



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 12, 1995

Mr. Andy Mozisek  
Manager, Materials Management Department  
Capital Metropolitan Transportation Authority  
2910 East Fifth Street  
Austin, Texas 78702

OR95-273

Dear Mr. Mozisek:

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 ID# 31474.

The Capital Metropolitan Transportation Authority ("Capital Metro") received a request for information relating to a recently awarded contract for public relations support services. Specifically, the requestor seeks "the comments on my proposal submitted for the recent Public Relations Support Services contract," "the winning proposal for the Public Relations Support Services contract," and "Estilo Communication's winning proposal for the Advantage Newsletter three-year contract." You advise us that Capital Metro has made some of the requested information available to the requestor. You seek our decision, however, with respect to the current contractor's proposal submitted for the Advantage Newsletter contract. You claim that sections 552.104 and 552.110 of the Government Code except this information from required public disclosure.

Pursuant to section 552.305 of the Government Code, we have notified the party whose proprietary interests are implicated by this request. We have received a response from Estilo Communications ("Estilo"). Estilo claims no specific exception to required public disclosure, but argues that "allowing my competitor to view my winning proposal is a breach of confidence," that "[s]omeone else should not be able to view my hard work and make it their own," and that, "if my competitor is allowed to view my winning proposal especially my proposed budget, she will gain unfair advantage." We assume, therefore, that Estilo claims that section 552.110 excepts the proposal from required public disclosure.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure trade secrets.<sup>1</sup> 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 . . . .* 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.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). We must accept a claim that a document is excepted as a trade secret if a *prima facie* case for exception is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 592 (1991) at 2. However, when a governmental agency or company fails to provide any evidence of the factors necessary to establish a trade secret claim, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983).<sup>2</sup>

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<sup>1</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). Neither Capital Metro nor Estilo has cited, nor are we aware of, any statute or judicial decision that makes the requested information privileged or confidential.

<sup>2</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 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

We have examined the arguments submitted to us for review. These arguments fail to indicate the extent to which the requested 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 that Capital Metro and Estilo have failed to make a prima facie case that the requested information contains trade secrets. Therefore, section 552.110 does not except the proposal from required public disclosure.

We next address Capital Metro's claim that section 552.104 excepts the proposal from required public disclosure. Section 552.104 excepts from 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.<sup>3</sup> Open Records Decision No. 541 (1990). You advise us that competitive bidding in this situation has concluded and that a contract has been awarded. We conclude that Capital Metro may not withhold the requested information under section 552.104 of the Government Code. Accordingly, Capital Metro must release the requested information in its entirety.

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 should 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,



Loretta R. DeHay  
Assistant Attorney General  
Open Government Section

LRD/GCK/rho

Ref.: ID# 31474

Enclosures: Submitted documents

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<sup>3</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, it may not be asserted to protect the interests of third parties.

cc: Ms. Dee Ann Campbell  
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