



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 31, 1994

Mr. Herbert L. Prouty
General Counsel
El Paso Water Utilities Public Service Board
P.O. Box 511
El Paso, Texas 79961-0001

OR94-023

Dear Mr. Prouty:

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# 21787.

The El Paso Water Utilities Public Service Board (the "board") has received a request for information relating to certain competitive bidding proposals. Specifically, the requestor seeks "a copy of the bid proposal submitted by Continental Analytical Services, Inc., in response to bid number 45-93, Bid Proposal for Contract Laboratory Services," including "the cover letter, table of contents, and sections I, II, III, and IV, and the first 10 pages of each book of method detection limit determinations, and interoffice memo & attachments (9 pages) requesting placement on agenda." In addition, the requestor seeks "the following information from the NET response: price list, cover letter and narrative up to, but not including MDL tables, and [certain specified] information from TWC and EPA." You advise us that the requestor and representatives of his company "were allowed to look through the bid submittals of all bidders . . . [and] the staff recommendations and evaluations of the four bids." You claim that sections 552.101, 552.104, and 552.110 of the Government Code except the requested information from required public disclosure.

¹We note that the Seventy-third Legislature repealed V.T.C.S. article 6252-17a.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 now is 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.

First, we consider whether the board has waived the right to claim these exceptions by giving the requestor access to the requested information. Section 552.007 of the Government Code provides:

(a) This chapter does not prohibit a governmental body or its officer for public records from voluntarily making part or all of its records available to the public, unless the disclosure is expressly prohibited by law or the records are confidential under law.

(b) Records made available under Subsection (a) must be made available to *any person*.

Gov't Code § 552.007 (emphasis added); *see also* Open Records Decision No. 507 (1988) at 3. Thus, if a governmental body voluntarily discloses information to the public,² it is precluded from withholding the information in the future unless prohibited from doing so by law. *See, e.g.*, Open Records Decision Nos. 436 at 7, 435 (1986) at 3-4; 412 (1984) at 2; 400 (1983) at 2.

In this case, the board allowed the requestor access to information that implicates third party interests. In Open Records Decision No. 552 (1990), this office determined that a governmental body cannot waive section 552.110 by failing to raise it within the ten-day deadline because that section is designed to protect interests of a third party. *See also* Open Records Decision Nos. 166 (holding that governmental body may not waive section 552.101), 155 (1977). Section 552.104, however, is designed to protect only a governmental body's interests. *See* Open Records Decision No. 541 (1990) at 4-5. Thus, section 552.104 can be waived by a governmental body. Therefore, we conclude that because the board has provided prior access to the requested information, the board has waived the right to assert it is excepted from public disclosure under section 552.104.

We next address your claim that some of the requested information is excepted from required public disclosure by section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, we notified Continental Analytical Services, Inc. ("Continental") of the request and solicited its arguments in support of your assertion that section 552.110 excepts the submitted information from required public disclosure.³

²It is not apparent to us, nor do you argue, that the requestor had any special right of access to the information. *See* Government Code § 552.023 (providing requestors special rights of access to information about themselves); Open Records Decision No. 481 (1987) (holding that common-law privacy does not provide a basis for withholding information from its subject).

³The requestor also seeks information contained in NET's proposal. You advise, however, that NET does not object to release of this information. Accordingly, we assume that this information has been or will be made available to the requestor. *See* Open Records Decision No. 402 (1983).

In response, we have received two letters from Continental claiming that section 552.110 excepts portions of its proposal from required public disclosure.⁴

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. 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, 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, . . . [but] 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. [Emphasis added.]

Restatement of Torts § 757, cmt. b (1939). If a governmental body takes no position with regard to whether information constitutes "trade secrets," we must accept the affected person's claim if that person establishes a *prima facie* case and the argument is not rebutted as a matter of law. Open Records Decision No. 552 (1990) at 5.⁵

⁴Continental also claims that sections 552.101 and 552.104 except the submitted information from required public disclosure. Section 552.101 excepts "information considered to be confidential by law, either Constitutional, statutory, or by judicial decision." Its applicability is discussed in note 5 below. Section 552.104, which excepts "information that, if released, would give advantage to a competitor or bidder," is not applicable for the reasons noted above.

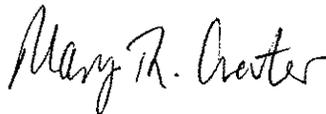
⁵The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(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.

Continental objects to release of information contained in the table of contents and sections I through IV of its proposal. We have examined the documents submitted to us for review and have considered Continental's arguments in support of its contention that this information constitutes "trade secrets" within the meaning of section 552.110. We believe that Continental has made a *prima facie* case establishing that the table of contents and sections I through IV of its proposal constitute trade secrets. Accordingly, the board must withhold this information in its entirety under section 552.110 of the Government Code.⁶ The remaining information, however, must be released in its entirety.

Because case law and 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,



Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/GCK/rho

Enclosures: Submitted documents

(Footnote continued)

RESTATEMENT OF TORTS § 757, cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2, 306 at 2 (1982); 255 (1980) at 2.

⁶You also assert that the requested information is confidential under section 552.101 of the act in conjunction with section 252.049 of the Local Government Code, which provides:

(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.

Because we determine here that you may withhold the portions of the requested information constituting trade secrets under section 552.110 of the act, we need not address the applicability of section 252.049 of the Local Government Code.

Ref.: ID# 21787
ID# 21789
ID# 22354
ID# 22348

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