



March 27, 2000

Mr. S. Calvin Capshaw
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Longview, Texas 75606-3999

OR2000-1177

Dear Mr. Capshaw:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133553.

The East Texas Council of Governments (the "council"), which you represent, received two requests for copies of proposals submitted to the council regarding a salary classification and pay system plan. Specifically, the requestors, which are two of the companies that submitted proposals, ask for the proposals submitted by the following companies: DMG-Maximus, Inc. ("DMG"), Ray Associates, Inc. ("Ray"), MGT of America, Inc. ("MGT"), The Waters Consulting Group, Inc. ("Waters"), The Segal Company ("Segal"), and Deloitte & Touche ("Deloitte").¹ While the council does not raise any objections to releasing the requested information, it has notified the six companies of the requests, pursuant to section 552.305 of the Government Code, in order to provide each one an opportunity to raise exceptions from required public disclosure on its own behalf.²

¹The council originally received Deloitte's request for the proposals from the other five companies. When the council notified the five companies of Deloitte's request, DMG's response included a request for the proposals submitted by the other companies, including Deloitte. Therefore, the proposals of all six companies have been requested by the two requests combined.

²Section 552.305(d) provides: "If release of a person's proprietary information may be subject to exception under Section 552.101, 552.110, 552.113, or 552.131, the governmental body that requests an attorney general decision under Section 552.301 shall make a good faith attempt to notify that person of the request for the attorney general decision."

All of the six companies have responded, however, only DMG, MGT, and Segal object to the release of portions of the requested information.³ Segal has simply raised a general objection to the release of the “fee information” portion of its proposal. DMG states that Exhibits I through V of its proposal are “confidential and/or proprietary.” Finally, MGT argues that Appendices A through D and F of its proposal are excepted under both prongs of section 552.110 of the Government Code. We have considered the arguments that these companies have raised and reviewed the submitted information that is at issue.

Initially, we note that the council failed to submit a copy of the information at issue to this office in a timely manner. Section 552.301 of the Government Code dictates the procedure that a governmental body must follow if it wishes to ask the attorney general for a decision determining whether requested information falls within an exception to disclosure. Among other requirements, the governmental body, “no later than the 15th business day after the date of receiving the written request,” must submit to the attorney general “a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested.” Gov’t Code § 552.301(e)(1)(D). If the governmental body fails to do this, the requested information “is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information.” Gov’t Code § 552.302.

The facsimile notation on the first request for information, Deloitte’s, indicates that the council received this request on January 15, 2000. Accordingly, the council’s deadline for submitting a copy of the requested information, or a representative sample thereof, expired fifteen business days later on February 8, 2000. *See* Gov’t Code § 552.301(e)(1)(D). However, the council did not send the requested information to this office until February 10, 2000. Therefore, the council missed its fifteen-day deadline as prescribed by section 552.301. Consequently, absent a compelling reason to withhold the requested information, the information must be released. However, because there are third parties in this case claiming to have an interest in the requested information, we find that a compelling reason exists. *See* Open Records Decision Nos. 630 (1994), 552 (1990), 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Accordingly, we will consider the third parties’ arguments for withholding portions of the requested information.

³Ray has submitted a letter to this office stating that it does not believe that any portion of its proposal is excepted from required public disclosure. Although we have not received a similar letter from Waters or Deloitte, you inform us that both companies have communicated to you that they do not object to the release of their proposal materials. Accordingly, the council must release Ray’s, Water’s, and Deloitte’s proposal materials if it has not already done so.

We begin with Segal's and DMG's objections to release. When a third party has a privacy or property interest in information that has been requested, that third party "may submit in writing to the attorney general the [party's] reasons why the information should be withheld or released." Gov't Code § 552.305(b). Segal has merely submitted one sentence for this office's consideration: "The Segal Company requests that you do not disclose fee information included in our proposal." DMG has submitted an equally laconic statement: "Exhibits I–V are confidential and/or proprietary. Please do not disclose that information." Neither Segal nor DMG has raised an exception to disclosure, nor has either one offered any reasons as to why its information should be withheld. Accordingly, Segal and DMG have failed to effectively raise objections to disclosure, and the council must release all of Segal's and DMG's proposal materials.

Next, we consider MGT's arguments that Appendices A through D and F of its proposal materials are excepted as trade secrets under section 552.110. Section 552.110(a) provides:

(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.

Gov't Code § 552.110(a). A "trade secret"

may consist of 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 single or ephemeral events 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 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).

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 party’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). However, where no evidence of the factors necessary to establish a trade secret claim is presented we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).

MGT explains that Appendices A through D and F reflect its salary and classification study component of its human resources management consulting practice. It states that it has “taken care to ensure that these tools are not available to its competitors or others outside of MGT.” It also states that “procedures are in place to ensure that the proprietary nature of these documents are observed.” Moreover, MGT states that it has spent significant resources in developing these materials and that these materials would be valuable to MGT’s

competitors. Having reviewed MGT's arguments, we find that it has made a prima facie case that Appendices A through D and F contain trade secrets and should be withheld under section 552.110(a). As the council has not taken a position in regard to whether this information is excepted as trade secrets, and no other party has submitted an argument that rebuts MGT's claims as a matter of law, the council must withhold Appendices A through D and F of MGT's proposal materials under section 552.110(a).⁴

Therefore, the council must withhold Appendices A through D and F of MGT's proposal materials. The council must release the rest of the requested information.

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).

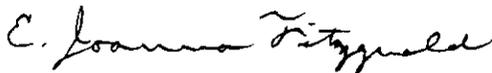
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

⁴Because section 552.110(a) is dispositive of this matter, we do not address MGT's arguments under section 552.110(b).

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,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\nc

Ref: ID# 133553

Encl Submitted documents

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