



August 14, 2000

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OR2000-3092

Dear Mr. Abernathy:

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# 137538.

The Plano Independent School District (the "district"), which you represent, received a request from GTE Service Corporation ("GTE") for information related to proposals submitted in response to a district request for proposal for a "Plano Wide Area Network." You contend that the property or privacy rights of third parties, Southwestern Bell Telephone Company ("SWB") and AT&T Broadband Network Solutions ("AT&T"), are implicated by the release of the submitted information. In response to this request you have submitted to this office for review the proposals submitted by these third parties, and the contract entered into between the district and SWB.

You indicate that the district notified the implicated third parties of this request for information. *See* Gov't Code §552.305(d) (governmental body must make good faith effort to notify a party whose proprietary interest may be implicated by the release of the requested information). The required notice informs a third party that it may submit to the attorney general, within ten days of receiving the notice, its reasons why the information in question should be withheld. In reaching a decision under chapter 552 of the Government Code, this office will consider the comments submitted by all interested persons. *See* Gov't Code §§ 552.304, .305(b). Here we consider the comments of the district, the requestor, SWB and AT&T.

Numbered here for reference purposes, the request seeks:

1. SWB's proposed Wide Area Network [redacted copy to exclude any and all vendor claimed proprietary and trademark protected information]. To include a reference log of redacted and omitted sections stating subject matter and claim justification;
2. ATT's Proposed Wide Area Network [redacted copy to exclude any and all vendor claimed proprietary and trademark protected information]. To include a reference log of redacted and omitted sections stating subject matter and claim justification;
3. Final Contract of Plano ISD/SWB Wide Area Network which was properly authorized and approved by the granting authority and the source of authority to expend public funds; and
4. Any and all records, either paper or electronic, that specifically relate to the creation, publication, authorization, implementation and dissemination of the Plano ISD Wide Area Network RFP created, issued and authorized by the Plano ISD to all requesting vendors

To include the submission vendor product information that is either readily available to a common independent school district customer or generally available to customers in the general public requesting such services.

To also include, but not be limited to, any and all internal and external electronic messages received, either internally or externally, by Plano ISD personnel directly connected to the creation, publication, authorization, implementation and dissemination of the Plano Wide Area Network RFP.

We note that no items responsive to request item 4 were submitted to this office for review. To the degree that such items exist, and are not made confidential by law, they must be released to this requestor. *See* Gov't Code §§ 552.301, 302.

On behalf of the third parties, the district has raised section 552.110 of the Government Code. This section 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. 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).

In determining whether information is excepted from public disclosure as a trade secret this office applies the following factors from the Restatement of Torts:

- (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; and

- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Blueprints, drawings, and customer lists are examples of information that may constitute trade secrets. *See, e.g., American Precision Vibrator Co. v. National Air Vibrator Co.*, 764 S.W.2d 274, 278 (Tex.App.--Houston [1st Dist.] 1988, no writ). Material which is essentially technical in nature and which relates to the substance of a proposal is ordinarily excepted as a trade secret. Open Records Decision Nos. 319 (1982), 296 (1981), 175 (1977). However, the terms of a contract with a state agency generally do not constitute a trade secret. Open Records Decision Nos. 541 (1990), 514 (1988). Similarly, information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted as trade secrets. Open Records Decision No. 319 (1982).

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if sufficient facts to establish a *prima facie* case that the information is a trade secret are alleged and no argument is submitted that rebuts that claim *as a matter of law*. Open Records Decision No. 552 at 5 (1990).

SWB has highlighted the information in its proposal that it asserts is protected. SWB relates that this information has been protected by SWB as a trade secret; that the information is not known outside SWB; that it was developed in a very restrictive and confidential manner; that internal access was limited on a "need to know" basis; that the value of the information is estimated in the millions of dollars; that SWB spent thousands of dollars in developing this particular proposal and multiple thousands of dollars in developing the skills, design and equipment required to make this proposal.

After reviewing the arguments and the submitted information, we conclude that SWB has demonstrated a *prima facie* case that the information that it has highlighted in its proposal is protected as a trade secret. Therefore, the information that SWB has highlighted in its proposal may be withheld as a trade secret under section 552.110(a).

SWB also asserts that a portion of the subject contract is protected as a trade secret. SWB claims this protection for article 4 of the Telecommunications Installation and Maintenance Agreement, section (d), "as it relates to 'plans, drawings, specifications, of the construction, assembly and testing.'" SWB also claims that this information is excepted under the "commercial or financial information" aspect of section 552.110. However, SWB does not specifically identify or provide information which it contends "relates" to this portion of the contract. Therefore, we conclude that no portion of the contract may be withheld under

either branch of section 552.110 of the Government Code. The contract must be released in its entirety.

AT&T asserts that its entire proposal consists of proprietary information with the exception of the following specific information:

1. The cover page of its proposal (1 page)
2. Letter dated July 29, 1999 from Carlo Terlizzi to PISD (1 page)
3. General Bidding Conditions (1 page)
4. II. Background and Experience (pp 5-12)
5. VI. Conclusion (p. 42)
6. VIII. General Information (p. 44)
  - a. Seaboard Surety Company Proposal Bond (3 pages)
  - b. Acknowledgment of Annexed Instrument (1 page)
  - c. Power of Attorney (1 page)
  - d. Financial Statement - March 31, 1999 - Seaboard Surety Company (1 page)
  - e. TCI Network Solutions Inc.: Certificate of Insurance (1 page)
7. IX. Appendix (p. 65)
  - a. Tele-Communications, Inc. : 1997 Annual Report to Stockholders (323 pages)
  - b. Resume of Carlo Terlizzi (3 pages)
  - c. Resume of Robert D. Blackwell (2 pages)
  - d. Resume of Bob Armentrout (2 pages)
  - e. Resume of Kerry Simmons (1 page)

As AT&T does not assert an exception for this identified information, it must be released. AT&T claims that the remaining portion of its proposal is excepted from disclosure as a trade secret.

AT&T asserts that its proposal information is unknown to anyone outside AT&T; the information is known to only 4 people inside AT&T; that AT&T safeguards the information and has taken significant measures to guard the secrecy of this information; that the information is "enormously" valuable; that AT&T devoted many years and millions of dollars in the development of the information and that this information cannot be easily duplicated. From AT&T's comments and our review of the submitted information, we conclude that most of this information may be protected. However, the "Executive Summary" and proposed pricing portion of these materials is not the type of information which can be considered a trade secret.

The district raises the "commercial and financial information" aspect of section 552.110 on behalf of AT&T. However neither the district nor AT&T provides comment in support of the application of this exception to the information in AT&T's proposal. The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See Open Records Decision No. 661 (1999); see also National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). We conclude that as no such showing has been made, no information in the AT&T proposal may be withheld under 552.110(b) of the Government Code.

Finally, the requestor asks for reference logs of redacted and omitted sections of the requested information, stating subject matter and claim justification. This information could not have existed at the time of the request. The Public Information Act does not require a governmental body to obtain information not in its possession or to prepare new information in response to an open records request. *Open Records Decision No. 445 (1986)*. Therefore, the district need not generate information responsive to this portion of the request.

In conclusion, the portion of the SWB proposal which SWB has highlighted may be withheld; the contract must be released in its entirety; the AT&T proposal may be withheld with the exception of the "Executive Summary" and the proposed pricing sections and the portion which AT&T has designated as subject to release; the district need not generate any logs in response to this request.

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.

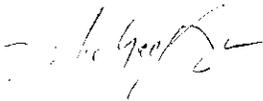
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge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

MJB/er

Ref: ID# 137538.

Encl. Submitted documents

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