld

from disclosure under section 552.110(a). Additionally, Baker contends that its bid proposal represents commercial or financial information that is excepted from disclosure under section 552.110(b).

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) (emphasis added); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If, as is the case here, a governmental body takes no position on the application of the “trade secrets” branch of section 552.110 to requested information, this office will accept a private person’s claim for exception as valid under that branch if that person establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law.² *See* Open Records Decision No. 552 at 5 (1990). Baker contends that its bid proposal constitutes a trade secret because it proposes the utilization of the company’s “Access” database tool and the implementation of an “all hazards approach” using the company’s Terrorism Response

²The Restatement of Torts lists the following six factors as indicia of whether 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 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.

Action Coalition (“TRAC”), which Baker’s proposal describes as being a consulting partnership with another company. Baker also argues that its proposed approach to the department’s Terrorism Consequence Management Exercise was unique and significantly different than what the department sought from bidders. EAI similarly argues, although in less detail than Baker, that its proposal is a unique approach, developed over time, that is unknown to its competitors and reflects proprietary competition sensitive information. EAI also contends that its employee and pricing information should be withheld from disclosure under the trade secret branch of section 552.110. We have carefully considered Baker’s and EAI’s arguments and their respective bid proposals. Having done so, we believe that both companies’ proposals constitute their respective summaries of the services that each proposed to provide to the department, the costs of those services, and the companies’ respective qualifications to provide them. Thus, Baker’s and EAI’s proposals are concerned with addressing specific details of an ephemeral business event, the department’s Terrorism Consequent Management Exercise, rather than describing the details of any specific process or device for continuous use in their respective businesses. Consequently, we conclude that the proposals submitted by Baker and EAI are not excepted from disclosure under the trade secrets branch of section 552.110. *See also* Open Records Decision No. 319 at 3 (1982) (information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing is not ordinarily trade secret material).

Baker also contends that its proposal is protected from disclosure under the financial or commercial information branch of section 552.110, which protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). Baker argues that it would be substantially harmed by the disclosure of the cost proposal and other commercial information that Baker submitted to the department. In the latter category, Baker includes what it describes as technical information relating to Baker’s employees, its partner in TRAC, and other matters. Having carefully considered Baker’s arguments, we are not persuaded that the release of Baker’s proposal will result in substantial competitive harm. Accordingly, we conclude that Baker’s proposal is not excepted from disclosure under section 552.110(b). *See* Open Records Decision No. 319 at 3 (1982).

In summary, Baker and EAI have not demonstrated that their respective bid proposals are excepted from disclosure. Accordingly, with the potential exception of the social security number in EAI’s proposal, the department must release Baker’s and EAI’s proposals in their entireties to the requestor. 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.

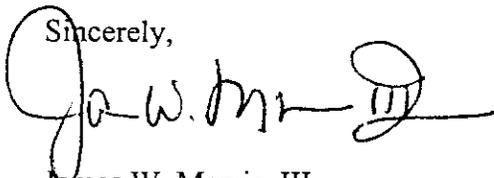
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a distinct "III" at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ch

Ref: ID# 133143

Encl. Submitted documents

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