



February 6, 2002

Ms. Pamela Smith  
Assistant General Counsel  
Texas Department of Public Safety  
P.O. Box 4087  
Austin, Texas 78773-0001

OR2002-0565

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158356.

The Texas Department of Public Safety (the "department") received a request for all proposals submitted in response to the Texas remote sensing solicitation, ORA 01-1400, to include the proposals submitted by Environmental Systems Products Holdings, Inc. ("ESP"), BAE Systems ("BAE"), and SPX Corporation ("SPX"). The requestor also seeks cost volumes and, when signed, a copy of the contract between the department and the new contractor. You inform us that you are releasing to the requestor a copy of the "price list" from each proposal, but claim that the remainder of the requested information may be excepted from disclosure under sections 552.101, 552.110, 552.113 and/or 552.131 of the Government Code. Although you raise exceptions to disclosure, you have declined to make arguments in support thereof. Rather, pursuant to section 552.305, you notified representatives of ESP, SPX and BAE of the request for their information and invited them submit arguments to this office as to why the information at issue should not be released.<sup>1</sup> A representative of SPX timely submitted arguments to this office and contends that a portion of the information contained in SPX's proposal is excepted from required public disclosure pursuant to sections 552.104 and 552.110 of the Government Code. This office received no arguments from BAE or ESP, and therefore, except as noted below, their proposal information must be released to the requestor. See Gov't Code § 552.110(b) (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

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<sup>1</sup>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 Public Information Act in certain circumstances).

faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

First, we note that the requestor seeks a copy of the signed contract between the department and the new contractor. You have not submitted any such contract to this office for review, nor have you informed us that you have released the contract to the requestor. Therefore, to the extent a contract responsive to the request existed on the date the department received the request, and to the extent the department has not already provided the requestor with such a contract, the department must release the responsive contract to the requestor at this time. See Gov't Code §§ 552.006, .301(a), .302; see also Gov't Code § 552.022(a)(3).

Next, we note your assertion that "either in the body of the proposal or in conversation with department staff, [all three firms indicated] that their proposals contain proprietary information they wish to protect from public disclosure." We note, however, that information is not made confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977); see also Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110).

We will now address SPX's argument under section 552.104. 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 does not protect the interests of third parties. *Id.* 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.

We next address the applicability of section 552.110 to SPX's information. 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). 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).<sup>2</sup> 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 to this office by counsel for SPX, as well as the submitted affidavits of SPX employees, we find that SPX has established that release of the following information from the SPX proposal would cause the company substantial competitive harm: the Table of Contents; pages 3-32 of the proposal; and Appendices J, K, and L-R. Therefore, this information must be withheld from the requestor under section

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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).

552.110(b). The remainder of the SPX proposal, including Appendices D, G, H, and I for which SPX makes arguments, must be released to the requestor. *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 personnel, market studies, professional references, qualifications and experience, and pricing).

We also note that the submitted proposals of all three companies contain e-mail addresses that are excepted from disclosure under section 552.137. Section 552.137 provides in relevant part:

**Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.**

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code § 552.137. Section 552.137 requires the department to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that the members of the public have consented to their release, the department must withhold the e-mail addresses of the third parties we have marked in the submitted documents (see green tags) under section 552.137 of the Government Code.

Finally, we note that some of the submitted materials are copyrighted. 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 materials, 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).

To summarize, to the extent a contract responsive to the request existed on the date the department received the request, and to the extent the department has not already provided the requestor with such a contract, the department must release the responsive contract to the requestor at this time. The department must withhold the following information from the SPX proposal under section 552.110(b): the Table of Contents, pages 3-32 of the proposal,

and Appendices J, K, and L-R. The remainder of the requested information pertaining to SPX, BAE, and ESP must be released to the requestor, with the exception of the marked e-mail addresses, which must be withheld under section 552.137. The copyrighted material must be made available to the requestor, but department must comply with the copyright law and is not required to furnish copies of information that is copyrighted.

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 Texas Building and Procurement 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/sdk

Ref: ID# 158356

Enc. Submitted documents

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