



October 22, 2001

Mr. James L. Hall
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR2001-4772

Dear Mr. Hall:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153708.

The Texas Department of Criminal Justice (the "department") received a request for information pertaining to offers received in response to solicitation 696-PD-1-0015 by the Board of Pardons and Paroles (the "board"). More specifically, the requestor seeks "copies of all documents prepared or used by the bid or offer selection committee in its selection process, including selection criteria, offer evaluations, comments, criticisms, the successful offeror's proposal, the contract awarded and minutes of all meetings awarding the contract, discussing the contract or bid/offers for the contract." As required under section 552.305 of the Government Code, you notified xNet Systems, Inc. ("xNet") of the request for their information and invited it to submit arguments to this office as to why the information at issue should not be released.¹ A representative of xNet timely responded to your notice. XNet contends that portions of its proposal are excepted from disclosure under sections 552.102, 552.104 and 552.110 of the Government Code. We have considered the arguments advanced by xNet and have reviewed the submitted information.

¹See 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 Public Information Act in certain circumstances)

Initially, we note that you have only submitted to our office for review a portion of the proposal submitted to the board by xNet. You have not submitted to this office, nor do you inform us that you have released to the requestor, the remaining requested information. Therefore, you must immediately release such information to the requestor if you have not already done so.² See Gov't Code §§ 552.006, .301(a), .302.

We now turn to xNet's arguments. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." However, this section only applies to employees of a governmental body. The right to privacy is also protected under section 552.101. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 also encompasses the doctrines of common law and constitutional privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. See also Open Records Decision No. 659 at 4-5 (1999) (summarizing types of information that are protected by rights of privacy).

Upon review of the information xNet seeks to withhold under a right to privacy, consisting of the biographical information on pages 7-8 of its proposal, and the Staffing plan on pages 18-21, we conclude that none of this information is intimate or embarrassing, and therefore, it may not be withheld under section 552.101 in conjunction with the common law right of privacy.

With regard to xNet's argument under section 552.104, we note that section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Therefore, the requested information may not be withheld under section 552.104.

²We note in this regard that xTel seeks to withhold what it describes as "Volume 1, Attachments Section (Project References)," as well as "Section 7 of the Negotiated Response," under section 552.110. This office did not receive copies of either of those documents to review. Therefore, to the extent such information exists and is responsive, it must be released to the requestor. See Gov't Code §§ 552.301(e)(1)(D), 302.

We will next address xTel's argument under section 552.110. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.110(a), (b). 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). 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).³ 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 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).

Upon review of the arguments submitted by xTel, we conclude that xTel has demonstrated how release of the information it refers to as "Volume 1, Section 7 (Workplan: pages 17-18)" would cause it substantial competitive harm. Therefore, this information must be withheld from the requestor under section 552.110(b). We have marked the information to be withheld. With regard to the remainder of the information xTel seeks to withhold, xTel has provided us only with conclusory assertions, and has thus failed to demonstrate that the remainder of the information is confidential as either a trade secret or as commercial or financial information. Therefore, we conclude that the submitted information must be released to the requestor in its entirety, with the exception of the information we have marked. See Open Records Decision No. 319 at 3 (1982) (stating that statutory predecessor to section 552.110 ordinarily does not protect information relating to organization and

³The 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).

personnel, market studies, professional references, qualifications and experience, and pricing).

Finally, we note that xTel asserts that much of the information it seeks to withhold was not intended to be made available to parties outside of the department or the board. We note, however, that information is not confidential under the Public Information Act simply because the party submitting it anticipates or requests that it be kept confidential. Open Records Decision No. 479 (1987). Nor is information excepted from disclosure merely because it is furnished with the expectation that access to it will be restricted. Open Records Decision No. 180 (1977).

To summarize, the requested information must be released to the requestor in its entirety, with the exception of the information we have marked on pages 17-19 of the proposal, which must be withheld pursuant to section 552.110(b).

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 153708

Enc. Submitted documents

c: Mr. John V. Rabel
Attorney at Law
17225 El Camino Road, Suite 344
Houston, Texas 77058
(w/o enclosures)

Mr. John M. Gambrell V
Davis & Opper, PC
8550 Katy Freeway, Suite 200
Houston, Texas 77024
(w/o enclosures)