



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 8, 1994

Ms. Ellen Rathgeber  
Staff Attorney  
Texas State Treasury  
P.O. Box 12608  
Austin, Texas 78711-2608

OR94-723

Dear Ms. Rathgeber:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27477.

The Texas State Treasury (the "treasury") has received two requests for information relating to the invitation for bids to conduct the 1994 unclaimed property auction. One of the requestors seeks "copies of bid submissions for Requisition No: 310-4-9008 from . . . Nelson International, Inc. . . . A.L. Buck Buchanan . . . Garrett Galleries, Inc. . . . [and] Lone Star Auctioneers, Inc." The other requestor seeks "copies of the scoring sheets on all bidders and a copy of the Lone Star proposal." You advise us that the treasury has made the requested scoring sheets available. You object to release of the requested proposals, however, and claim that sections 552.101, 552.104, and 552.110 of the Government Code except it from required public disclosure.

We first address your assertion that section 552.101 of the Government Code excepts the requested information from required public disclosure. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You cite no authority in conjunction with your assertion of section 552.101. In addition, we are not aware of any law that makes the submitted information confidential. Accordingly, we conclude that the treasury may not withhold the requested information under section 552.101 of the Government Code.

Next, we address your claim that section 552.104 excepts the requested information from required public disclosure. Section 552.104 excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect the interests of a governmental body by preventing one competitor or bidder from gaining an unfair advantage over others in the context of a pending competitive bidding process. Open Records Decision No. 541 (1990).<sup>1</sup> We understand that a contract in this instance has been awarded and that the competitive bidding process has concluded. Accordingly, we conclude that the treasury may not withhold the requested information under section 552.104 of the Government Code.<sup>2</sup>

Finally, we address your assertion that section 552.110 of the Government Code excepts the requested information from required public disclosure. Section 552.110 protects the property interests of private persons by excepting from required public disclosure trade secrets.<sup>3</sup> Pursuant to section 552.305 of the Government Code, we have notified the parties whose proprietary interests are implicated by this request. We have received a response only from Lone Star Auctioneers, Inc. ("Lone Star").<sup>4</sup> Lone Star claims that its proposal contains proprietary or trade secret information that is not subject to required public disclosure under the Open Records Act.

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

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<sup>1</sup>Ordinarily, section 552.104 can not be asserted to protect a governmental body's "competitive advantage" because a governmental body cannot be regarded as being in competition with private enterprise. *See* Open Records Decision No. 463 (1987) at 2. *But see* Open Records Decision No. 593 (1991) (concluding that governmental body might be deemed, under certain circumstances, to be "competitor" in the marketplace).

<sup>2</sup>Section 552.104 is designed to protect only a governmental body's interests. *See* Open Records Decision No. 541 (1990) at 4-5. Thus, you may not assert it to protect the interests of third parties.

<sup>3</sup>Section 552.110 also excepts commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. *See* Open Records Decision No. 592 (1991). The respondent has not cited, nor are we aware of, any statute or judicial decision that makes the requested information privileged or confidential.

<sup>4</sup>The other companies did not respond. When an agency or company fails to provide relevant information regarding factors necessary to make a 552.110 claim, a governmental body has no basis for withholding the information under section 552.110. *See* Open Records Decision No. 402 (1983) at 2. Accordingly, the treasury may not withhold the proposals of any of the companies that did not respond.

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. [Emphasis added.]*

RESTATEMENT OF TORTS § 757 cmt. b (1939). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we 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 one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5.<sup>5</sup>

We have examined the arguments submitted to us for review. Lone Star has demonstrated the amount of effort or money it expended in developing the information, the potential value of the information to competitors, and the competitive value of the information. Lone Star, however, has failed to indicate the extent to which the information is known outside of the company, the extent of measures taken to guard the secrecy of the information, and the ease or difficulty with which the information could be properly acquired or duplicated by others. We conclude, therefore, that Lone Star has

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<sup>5</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are

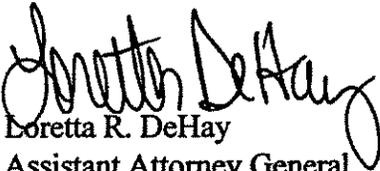
- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information 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, 306 at 2 (1982); 255 (1980) at 2.

failed to make a prima facie case that its proposal contains trade secrets. Accordingly, the treasury may not withhold Lone Star's proposal under section 552.110 of the Government Code and must release the requested information in its entirety.<sup>6</sup>

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,

  
Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 27477

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<sup>6</sup>Lone Star also suggests that its proposal is exempted from required public disclosure because the proposal was submitted to the treasury with the expectation that it would be kept confidential. We note, however, that information is not confidential under the Open Records Act merely because the party submitting it anticipates or requests that it be kept confidential. See Open Records Decision Nos. 479 (1987); 180 (1977); see also Open Records Decision No. 203 (1978) (concluding that mere expectation of confidentiality by individual supplying information is not sufficient to invoke section 552.110.)

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