



Office of the Attorney General
State of Texas

January 31, 1994

DAN MORALES
ATTORNEY GENERAL

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
Institutional Division
P.O. Box 99
Huntsville, Texas 78342-0099

OR94-012

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), Government Code chapter 552.¹ We assigned your request ID# 22515.

The Texas Department of Criminal Justice, Institutional Division, (the "department") has received a request for information regarding the establishment of the prevailing wage rate for a certain department construction project. Specifically, the requestor seeks "all documents, memos, notes and correspondence concerning or related to the establishment of the prevailing wage rate for *sheet metal workers* in Walker County . . . regarding the 'ALBERTI' Project located in Huntsville, Texas." (Emphasis in original.)

We understand that the information at issue here is created in response to the department's responsibilities under article 5159a, V.T.C.S., which provides that laborers, workmen, and mechanics employed by or on behalf of the state of Texas shall be paid "[n]ot less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed." V.T.C.S. art. 5159a, § 1. State agencies employing laborers, workmen, and mechanics must "ascertain the general prevailing rate of per diem wages in the locality." *Id.*, § 2. You advise us that the department has generated four categories of information in connection with its responsibilities under article 5159a:

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

[1.] [T]he mailing list of active contractors to whom we might send surveys.

[2.] [T]he surveys which we sent out and which were returned, which in turn contain both the identities of the responding contractors and extremely sensitive financial information provided in response to the survey questions.

[3.] [T]ally sheets which provide intermediate information on different crafts and the variety of wages paid for them without identifying individual contractors.

[4.] [T]he prevailing wage survey.

You do not object to release of the first and fourth categories, but object to release of the second.² You claim that information comprising the second category is excepted from required public disclosure by sections 552.104 and 552.110 of the act.

Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." You believe that section 552.104 applies in this instance because "release of the primary information, i.e., the firm's specific scales, could give the competitors of the various responding firms an advantage over responding firms, especially when the competitors did not respond." You contend too that "the competitors could use the wage information in adjusting either wages or profit margins and bids as a way of improving their market position against those of the responding firms." The purpose of section 552.104, however, is to protect governmental interests in commercial transactions, not the interests of private competitors. Open Records Decision No. 541 (1990) at 4-5. Although you explain how release of the second category of information might impair the interests of private competitors in commercial transactions, you do not explain how its release would impair the department's interests. Accordingly, we conclude that the department may not withhold the second category of information under section 552.104 of the act.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. You claim that section 552.110 excepts the requested wage information because it constitutes "confidential financial information."

²You advise us that the third category of information "cannot be found." We assume that when and if it is found, it will be made available to the requestor in its entirety. See generally Open Records Decision No. 363 (1983).

You claim that the requested wage information is excepted from required public disclosure under the "commercial or financial information" branch of section 552.110 for two reasons. First, you contend that section 552.110 applies because you "have given responding firms some basis for believing that their responses would be kept confidential." Second, you contend that section 552.110 applies because its release would either 1) impair its ability to obtain the information in the future or 2) cause substantial harm to the competitive position of the person from whom the information was obtained. In Open Records Decision No. 592 (1991), this office reexamined the section 552.110 exception and held that, unless information constitutes trade secrets or is "privileged or confidential" under the common or statutory law of Texas, it cannot be withheld under section 552.110. *Id.* You do not claim that the requested wage information constitutes trade secrets.³ Moreover, you have not demonstrated, nor is it otherwise apparent, that the requested wage information is "privileged or confidential" under the common or statutory law of Texas. Accordingly, we conclude that you may not withhold the requested information under section 552.110 of the act and must release it in its entirety.

Because prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Susan Garrison
Assistant Attorney General
Open Government Section

SG/GCK/rho

³We note that, as a matter of law, the requested wage information does not constitute trade secrets. Texas has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. 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, as, for example, the amount or other terms of a secret bid for a contract *or the salary of certain employees.* [Emphasis added.]

Ref.: ID# 22515
ID# 23095
ID# 23155
ID# 23355

Enclosures: Information submitted

cc: Mr. Vinton Lambright
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(w/o enclosures)