



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1994

Mr. Joe H. Staley, Jr.
Law Offices of Locke, Purnell, Rain & Harrell
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776

OR94-463

Dear Mr. Staley:

You have asked this office to determine if certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 23781.

The Texas Turnpike Authority (the "authority") received a request for documents concerning the awarding of a contract to Cubic Toll Systems ("CTS"). The requested documents include a copy of the proposal submitted by CTS, the contract itself, and various documents connected with the awarding of that contract. You state that the requestor has already been provided a copy of the contract; however, you contend that the other requested documents are excepted from disclosure under sections 552.101, 552.107, 552.110, and 552.111 of the Open Records Act.

You contend that various documents are confidential attorney-client communications under sections 552.101 and 552.107. In Open Records Decision No. 574 (1990) at 2, this office determined that the attorney-client privilege is properly asserted in connection with section 552.107 rather than section 552.101. Section 552.107 excepts information from required public disclosure if:

(1) it is information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas; or

(2) a court by order has prohibited disclosure of the information.

You have submitted a number of documents to this office that you contend are confidential attorney-client communications. You state that these documents are correspondence between high level employees and the authority's legal counsel; notes made by the authority's legal counsel; drafts of documents created by the authority and its legal counsel; and documents from the files of the authority's legal counsel. However,

section 552.107 does not provide a blanket exception for all communications between clients and attorneys or all documents created by an attorney. It excepts only those communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1; 574 at 3; 462 (1987) at 9-11. Section 552.107 does not except from disclosure a "basically factual recounting of events." Open Records Decision No. 574 at 5. It also does not except from disclosure "the attorney's mere documentation of calls made, meetings attended or memos sent . . . if no notes revealing the attorney's legal advice or the client's confidences are included." *Id.*

You did not mark the information submitted for review to indicate which portions of each document you believe to be excepted under section 552.107. We were unable to determine who had written various documents or for what purpose. We note that it was your responsibility to show the applicability of section 552.107 to the information. Open Records Decision No. 542 (1990) at 2 ("governmental body bears the burden of stating which exceptions apply and why"). However, we have examined the information and have marked the information that we conclude clearly documents confidences of governmental representatives or reveals an attorney's legal opinion and advice. The marked information may therefore be withheld from required public disclosure. To the extent that we are able to determine, the remaining information does not reveal client confidences or an attorney's legal opinion and advice to the client, and may not be withheld under section 552.107.

You have asserted that various documents are excepted under section 552.111 as interagency or intraagency memoranda. Section 552.111 excepts from disclosure "only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. Correspondence that is not interagency or intraagency does not fall within the exception. Purely factual material, such as objective statements concerning various events, is not excepted. *Id.* at 6. Although you did not mark the documents to show what portions of the documents you believe to be excepted under section 552.111, we have examined the information and have marked the information that we have been able to determine consists of advice, recommendations, opinions, and other material relating to the policymaking functions of the authority. The remaining information may not be withheld under section 552.111.

You also assert that the CTS proposal and other documents are excepted under section 552.110.¹ Pursuant to section 552.305(b) of the Government Code, this office notified CTS of the request for information and offered CTS the opportunity to address

¹CTS submitted to this office the documents it considers to be to be excepted from disclosure under section 552.110. We reviewed the documents that CTS submitted and contended were excepted from disclosure. Since the authority urged that CTS' section 552.110 argument be considered, there seems to be no conflict between the authority and CTS over the documents for which section 552.110 protection is sought. It therefore was not necessary for this office to review duplicative documents separately submitted by the authority on behalf of CTS.

the availability of the proposal and other documents. CTS has submitted to this office the proposal and various information that it contends is excepted from disclosure under section 552.104 and 552.110. The requestor, MFS Network Technologies, Inc. ("MFS") also responded, urging that the information be disclosed. We will address arguments under both section 552.104 and 552.110.

Section 552.104 provides that information is excepted from public disclosure "if it is information that, if released, would give advantage to a competitor or bidder." CTS indicates that it plans to respond to at least seven toll road requests for proposals in the next year and that the information it has submitted to the authority will be used in these proposals. However, the purpose of section 552.104 is to protect a *governmental body's* interests in a commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. In Open Records Decision No. 541, the railroads who were parties to the contract and their main competitor all agreed that disclosure of the requested information would harm the parties' competitive interests on similar contracts. However, we stated that the "broader competitive interests" of the successful bidders are interests that are simply not addressed by section 552.104. *Id.* at 5. Section 552.104 will not operate to except this information once the bidding process is over and the contract has been awarded.

Section 552.110 excepts from 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 commercial or financial information aspect of section 552.110 is redundant of section 552.101, which protects information "considered to be confidential by law, either constitutional, statutory or by judicial decision." Open Records Decision No. 203 (1978) at 1. To the extent that statutes confer confidentiality on commercial or financial information, such confidentiality is incorporated into the Open Records Act by either section. However, we are aware of no statute which protects this information. Furthermore, there is no protected common-law privacy interest in commercial or financial information about a business. Open Records Decision No. 192 (1978) at 4 (right of privacy protects the feelings of human beings, not property, business, or other monetary interests).

At one time this office employed tests developed by federal courts applying the federal Freedom of Information Act as a basis for excepting information as "commercial or financial information" under section 552.110. The principal federal test, set out in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), excepted financial information from disclosure if such disclosure was likely either (1) to impair the government's ability to obtain the information in the future or (2) to cause substantial harm to the competitive position of the person from whom it was obtained. CTS argues that this office should apply the two-part test for confidential financial or commercial information formulated in *National Parks*. However, as CTS also acknowledges, in Open Records Decision No. 592 (1991), this office rejected *National Parks* for purposes of determining whether financial and commercial information is

excepted from disclosure under section 552.110. This office overruled the line of decisions that had applied the *National Parks* test on the grounds that *National Parks* was not "an expression of the common law of privilege or confidentiality." Open Records Decision No. 592 at 6.

CTS also urges that certain documents are excepted as trade secrets under section 552.110. In *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert denied*, 358 U.S. 898 (1958), the Texas Supreme Court adopted the definition of trade secret from section 757 of the Restatement of Torts. Section 757 provides that 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 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).

This office must accept a claim that information is excepted from disclosure as a trade secret if a *prima facie* case is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 592 at 2. However, when a governmental body or company fails to provide evidence of the factors necessary to establish a trade secret claim, this office cannot conclude that the trade secret prong of section 552.110 applies. Open Records Decision No. 401 (1983). The Restatement lists six factors that should be considered in determining whether information constitutes a trade secret:

- (1) the extent to which the information is known outside [the owner's] business;
- (2) the extent to which it is known by employees and others involved in [the owner's] business;
- (3) the extent of measures taken by [the owner] to guard the secrecy of the information;
- (4) the value of the information [to the owner] and to [its] competitors;
- (5) the amount of effort or money expended by [the owner] 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).

CTS has indicated what documents, correspondence, and portions of its proposal to the authority it believes are protected under section 552.110. However, not all of the documents that CTS seeks to withhold appear to be the type of information that is protected as a trade secret. You may not withhold the letter dated February 26, 1993, from CTS to the authority. This letter does not have information of the type that is defined in the Restatement as a trade secret. Nor may you withhold the information marked "Chapter III Administrative Information," which includes information about insurance; performance and payment bonds; information about the company's financial background; background information on subcontractors and companies contributing to the project; and annual reports and income statements. As indicated previously, section 552.110 does not protect from disclosure financial and commercial information.

Further, you may not withhold any of the resumes or the biographical data on CTS officers and employees. CTS contends:

Because of the competitive nature of the toll revenue collection industry and CTS' status as the industry leader, CTS' competitors recruit CTS' employees. . . . Disclosing the information in the particular format used in Section IV will allow competitors to "cherry pick" key CTS employees for employment.

CTS relies upon *Audio Technical Services Ltd. v. Department of the Army*, 487 F. Supp. 779 (D.D.C. 1979), for the proposition that biographical data on key employees is a trade secret. A review of that case indicates that the court was provided with sufficiently detailed facts and information to persuade the court that, based on the facts in that case, the resumes at issue were protected. The argument that employees might be recruited by competitors is not sufficient to show that the CTS employees' resumes and biographical information constitute trade secrets. Open Records Decision No. 402 (1983) (when no relevant information regarding the trade secret factors is provided, this office has no basis on which to conclude the trade secret exception applies.)

As to the remaining information, we agree that CTS has made a prima facie case for protection of trade secret information. CTS submitted an affidavit from Larry Ames, CTS' Vice President of Engineering and Program Management; sections from its corporate statement of internal corporate policy; and other information in support of its argument. Ames' affidavit states:

Less than 50 employees out of an approximate work force of 1,200 are aware of the specific information within CTS' VIVID System Proposal. These employees are engineers, software programmers and designers, and employees within CTS' or CARCG's

[a subsidiary company] ² marketing departments. . . . A limited number of CTS contract administration employees are aware of CTS component cost and internal pricing structure."

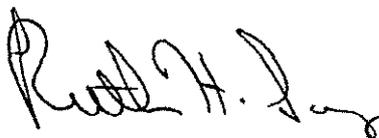
Ames discusses how the system being presented by CTS "is a point of departure from historical toll revenue collection system architecture."

The brief submitted by CTS states that the company "has expended in excess of \$5,000,000 in developing the information embodied within its VIVID System documents" and that in preparation of its proposal and negotiation information "CTS expended approximately \$297,000 and thousands of hours of employee time." Clients who obtain access to its proposal information must sign nondisclosure statements. Employees are required to sign agreements concerning inventions, secrecy, transmission of information, and conflicts of interest. Information provided by CTS indicates that the company has previously sought court protection in another state to keep from disclosing information about its toll revenue collection equipment system.

Although MFS submitted a brief that correctly applied the applicable standards by which trade secret protection is judged, no argument was presented which, *as a matter of law*, rebuts CTS' claim for trade secret protection for the remaining information. Therefore, you may withhold the remaining information for which CTS has asserted trade secret protection.

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 our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/KKO/rho

Ref.: ID#23781

Enclosures: Marked and submitted documents

²According to information in Ames' affidavit, CTS and CARCG (Cubic Automatic Revenue Collection Group Inc.) are both subsidiaries of Cubic Corporation.

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