



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 24, 2003

Ms. Kathleen Spears
Officer for Public Information
Parkland Health & Hospital System
5201 Harry Hines Boulevard
Dallas, Texas 75235

OR2003-8458

Dear Ms. Spears:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191638.

The Dallas County Hospital District (the "district"), which you represent, received four separate requests for information regarding RFP 4061-03. You claim that the requested information from Affiliated Computer Services, Inc. (ACS) is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. You state that the remaining requested information may be confidential under section 552.110 of the Government Code, but make no arguments and take no position as to whether the information is so excepted from disclosure. You inform this office and provide documentation showing that you have notified all the interested third parties, ACS, Cap Gemini Ernst & Young ("Cap Gemini"), Computer Sciences Corporation ("CSC"), Schlumberger Technology, Inc. ("Schlumberger"), Perot Healthcare Systems ("Perot"), and Buchanan Associates ("Buchanan"), whose proprietary interests may be implicated by the requests 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); *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 in Public Information Act (the "Act") in certain circumstances). As of the date of this ruling, we received arguments from representatives for ACS, CSC, and Schlumberger. You note that Perot has not claimed an exception for disclosure of their proposal and as such, their information has been released to all requestors.

We have reviewed the representative sample of information you submitted and considered all of the submitted arguments and the exceptions you claim.¹

First, we address your claims in regard to ACS's request. Section 552.103, known as the litigation exception, 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 district 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 on the date that the governmental body receives the request for information 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 district must meet both prongs of this test for information to be excepted under 552.103(a).

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 at 1 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986), and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include the governmental

¹ We assume the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision Nos. 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. Open Records Decision No. 638 at 3 (1996). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this case, you state that ACS has repeatedly alleged irregularities in the RFP contract award process, hired lawyers to file a protest to the RFP award, and requested that the district grant remedies to ACS in order to minimize the prospect of judicial intervention. Upon review of your arguments and the submitted information, we find that you have adequately demonstrated that litigation is reasonably anticipated in this matter for purposes of section 552.103. Accordingly, the district may withhold the submitted information from disclosure pursuant to section 552.103 of the Government Code. As section 552.103 is dispositive to our ruling in regards to ACS's request for information, we do not address your section 552.107 and 552.111 claimed exceptions.

We now address the remaining three open records requests. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Cap Gemini and Buchanan have not submitted to this office their reasons explaining why their information should not be released. Therefore, Cap Gemini and Buchanan have provided us no basis to conclude that their information is excepted from disclosure. *See, e.g.*, 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 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). Consequently, the district may not withhold the requested information pertaining to Cap Gemini or Buchanan under section 552.110.

However, ACS, Schlumberger, and CSC all submitted third party briefs claiming an exception from disclosure under section 552.110. Section 552.110 of the Government Code 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. 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 excepted 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) 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. *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).

After a review of ACS’s arguments and the submitted information, we conclude that portions of the Network Services (pp. 15-18), Telecommunications Services, Methodology (pp. 20-24); Data Center Services, Methodology (pp. 26-33); Help Desk Services, Methodology (pp. 34-35); and Desktop Services, Methodology (pp. 38-41) are excepted from

disclosure under section 552.110(a). We have marked this information accordingly. Likewise, we conclude that sections 4.1, 4.3, 4.4, 4.5, and some of the questions in 4.7.1(b) are excepted from disclosure under section 552.110(a). The 4.7.1(b) questions that are excepted from disclosure are the sections that describe the three risks in question 6, questions 9,10, and 13. Section 4.7.1(c) Key Financial Results and Pricing Approach; the Dallas Data Center Profile Appendix; and Key Methodology Descriptions all contain confidential trade secret information that is excepted from disclosure under section 552.110(a). However, pricing information contained in section 4.6 of ACS's bid proposal must be released to the requestor because ACS has not shown that the prices are used in their business rather than information as to a single event that is only specific to this RFP. *See* Open Records Decision Nos. 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 pricing not excepted under section 552.110 and that pricing proposals are entitled to protection under section 552.104 only during bid submission process), 184 (1978). Consequently, the submitted pricing information in section 4.6 as well as all of the remaining information contained in ACS's bid proposal may not be withheld under section 552.110(a). Because ACS has failed to adequately demonstrate that the release of any portion of their proposal would cause them substantial competitive harm for purposes of section 552.110(b), we also conclude that the district may not withhold any portion of ACS's remaining information under section 552.110(b).

Although ACS also objects to the release of the district's evaluation materials regarding ACS, the district has not requested that this information be excepted from disclosure and has not submitted the information. Because the district has not requested that the evaluation materials be excepted from disclosure, we do not address the evaluation materials in this ruling.

We next consider whether portions of CSC's bid proposal are excepted from public disclosure by section 552.110. After a review of CSC's arguments and the submitted information, we conclude that sections 4.4-3 through 4.4-11 and 4.7.1(e)-2 through 4.7.1(e)-8 contain confidential trade secrets that are excepted from disclosure under section 552.110(a). We have marked this information accordingly. Although pricing information contained in section 4.6 of CSC's bid proposal cannot be withheld pursuant to section 552.110(a) as noted above, CSC also argues that the information should be withheld under section 552.110(b). Upon review, we find that CSC has adequately demonstrated that the pricing information contained in section 4.6 of their bid proposal would cause them substantial competitive harm for purposes of section 552.110(b). Consequently, the submitted pricing information in section 4.6 is excepted from disclosure under section 552.110(b). However, CSC has failed to demonstrate that their remaining information constitutes confidential trade secrets under section 552.110(a) and have failed to show that the release of the remaining information

would cause them substantial competitive harm under section 552.110(b). Therefore, the remaining information may not be withheld under section 552.110.

CSC also claims that portions of their remaining proposal are excepted from disclosure under section 552.131 of the Government Code. Section 552.131(a) excepts from public disclosure a business prospect's trade secret or commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the governmental body's territory. Gov't Code § 552.131(a). CSC has failed to demonstrate that their remaining information constitutes trade secrets under section 552.131(a)(1) and has failed to show that the release of their commercial or financial information would cause them substantial competitive harm under section 552.131(a)(2). Therefore, the district may not withhold the remaining portions of CSC's proposal under section 552.131.

Because Schlumberger has failed to adequately demonstrate that any portion of their information constitutes confidential trade secrets under section 552.110(a), we conclude that the district may not withhold any portion of Schlumberger's information under section 552.110 of the Government Code.

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,



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Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 191638

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