



June 1, 2001

Ms. Cynthia J. Hill
Acting General Counsel
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR2001-2264

Dear Ms. Hill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 147848.

The General Services Commission ("GSC") received a request for an electronic copy of the RFO responses for the Telecommunications Back Office System submitted to the GSC by AT&T Solutions ("AT&T"), Daleen Technologies ("Daleen"), and Telesoft Corp. ("Telesoft"). You have submitted for our review Exhibits B and C representing the Best and Final Offers of AT&T and Daleen and of Telesoft in response to the GSC's Request for Offer, RFO 303-0-7373-Telecommunications Back Office System.¹ You state you have notified AT&T, Daleen, and Telesoft of the request by copy of your letter dated March 29, 2001, as well as the notice required by section 552.305 of the Government Code. 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 Open Records Act in certain circumstances). Without taking a position on the release of the information, you ask whether the requested information is excepted from disclosure under section 552.110 of the Government Code. We received letters from AT&T, Daleen, and

¹ We note that AT&T and Daleen state that the request is not specific as to whether the request pertains to their RFO responses submitted August 15, 2000, or to the Best and Final Offers submitted on November 8, 2000. The GSC has submitted as responsive to the request the Best and Final Offers of AT&T, Daleen, and Telesoft dated November 8, 2000. Consequently, we only rule on the Best and Final Offers submitted to the GSC by AT&T, Daleen, and Telesoft, and do not rule on any portion of those RFO responses previously submitted to the GSC on August 15, 2000.

Telesoft asserting that the requested information is excepted under section 552.110. We have considered the exception raised and reviewed the submitted information.

AT&T and Daleen assert that their pricing matrix and assumptions are excepted from disclosure under the commercial or financial information prong of section 552.110. Daleen also asserts that its BillPlex Architecture and BillPlex System Architecture are excepted under the commercial or financial information prong of 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 the commercial or financial information prong of 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); Open Records Decision No. 661. (1999); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. cir. 1974).

AT&T and Daleen assert the telecommunications marketplace is fiercely competitive, and that the description of the assumptions used in developing the AT&T/Daleen responses and establishing the specific technical capabilities, specification, service levels, network management processes, and business processes all represent information which is used by AT&T and Daleen in their businesses and gives them "an opportunity to obtain an advantage over competitors" who do not know or use it. In addition, AT&T states that the specific pricing information enables AT&T to "obtain an advantage over competitors' or to otherwise differentiate itself from its competitors in the market." Moreover, AT&T and Daleen assert that their proprietary information will be used in some form by them in future bids against their competitors and that release of the information would allow their competitors to undercut their prices and copy product functionality. After reviewing the information at issue and the arguments set forth by AT&T and Daleen, we conclude AT&T and Daleen have demonstrated that substantial competitive injury would result from disclosure of the submitted information, and thus their pricing matrix and assumptions as well as Daleen's BillPlex Architecture and BillPlex System Architecture must be withheld from the requestor under section 552.110(b) as commercial or financial information. Therefore, the GSC must withhold Section 1.15.11, including Exhibits A and A1, Appendix C, and Attachments 3 and 4. Because the commercial or financial information prong of section 552.110 is dispositive of AT&T's and Daleen's proprietary information, we do not address their arguments under the trade secret prong.

Next, we address Telesoft's assertion that the requested information is excepted from disclosure under section 552.110 of the Government Code. Telesoft argues that it was clearly defined within the bid that submitting vendors had the responsibility to indicate what information was proprietary to prevent release of that information and that Telesoft followed

these instructions carefully. In addition, Telesoft contends it would not have responded to the bid had it known that the information would subsequently be released. A mere expectation of confidentiality by an individual supplying information does not properly invoke section 552.110. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977); Open Records Decision No. 203 (1978) (construing predecessor to section 552.110); *see also* Open Records Decision No. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential). Additionally, a governmental body's promise to keep information confidential is not a basis for excepting information from required public disclosure under the Public Information Act unless the governmental body has specific statutory authority to do so. Open Records Decision Nos. 514 (1988), 479 (1987), 444 (1986). Telesoft further makes a conclusory assertion that its response contains trade secrets and that release of the requested information would be harmful to its position in the market place. However, Telesoft has not adequately demonstrated the applicability of section 552.110; therefore, the GSC must release Telesoft's RFO 303-0-7373 response to the requestor. Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). *See also* Open Records Decision No. 661 at 5-6 (1999) (addressing required showing under section 552.110(b)).

We note that a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted material, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, GSC must withhold from AT&T's and Daleen's Best and Final Offer: Section 1.15.11, including Exhibits A and A1; Appendix C; and Attachments 3 and 4. GSC must release Telesoft's Response to Best and Final Offer, Bid No. 303-0-7373 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).

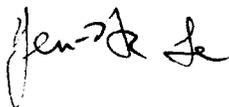
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

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 Hadassah Schloss at 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

