



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 9, 1995

Mr. Charles E. Griffith, III
Deputy City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR95-252

Dear Mr. Griffith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 29542.

Brackenridge Hospital, a department of the City of Austin, has received a request for "a copy of the 'TravCorp[s]' bid for 'Travel Nurse Services.'" You state that the requested information consists of a proposal TravCorps, Inc., submitted in response to a Request for Proposal Number BC2-361 for the service of supplemental temporary traveling nurses. You indicate that the city awarded the primary contract to TravCorps in September 1993 and awarded back-up contracts to two other companies that submitted proposals.¹ One of the companies awarded a back-up contract is the requestor here.²

You believe the city may withhold from required public disclosure pursuant to Government Code sections 552.101 and 552.110 and Local Government Code section 252.049 those portions of the proposal that TravCorps has marked "proprietary."

¹You advise that in September 1994 the city extended all three contracts to run through August 31, 1995.

²Of course, section 552.222 of the Government Code prohibits the officer for public records of a governmental body from making any inquiry of a requestor except to establish proper identification and the public records requested. Furthermore, the officer for public records must treat all requests for information uniformly "without regard to the position or occupation of the person making the request [or] the person on whose behalf the request is made . . ." Gov't Code § 552.223. Accordingly, the identity of the requestor is not a factor that we may consider in determining whether the city may withhold the requested information.

In accordance with section 552.305 of the Government Code, this office notified TravCorps of the request and solicited arguments in support of your suggestion that the requested proposal may be confidential. TravCorps has responded, contending that sections 552.104 and 552.110 of the Government Code authorize the city to withhold the requested information.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You cite section 252.049 of the Local Government Code as a statute that deems the requested information confidential. Section 252.049 of the Local Government Code provides as follows:

(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 the city already has awarded the contract in this case, section 252.049 protects from required public disclosure only trade secrets and confidential information in the requested proposal. Neither you nor TravCorps contend that the requested information is confidential for any reason other than that it allegedly contains trade secrets. We will consider whether the requested proposal contains trade secrets in connection with section 552.110 of the Government Code.

Section 552.104, which TravCorps has raised, excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 protects the government's interest in purchasing by ensuring that the bidding process will be truly competitive. *See* Open Records Decision Nos. 583 (1990) at 4, 554 (1990) at 3. Section 552.104 is not designed to protect the interest of private parties submitting information to the government. Open Records Decision No. 592 (1991) at 8. Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *E.g.*, Open Records Decision No. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3.

The city does not claim the release of the requested information would harm its interests. Moreover, of course, in September 1993 the city awarded the contract for which the requested proposal was submitted. Thus, section 552.104 does not except the requested information from required public disclosure.

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. TravCorps does not assert that any portions of its bid consists of confidential commercial or financial information. Accordingly, we need address only the trade secret branch of section 552.110.

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) (emphasis added).³

³The Restatement lists six factors we must consider when determining whether particular information is a trade secret:

(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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

You have submitted a copy of the requested proposal for our review. See Gov't Code § 552.303 (requiring governmental body that requests attorney general decision on open records request to supply to attorney general specific information requested). We note that the requested information consists of two documents, an original proposal dated September 17, 1992, and a "Best and Final Offer" dated December 17, 1992. TravCorps, by its attorneys, has presented its arguments as to why the requested information constitutes trade secret excepted under section 552.110.

TravCorps characterizes the information contained in both the September 17, 1992, original proposal and the December 17, 1992, "Best and Final Offer," as falling into two categories. TravCorps refers to the two categories of information contained in the requested documents as "pricing information" and "nurse pool and customer information." We understand pricing information to include information regarding alternative pricing structures and nonprice terms TravCorps offered to Brackenridge. We understand nurse pool and customer information to include breakdowns of the numbers, specialties, and availability of the nurses in TravCorps' pool, as well as a list of certain TravCorps' customers and a summary of how TravCorps has matched its nurses with particular hospitals over time.

The requestor has informed us that he is not, in fact, interested in the nurse pool and customer information. Accordingly, we will not here consider whether nurse pool and customer information constitutes trade secret information that the city may withhold pursuant to section 552.110 of the Government Code. We will address only the pricing information contained in the September 17, 1992, original proposal and the December 17, 1992, best and final offer.

By pricing information, we understand TravCorps to refer to those sections of the original proposal and the best and final offer that are entitled "Pricing Options." These sections detail proposed hourly rates for nurses' services and outline other terms of proposed contracts with Brackenridge. Ordinarily, as Open Records Decision No. 319 (1982) instructs, information relating to pricing does not fall within the trade secret exception to required public disclosure. *Accord* Open Records Decision Nos. 306 (1982) at 3, 184 (1978) at 2.

We find nothing in the requested pricing information indicating that the general rule enunciated in Open Records Decision No. 319 (1982) should not apply here. We do not find the pricing information to be "formula[e], pattern[s], device[s] or compilation[s] of information" that TravCorps uses in its business and that gives TravCorps an opportunity to obtain an advantage over its competitors. See *RESTATEMENT OF TORTS supra; Hyde Corp.*, 314 S.W.2d at 776; *supra* page 3 (quoting Restatement's definition of trade secret). Indeed, TravCorps does not suggest that the information contains formulae or describes a pattern or device.

While the information may be considered a "compilation of information," it is not trade secret because TravCorps does not use it on an ongoing basis; instead, the pricing information relates solely to TravCorps' relationship with Brackenridge Hospital. Furthermore, we do not believe the requested pricing information constitutes information as to "a process or device for continuous use in the conduct of the business." See RESTATEMENT OF TORTS *supra*; *Hyde Corp.*, 314 S.W.2d at 776; *supra* page 3 (quoting Restatement's definition of trade secret). Consequently, we conclude section 552.110 of the Government Code does not authorize the city to withhold the requested pricing information.⁴

Portions of the requested information contain neither pricing, nurse pool, nor customer information. Because TravCorps protests the release of only the pricing, nurse pool, and customer information, the city must release information that does not fall in these categories. For your convenience, we have marked the information the city may withhold.

We are resolving this matter with an 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 of the Government Code regarding any other records. If you have questions about this ruling, please contact this office.

Yours very truly,



Kymberly K. Oltrogge
Assistant Attorney General
Open Government Section

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Ref.: ID# 29542

⁴TravCorps has marked many pages of the September 17, 1992, original proposal and December 17, 1992, best and final offer "proprietary." A document stamped confidential does not necessitate a finding that the document contains trade secret information. Determining whether a particular document indeed contains trade secret information excepted from required public disclosure under section 552.110 of the Government Code requires a consideration of whether the information fits the definition of trade secret adopted in *Hyde Corp.*, and whether the proprietor of the information sufficiently demonstrates, using the six factors listed in the Restatement of Torts, that the proprietor maintains the confidentiality of the information the proprietor claims is trade secret. Here, we do not believe the pricing information fits the definition of trade secret adopted in *Hyde Corp.*

Enclosures: Marked documents

cc: Mr. Marc Leon
Senior District Market Manager
Cross County Healthcare
1515 South Federal Highway, Suite 210
Boca Raton, Florida 33432
(w/o enclosures)

Mr. Edward E. Saraiva
Vice President Finance
TravCorps
40 Eastern Avenue
Malden, Massachusetts 02148-9104
(w/o enclosures)

Mr. Michael A. Albert
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109-2170
(w/o enclosures)