



September 4, 2001

Ms. Ruth H. Soucy  
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Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2001-3918

Dear Ms. Soucy:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 151420.

The Comptroller of Public Accounts (the "comptroller") received a request for "SCT's Response/Proposal to the RFP for Records Administration and Management Services dated February 23, 2001 for the Texas Prepaid Higher Education Tuition Board." You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code, and may be excepted from disclosure under section 552.110 of the Government Code. You make no arguments in support of the section 552.110 exception, but you have notified the third party whose proprietary interests may be implicated by the request for information. *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). SCT Software & Resource Management Corporation ("SCT") timely responded to your notice, and contends that portions of its proposal are excepted from required public disclosure pursuant to section 552.110 of the Government Code. We have considered the asserted exceptions and reviewed the submitted information.

You claim that section 552.103 of the Government Code will except the requested information from public disclosure. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The comptroller has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The comptroller must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>1</sup> Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. See Open Records Decision No. 331 (1982).

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<sup>1</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You inform us that the requestor filed suit against the comptroller on July 6, 2001 (Cause No. GN102081), in the 126<sup>th</sup> District Court of Travis County, Texas, *Intuition Solutions, Inc. v. Texas Comptroller of Public Accounts and the Texas Pre-Paid Higher Education Tuition Board*), shortly after the date of the subject request for information. Additionally, you maintain that on the date you received the request, attorneys for the comptroller “reasonably anticipated that InTuition would initiate litigation based on conversations with agents of InTuition and the understanding that litigation was a likely possibility in this situation.” We have considered your representations carefully and conclude that litigation was not reasonably anticipated on June 25, 2001, the date the comptroller received the request. Thus, the submitted information may not be withheld under section 552.103.

Next, we address the claim of the third party, SCT, that section 552.110 excepts a portion of the submitted information from disclosure. Section 552.110 of the Government Code 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. SCT contends that the information at issue constitutes trade secret information and commercial or financial information for which disclosure would cause substantial competitive harm to SCT.

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.<sup>2</sup> *Id.* 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).

The governmental body, or interested third party, raising section 552.110(b) 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* Open Records Decision No. 661 at 5-6 (1999); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

Submitted to this office as responsive to the request were SCT's RFP dated March 30, 2001, a revised Proposed Project Workplan dated June 6, 2001, and SCT's annual report 2000.<sup>3</sup> SCT argues that Appendix K (Sample Banner Product Screens) and the Initial Project Plan (Exhibit 3.1 of the Proposal) are excepted from disclosure pursuant to section 552.110(a) and (b). SCT further argues that Appendix J (Project Organization and Team Resumes) and Section 5 (Personnel and Organizational Information) are excepted from disclosure pursuant to section 552.110(b).

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). After reviewing the information at issue and the arguments set forth by SCT, we conclude that SCT has not demonstrated that substantial competitive injury would result from disclosure of the submitted information contained in Appendix J (Project Organization and Team Resumes) and Section 5 (Personnel

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<sup>2</sup>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).

<sup>3</sup>Although SCT's brief makes reference to "Exhibit B to the Record Administration and Management Services Agreement between SCT and the Office of the Comptroller of Public Accounts", and "Exhibit 2 of the Software License & Services Agreement (Exhibit A of the Agreement)," it does not appear that those documents were provided to this office.

and Organizational Information), and thus this information may not be withheld from the requestor under section 552.110(b). We find that SCT has demonstrated that Appendix K and the Project Plan (§3.1) constitute commercial or financial information, the release of which would result in substantial competitive injury. The comptroller must therefore withhold from public disclosure the information in Appendix K and in the Project Plan (§3.1) under section 552.110(b). As section 552.110(b) is dispositive regarding the information in Appendix K and the Project Plan, we do not reach your section 552.110(a) argument for this information.

In summary, the information in Appendix K and in the Project Plan (§3.1) is excepted from disclosure under section 552.110(b). The comptroller must release the remaining requested information 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 151420

Enc. Submitted documents

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