Office of the Attorney General · State of Texas
John Cornyn

November 21, 2000

Ms. Mia M. Martin
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Attorneys and Counselors
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OR2000-4480

Dear Ms. Martin:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 141442.

The Richardson Independent School District (the "district"), which you represent, received a request for copies of the responses the district received to a "Request for Proposal for an Enterprise Resource Planning System." You suggest that the property and privacy rights of third parties may be implicated by the release of the requested information. You state that you have notified the five companies whose information is responsive to the request. *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 in Act in certain circumstances). Section 552.305(d) of the Act requires a governmental body to make a good faith effort to notify a party whose proprietary interest may be implicated by the release of the requested information. The third party notice must be sent within ten days of the governmental body's receipt of the request and must include a copy of the written request for information and a statement in the form prescribed by the attorney general. The third party may submit to the attorney general, within ten days of receiving the notice, its reasons why the information in question should be withheld.

Three of the five companies, Compuware Corporation, Arthur Andersen, and Deloitte & Touche, did not provide comment to this office. Therefore, those three companies have provided no basis to conclude that their information is excepted from disclosure. *See* Open Records Decision Nos. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or

generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, these three companies' proposals must be released to the requestor.

The two remaining companies, KPMG Consulting L.L.C. ("KPMG") and DARC Corporation ("DARC"), have submitted comments to this office. Both KPMG and DARC raise exception to the public disclosure of their proposals under sections 552.101 and 552.110 of the Government Code. We will first address the arguments under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

> 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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt.

b (1939).[1] This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

KPMG does not establish a *prima facie* case for exception of the submitted proposal as a trade secret under section 552.110. Specifically, KPMG has not shown, based on the Restatement's definition of trade secret, that their proposal should be excepted. Further, KPMG makes only conclusory allegations as to the competitive harm that would result from release of its proposal. Therefore, KPMG's proposal may not be withheld under either branch of section 552.110.

We now address the arguments made by DARC under section 552.110.[2] Material which is essentially technical in nature and which relates to the substance of a proposal may be excepted as a trade secret. Open Records Decision Nos. 319 (1982), 296 (1981), 175 (1977). 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). Based upon DARC's arguments and our review of the submitted documents, we find that the information contained in Appendix G constitutes trade secret that must be withheld under section 552.110. Additionally, DARC's methodology documents, pages 116-118, must be withheld.

However, information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted as trade

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[1]The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

> (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 § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

[2]We note that while the district only submitted portions of DARC's proposal for our review, DARC itself has submitted more of its proposal as excepted from required public disclosure. Therefore, this ruling encompasses both the information submitted by the district and DARC.

secrets. Open Records Decision No. 319 (1982). Thus, we find that the consultant rates submitted by DARC may not be withheld under section 552.110. Further, the résumés contained in Appendix H listing only the education and experience of DARC employees cannot reasonably be said to fall within the "trade secret" or any other exception of the Act. Open Records Decision No. 175 (1977). Additionally, we find that DARC has not established that the submitted financial statements are protected under either branch of section 552.110. As such, they must be released to the requestor.

Finally, we note that none of the information that this decision finds is not protected under section 552.110 implicates the privacy interests of an individual so as to be excepted under section 552.101.

In summary, the proposals submitted by Compuware Corporation, Arthur Andersen, and Deloitte & Touche must be released. KPMG's proposal must also be released. We have marked those portions of the proposal submitted by DARC that must be withheld under section 552.110 of the Government Code. The remaining information must be released.

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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

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,

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Assistant Attorney General
Open Records Division

PMA/AEC/seg

Ref: ID# 141442

Encl: Submitted documents

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