

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2004

Ms. Jan Clark
Assistant City Attorney
City of San Marcos
630 East Hopkins
San Marcos, Texas 78666

OR2004-1544

Dear Ms. Clark:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 197050.

The City of San Marcos (the "city") received a request for "copies of proposals submitted . . . in response to RFP 23-039." On behalf of the third parties who submitted proposals to the city, you ask whether the requested information is excepted from disclosure under section 552.110 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You state that the city received the request for information on October 24, 2003. You did not request a decision from this office until December 18, 2003. Consequently, you failed to request a decision within the ten business day period mandated by section 552.301(a) of the Government Code.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. The city did not, however, submit these required items to this office until December 18, 2003.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). This office has held that a compelling reason exists to withhold information when the information affects third party interests. *See* Open Records Decision No. 150 (1977). You contend that the requested information affects third party interests and may be excepted from disclosure under section 552.110. Therefore, we will consider whether section 552.110 applies to the requested information.

Although the city takes no position with respect to the release of the requested information, you state and provide documentation showing that the city notified Datamatx, Inc. ("Datamatx"), NCP Solution ("NCP") and InterCept Output Solutions ("InterCept"), whose propriety interests may be implicated by the release of this information, of the request pursuant to section 552.305 of the Government Code. *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 to disclosure in certain circumstances). We have received correspondence from Datamatx and InterCept. We have reviewed their arguments and the submitted information.

We note that 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 requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, NCP has not submitted any comments to this office explaining how release of its proposal would implicate its proprietary interests. Therefore, NCP has provided us with no basis to conclude that it has a protected proprietary interest in its proposal. *See* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990), 542 at 3 (1990). Therefore, NCP's proposal must be released.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial 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. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

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).¹ 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

¹The 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).

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).

Datamatx contends that release of its proposal would violate its trade secrets. After reviewing Datamatx's arguments and the information at issue, we conclude that Datamatx has not established a *prima facie* case that its proposal contains any trade secrets. See Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the city must release Datamatx's proposal.

Section 552.110(b), which protects certain financial or commercial information, 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. See also Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

InterCept generally contends that disclosure of its proposal would make valuable information available to its competitors. InterCept alleges that disclosure of its proposal would likely cause substantial harm to InterCept's competitive position. Having reviewed InterCept's arguments and the information at issue, we find that InterCept has not provided a specific factual or evidentiary showing that release of its proposal would likely cause the company to suffer substantial competitive injury. Therefore, InterCept's proposal must be released.

In summary, you must release NCP's, Datamatx's and InterCept's proposals.

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); *Tex. 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,



Melissa Vela-Martinez
Assistant Attorney General
Open Records Division

MVM/sdk

Ref: ID# 197050

Enc. Submitted documents

c: Information Management Solutions
c/o Purchasing
2422 Freedom
San Antonio, Texas 78217
(w/o enclosures)

Mr. Harry Stephens
Datamatx, Inc.
3146 Northeast Expressway
Atlanta, Georgia 30341-5345
(w/o enclosures)

Ms. Lisa M. DeCaprio
InterCept Output Solutions
3150 Holcomb Bridge, Suite 200
Norcross, Georgia 30071-1370
(w/o enclosures)

Mr. Darrell Morgan
NCP Solution
5200 East Lake Boulevard
Birmingham, Alabama 35217-1234
(w/o enclosures)

CAUSE NO. GN400836

INTERCEPT, INC. AND INTERCEPT
OUTPUT SOLUTIONS, L.P.,
Plaintiffs,

V.

GREG ABBOTT, ATTORNEY GENERAL,
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§ 53RD JUDICIAL DISTRICT

FILED

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Marian Rodriguez

DISTRICT CLERK
TRAVIS COUNTY, TEXAS

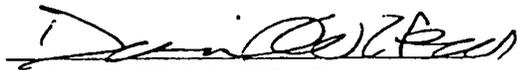
AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiffs InterCept, Inc. and InterCept Output Solutions, L.P. (InterCept), and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, John Reed, was sent reasonable notice of this setting and of the parties' agreement that the City of San Marcos must withhold the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. The information at issue, portions of InterCept's Proposal to the City of San Marcos, dated August 14, 2003, in response to RFP 23-039, is commercial or financial information and,

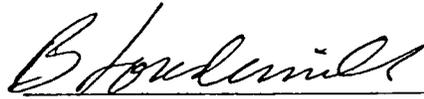
APPROVED:


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