



OFFICE of *the* ATTORNEY GENERAL
GREG ABBOTT

May 12, 2003

Ms. Alejandra I. Villarreal
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111 Soledad, Suite 1220
San Antonio, Texas 78205

OR2003-3165

Dear Ms. Villarreal:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180856.

Alamo Workforce Development, Inc. ("Alamo"), which you represent, received a request for the cost and technical proposal submitted by Affiliated Computer Solutions ("ACS"), and for any existing award evaluations pertaining to a request for proposals for workforce center contractors. You state that information responsive to the request for evaluations is being provided to the requestor.

While you indicate that the remaining requested information may be excepted from disclosure under sections 552.101 and 552.110 of the Government Code, Alamo takes no position as to whether the requested information is so excepted. Rather, you state, and provide documentation showing, that you notified ACS, the interested third party, of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). We have reviewed the submitted information and considered the claimed exceptions.

ACS asserts that portions of its proposal are excepted under sections 552.104 and 552.110 of the Government Code. Section 552.104 protects the interests of governmental bodies, not

third parties: Open Records Decision No. 592 (1991). As Alamo does not raise section 552.104, this section is not applicable to the requested information. *Id.* (predecessor to section 552.104 may be waived by governmental body). Thus, no portion of the requested information may be withheld under section 552.104.

ACS argues that the information at issue is excepted under both prongs of 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. Section 552.110(a) protects the proprietary 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 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. *See* Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) applies 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. *See* 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).

ACS objects to the public disclosure of specified items contained in its proposal. Specifically, ACS seeks to withhold information concerning the following:

- [1.] Curricula highlights as found on pages 90-91, Opening Doors to Work;
- [2.] Curricula highlights as found on pages 108-109, Opening Doors to Job Success;
- [3.] Budget Forms as found on pages 265-278 of the Proposal Narrative;
- [4.] Customer Flow Charts as found on pages 294-297;
- [5.] ACS Organization Chart as found on pages 300-301;
- [6.] Indirect cost Plan as found page 379 [sic];
- [7.] Financial Audits as found on page 382;

[8.] Attachment O, ACS State & Local Solutions, Inc. HR Policies and Procedures;

[9.] Attachment N, Affirmative Action & Equal Employment Opportunity Policies;

[10.] and Attachment Q, Monitoring Reports; [and]

[11.] [A]ny addenda thereto.

Upon review of ACS's arguments and the information at issue, we conclude that the company has established a *prima facie* case that portions of the information at issue constitute trade secrets. Because we have received no argument to rebut the company's claim as a matter of law, Alamo must withhold the information that we have marked under section 552.110(a). Furthermore, we conclude that ACS has demonstrated how the release of portions of the information it seeks to withhold would result in substantial competitive injury to ACS, and, therefore, the information that we have marked is excepted from public disclosure as confidential commercial and financial information under section 552.110(b).

However, as to the remainder of the information that ACS seeks to withhold from disclosure, we find that ACS has not met its burden of making a *prima facie* case as required by section 552.110(a), nor has ACS made a sufficient specific factual or evidentiary showing that release of the information at issue would result in substantial competitive injury to ACS. *See* Gov't Code § 552.110(b); *see also Nat'l Parks*, 498 F.2d. 765; Open Records Decision Nos. 661 (1991), 514 (1988) (public has interest in knowing prices charged by government contractors), 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) (finding information relating to organization, personnel, market studies, professional references, qualifications, experience, and pricing not excepted). Consequently, we conclude Alamo may not withhold the remainder of ACS's information under section 552.110 of the Government Code.

We note that the submitted records contain social security numbers, which may be withheld in some circumstances under section 552.101 of the Government Code.¹ A social security number or "related record" may be excepted from disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See* Open Records Decision No. 622 (1994). These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See id.* We have no basis for concluding that any of the social

¹Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, Alamo should ensure that no such information was obtained or is maintained pursuant to any provision of law, enacted on or after October 1, 1990.

Finally, we note that some of the materials at issue may be protected by copyright. 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).

In summary, Alamo must withhold the information that we have marked under section 552.110 of the Government Code. As ACS has not established the applicability of section 552.110 to any other portions of the submitted information, Alamo must release the remaining documentation to the requestor in compliance with copyright law, with the exception of social security numbers contained therein, which may be confidential under federal law.

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 Dep't of Pub. 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 180856

Enc. Submitted documents

c: Ms. Elizabeth D. Steponkus
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(w/o enclosures)