



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 13, 1995

Mr. Michael H. Corley
The University of Texas System
Office of General Counsel
201 West Seventh Street
Austin, Texas 78701-2981

OR95-587

Dear Mr. Corley:

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# 32112.

The University of Texas System (the "university") received two requests for copies of the bids made by ten insurance providers in response to the university's request for proposal on an optional retirement program. You claim that the requested information is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. One of the providers, Fidelity Investments Tax-Exempt Services Company ("Fidelity Investments"), submitted a response under section 552.305 of the Government Code, also claiming that its proposal was excepted under section 552.110. We have considered the exceptions you and Fidelity Investments claimed and have reviewed the documents at issue.

Section 552.104 of the Government Code states:

Information is excepted from the requirements of Section 552.021 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 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 specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. A general allegation or a remote possibility of an advantage

being gained is not enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 (1990) at 4, 520 (1989) at 4. A general allegation of a remote possibility that some unknown "competitor" might gain some unspecified advantage by disclosure does not trigger section 552.104. Open Records Decision No. 463 (1987) at 2. As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. See Open Records Decision No. 592 (1991) at 8.

You state that the providers submitted bids in response to the university's request for proposal. You further state that the negotiations with the bidders are not yet complete and that contracts have not yet been executed with these companies. You also state that the university believes that, in this specific bidding situation, disclosure of the bids would give advantage to a competitor. Therefore, we conclude that, until final contracts are executed, the university may withhold the requested information. See Open Records Decision No. 170 (1977). However, as you acknowledge in your letter, once the contracts are executed, the university may not withhold the requested bids under section 552.104.

Fidelity Investments asserts that a portion of the bid it submitted is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 excepts from disclosure:

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. . . .

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

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 a single or ephemeral event 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); see *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958). 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 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 (1990) at 5.¹

The university states that it believes the providers' submissions contain trade secrets, commercial or financial information but that the university is not in a position to know which particular portions of the proposals contain trade secrets.² Accordingly, it is the responsibility of the private companies to make a prima facie case that their records are within section 552.110 of the Government Code. Nine providers did not write to this office to explain why their proposals should be excepted from disclosure under section 552.110. The proposals of these nine providers are therefore not excepted from disclosure by section 552.110.

Fidelity Investments claims that its responses to questions B 28, B 31, and B 33e of the request for proposal are trade secrets. The first response "highlight[s] confidential bonus criteria and salary/bonus ratios." The second and third responses relate to marketing tools. We conclude that Fidelity Investments has not made a prima facie case that the submitted information is a trade secret. No specific information is provided as to how salaries and bonuses are calculated. Additionally, we do not believe and Fidelity Investments does not explain how access to this salary information would provide an advantage to another provider in competing for customers. Similarly, the second and third responses provide a general overview of how the provider would interact with the university's employees. We find nothing "secret" in this information. Many of these concepts are common in the financial planning area. Therefore, the submitted information may not be withheld from disclosure after the signing of the contract with Fidelity Investments.³

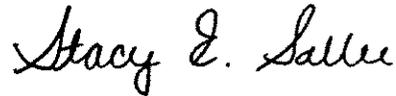
¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of 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, *supra*; see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

²The university generally asserts that the requested information may be "commercial or financial information" subject to exception under section 552.110. Section 552.110 is divided into two parts: (1) trade secrets and (2) commercial or financial information. To fall within the second part of section 552.110, the information must be made confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. As neither the university nor Fidelity Investments has demonstrated that a statute or judicial decision excepts this information from disclosure, we conclude that this information is not excepted by the second part of section 552.110 of the Government Code.

³Fidelity Investments advises us that it anticipated that its proposal would be held in the strictest confidence. We note that information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. See, e.g., Open Records Decision No. 180 (1977).

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,



Stacy E. Sallee
Assistant Attorney General
Open Government Section

SES/KHG/rho

Ref.: ID# 32112

Enclosures: Submitted documents

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