



THE CITY OF MIDLAND, TEXAS

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December 14, 1990

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Opinion Committee

The Honorable Jim Mattox
Attorney General, State of Texas
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

Attention: Open Government Section

Dear General Mattox:

The City of Midlnad ("City") has received a request which the City is treating as having been made pursuant to the Texas Open Records Act, Tex. Rev. Civ. Stat. Art. ann. 6252-17a (Vernon Supp. 1990). Pursuant to Sec. 7a of the Open Records Act, the City requests that you issue an opinion as to whether or not the City must release the requested information. The following contains the facts leading up to the request for an open records decision and the City's argument for denying said request.

I. Facts

On December 5, 1990, GE requested by letter that the City release Motorola's high tech proposal with the City for a Radio Communication System.

II. Statement of the Issue

Are equipment list prices and installation services attached as Exhibit "A" contained in a high technology bid proposal exempt from disclosure under the Open Records Act?

III. Argument

A. Whether the equipment price lists and installation services are prohibited from disclosure as confidential/trade secret information?

The disclosure of the equipment price lists and installation services are prohibited by the Open Records Act, Tex. Rev. Civ. Stat. Ann. art. 6252-17a §§ (3)(a)(i) and (10) (Vernon Supp. 1990) which state as follows:

Jim Mattox
December 14, 1990
Page 2

Sec. 3(a) All information collected, assembled or maintained by or for governmental bodies, except in those situations where the governmental body does not have either a right of access to or ownership of the information, pursuant to law or ordinance or in connection with the transaction of official business is public information and available to the public during normal business hoursexcept (emphasis supplied)

(1) information deemed confidential by law, whether constitutional, statutory, or by judicial decision; and

(10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Texas law specifically exempts from disclosure the high technology bid proposals submitted by vendors, Tex. Local Gov't Code § 252.049 (a) and (b) (Vernon 1989) which states as follows:

(a) Trade secrets and confidential information in competitive sealed bids are not open for public inspection.

(b) If provided in a request for proposals, proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations. All proposals are open for public inspection after the contract is awarded, but trade secrets and confidential information in the proposals are not open for public inspection. (emphasis supplied).

Motorola has stated to the City that the equipment price lists and installation services attached as Exhibit "A" and marked "Confidential" are specific pricing and services designed for the City and are not released to the public or to their customers.

B. What is a Trade Secret or Confidential Information?

The burden is on the vendor to show that the information supplied constitutes a trade secret or confidential information. Different tests apply for each one. Trade secrets are generally protected by federal patent and copyright laws.

Jim Mattox
December 14, 1990
Page 3

Court decisions protect "trade secrets" as defined in the Restatement of Torts:

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 list of customers. Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958).

The Restatement lists six factors for determining whether particular information constitutes 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 its 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;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

Section 3(a)(10) also protects certain commercial or financial information that need not constitute a trade secret. Texas Attorney General open records decisions rely on federal cases ruling on exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), ("FIOA") in applying section 3(a)(10) to commercial information. See, e.g., Tex. Att'y. Gen. O.R.D. No. 309 (1982). The federal test is as follows:

Jim Mattox
December 14, 1990
Page 4

"commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects:

1) to impair the Government's ability to obtain necessary information in the future; or 2) to cause substantial harm to the competitive position of the person from whom the information was obtained." (Emphasis added.) National Parks and Conservation Association v. Morton, 498 F2d 765, 770 (D.C. Cir. 1974)."

Under the first National Parks test the burden is on the agency releasing the information to show that it will impair its ability to obtain the information in the future. See Chrysler Corporation v. Brown, 441 U.S. 281, 292-93 (1979), (which holds that the agency would have to endorse the interest in confidentiality). The majority of these cases indicate that an agency's ability would be impaired to gather the information in the future because of the failure to keep the information confidential. Courts look at whether the information is required to be reported by law in determining whether releasing the information would impair the agency's ability to obtain the information in the future.

The second National Parks test is whether release of the information will cause substantial competitive harm to the person from whom the information was obtained. Cf. Audio Technical Services, Ltd. v. Department of the Army, 487 F.Supp. 779, 782 (D.D.C. 1979)

In Gulf & Western Industries, Inc. v. United States, 615 F2d 527, 530 (D.C. Cir. 1979), the court stated:

[i]n order to show the likelihood of substantial competitive harm, it is not necessary to show actual competitive harm. Actual competition and the likelihood of substantial competitive injury is all that need be shown.

Jim Mattox
December 14, 1990
Page 5

Federal cases determining the applicability of exemption 4 of the FOIA under the "substantial competitive injury" test hold that the burden of proof is on the agency or the company wishing to have the information withheld and that general allegations of unspecified competitive harm will not suffice. See, e.g., Burnside-Ott Aviation Training v. United States, 617 F.Supp. 279, 286 (S.D. Fla. 1985); Sears, Roebuck and Co. v. General Services Administration, 402 F.Supp. 378, 383 (D.D.C. 1975).

Moreover, if information can be relatively easily ascertained from other sources, release of the information is unlikely to cause substantial competitive harm. Sears, 402 F.Supp. at 383. For example, in Braintree Electric Light Department v. Department of Energy, 494 F.Supp. 287, 290 (D.D.C. 1980), the court held that the identities of customers purchasing fuel oil from a specific company could not be considered confidential because trucks bearing the company's logo were highly visible when making deliveries and because purchasers in the oil industry are well known.

Finally, federal cases applying exemption 4 require a balancing of the public interest in disclosure with the competitive injury to the company in question. See, e.g., Pennzoil Company v. Federal Power Commission, 534 F.2d 627, 632 (5th Cir. 1976).

GE's obvious purpose in seeking this information is to outbid Motorola on future contracts with other entities. The City maintains that this compilation of information is a trade secret as defined in Hyde Corp., supra. Releasing this information to GE would give GE as a competitor a business advantage over Motorola.

Furthermore, Motorola's individual pricing of component parts and the design and implementation of a radio system to fit the City's needs is not information known outside of Motorola's business. Motorola had marked this information confidential. Requiring this information to be released will place the City at a disadvantage in the future. High technology vendor's will not bid on the City's projects if their confidential information is held to be public information. Therefore, the public interest would be served by withholding this information.

Jim Mattox
December 14, 1990
Page 6

CONCLUSION

Based on the foregoing, that state law prohibits confidential information in high tech bid proposals from being disclosed, Motorola's equipment price lists and installation services attached as Exhibit "A" should not be disclosed.

Sincerely,


Dorothy G. Palumbo
Assistant City Attorney

DGP/jw

Enclosures

cc: Motorola
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