



September 19, 2002

Ms. Anne M. Constantine
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OR2002-5293

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168873.

The Dallas/Fort Worth International Airport Board (the "board") received a request for numerous documents regarding two requests for proposals. In particular, the requestor seeks documents relating to contract number 7003295, for an automated parking system, including a copy of the proposal submitted by Federal APD ("Federal"). Additionally, the requestor seeks documents relating to contract number 8001545, for consulting services for the automated parking system, including a copy of the proposal submitted by Walter P. Moore & Associates, Inc. ("Moore"). You state that most of the documents at issue will be made available for inspection. You claim, however, that a portion of the responsive documents are protected by the attorney-client privilege. Furthermore, you state that release of the requested proposals may implicate the proprietary interests of Federal and Moore. You state, and provide documentation showing, that you notified Federal and Moore of the request and of their right to submit arguments to this office as to why the proposals should not be released. *See* Gov't Code § 552.305(d), *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act in certain circumstances). We have considered your comments and reviewed the submitted information. We have also considered comments submitted by Federal and Moore. Gov't Code § 552.305(d).

Section 552.107 of the Government Code protects information coming within the attorney-client privilege. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to the attorney's client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. You state that a portion of the documents at issue consist of confidential communications between the board and the board's legal counsel. After careful review, we agree that these documents contain client confidences or an attorney's advice and opinion. We have marked the documents that the board may withhold from public disclosure pursuant to section 552.107(1) of the Government Code.

Federal argues that certain information redacted from the copies of Federal's original proposal and Best and Final Offer that Federal submitted for our review should be withheld from disclosure under section 552.103 of the Government Code. Moreover, both Federal and Moore argue that information in their proposals should be withheld under section 552.104 of the Government Code. Sections 552.103 and 552.104 are discretionary exceptions that protect only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation, and does not itself make information confidential), 522 (1989) (discretionary exceptions in general). As the board does not raise sections 552.103 and 552.104, these sections do not apply to the requested information. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103), Open Records Decision No. 592 (1991) (governmental body may waive section 552.104). Therefore, the requested information may not be withheld under section 552.103 or section 552.104.

Next, both Federal and Moore raise section 552.110 of the Government Code. 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). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this information; and
- (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 No. 232 (1979). This office must accept a claim that information subject to the Public Information Act (the "Act") is exempted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records

Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Based on our review of Federal’s arguments and the submitted information, we determine that Federal has not demonstrated that any portion of its original proposal or Best and Final Offer is excepted from disclosure under section 552.110(a). We find, however, that Federal has demonstrated that release of certain technical information would interfere with Federal’s ability to recoup its development costs or obtain protection for certain intellectual property. Thus, we find Federal has demonstrated that release of certain portions of its original proposal and Best and Final Offer would cause it substantial competitive harm. We have marked the information in Federal’s documents that the board must withhold pursuant to section 552.110(b). *See* Open Records Decision Nos. 661 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). The remainder of Federal’s information may not be withheld under section 552.110(b) and must be released to the requestor. *Id.*; *see also* Open Records Decision No. 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor).

Moore argues that certain information contained in Attachment C of Moore’s proposal regarding costing, overhead rates, profit margins, and the individual rates of principals and employees is commercial information protected by section 552.110(b). Upon careful review of Moore’s comments and the submitted information, we find that Moore has provided a general, conclusory statement that release of the information would cause Moore substantial competitive harm. Moreover, Moore has not substantiated its comments with any specific factual evidence. Thus, we are unable to determine that section 552.110(b) applies to any of the information in Moore’s proposal. *See* Open Records Decision Nos. 661 (1999), 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319(1982); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). *Cf.* Open Records

Decision Nos. 514 (1988) (public has an interest in knowing prices charged by government contractors), 184 (1978). Accordingly, the board may not withhold any portion of Moore's proposal under section 552.110 of the Government Code.

In summary, we have marked the information that the board may withhold under section 552.107(1) of the Government Code. We have marked the information in Federal's original proposal and Best and Final Offer that the board must withhold pursuant to section 552.110(b) of the Government Code. The remainder of the information must be released 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 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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

DRS/seg

Ref: ID# 168873

Enc: Submitted documents

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