



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 30, 1995

Mr. J. G. Warburton
City Attorney
City of Brownsville
P.O. Box 911
Brownsville, Texas 78520

OR95-021

Dear Mr. Warburton:

You ask whether 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# 29145.

The City of Brownsville (the "city") received a request for "a copy of the negotiated contract to include a list of quantities of equipment, including model numbers to be provided." The city asserts that the requested information is excepted from required public disclosure based on section 552.110 of the Government Code.

Since the property and privacy rights of a third party are implicated by the release of the requested information here, this office notified that third party of this request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits a governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). The third party, Motorola Communications and Electronics, Inc. ("Motorola"), asserts that the requested information is excepted from required public disclosure based on sections 552.104 and 552.110 of the Government Code.

Section 552.104 states that:

Information is excepted from [required public disclosure] if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. See Open Records Decision No. 463 (1987). Consequently, a governmental body may waive section 552.104. See Open Records Decision No. 592, at 8.

In this instance, the city did not raise section 552.104; only Motorola did so. Section 552.104 is inapplicable to protect the interests of Motorola. Accordingly, the city may not withhold the requested information based on section 552.104 of the Government Code.

Section 552.110 of the Government Code excepts a trade secret from required public disclosure. 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939). The Restatement also lists the following six factors to be considered in 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 the 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.

Id. This office will accept a claim that information is a trade secret when a prima facie case is made that the information in question constitutes a trade secret, and no argument is made that rebuts that assertion as a matter of law. See Open Records Decision No. 552 (1990).

The requested information consists of the negotiated contract, which includes Motorola's proposals and a list of equipment and services. Motorola presents arguments for claiming that all of the requested information is a trade secret.

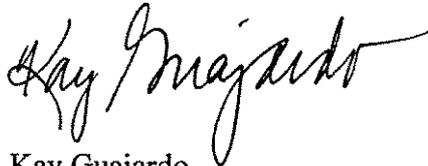
Motorola states that the requested records contain information about pricing, systems design, implementation and testing, coverage methodology and analysis, and operations capabilities. Motorola informs us of measures the company takes to insure the protection of all of its proprietary information and that the proposal information is marked as proprietary information. Motorola explains that the information is valuable to its competitors because disclosure of the requested information will enable its competitors to uncut its bids. Motorola states that the documents contain information about its products which were developed at great expense. Finally, Motorola explains that the information can be acquired or developed through independent product development or through acquisition of Motorola or Motorola's particular product line.

A prior decision of this office established that in order to withhold a contract with a state agency from required public disclosure under section 552.110 as a trade secret, it must be specifically shown that all provisions of the contract are entitled to be treated as such. See Open Records Decision No. 541 (1990) at 8. That is, precise explanations of the relative commercial value of each particular piece of information in the contract must be supplied. *Id.* at 12. We think the same burden is required to establish that a proposal for a governmental contract is a trade secret.

We believe that Motorola has not adequately explained the commercial value of particular pieces of information in the contract or in the proposals. Rather, Motorola's trade secret arguments seem to be directed to the entire contract and to the entire proposals. As Motorola has not explained the commercial value of any piece of information in the contract or the proposals, we conclude that the city may not withhold the requested information as trade secrets based on section 552.110 of the Government Code.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/rho

Ref.: ID# 29145

Enclosures: Submitted documents

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