



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 27, 1995

Ms. Sandra C. Joseph
Open Records Counsel/Disclosure Officer
Office of the Comptroller of Public Accounts
LBJ State Office Building
111 East 17th Street
Austin, Texas 78774

OR95-714

Dear Ms. Joseph:

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# 32339.

The Office of the Comptroller of Public Accounts (the "comptroller") received three requests for copies of the bids submitted to the comptroller in response to the comptroller's statement of need for a mainframe computer. You state that the companies who submitted the bids designated them as confidential.¹ You therefore conclude that the companies may claim that the requested information is excepted from disclosure under section 552.110 of the Government Code. Pursuant to section 552.305 of the Government Code, this office informed the bidders of the requests and of their obligation to claim the exceptions to disclosure they believe apply to the requested information, together with their arguments as to why they believe the claimed exceptions apply. Only one of the companies, International Business Machines Corporation ("IBM"), replied, claiming that sections 552.101, 552.104, and 552.110 of the Government Code except portions of its bid from disclosure. As the other bidders, AT&T Capital Corporation, Amdahl Corporation, and Hitachi Data Systems Corporation, did not claim an exception

¹We 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).

to the Open Records Act nor establish why any exception to disclosure applies to the requested information, the comptroller may not withhold the bids submitted by these companies.²

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 who 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. 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. The protection of section 552.104 ends when the contract at issue is awarded. Open Records Decision No. 170 (1977). IBM claims that portions of the proposal are still subject to competitive bidding. However, the comptroller does not claim that section 552.104 excepts any of the information from disclosure or that its interests would be harmed by release of the requested information. Moreover, the comptroller informs us that the contract at issue has been awarded. Therefore, section 552.104 does not except the requested information from disclosure.

Section 552.110 of the Government Code excepts from disclosure:

²We note that the comptroller did not timely request an opinion from this office. The first request for information was received on February 15, 1995, yet the comptroller did not seek an opinion from this office until March 15, 1995. Sections 552.301 and 552.302 of the Government Code require a governmental body to release requested information or to request a decision from the attorney general within 10 days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within 10 days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See id.* As third-party interests in requested information are compelling interests, we address IBM's claimed exceptions to required public disclosure. *See, e.g.*, Open Records Decision Nos. 552 (1990), 473 (1987), 150 (1977).

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 5.³

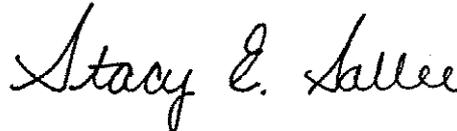
We conclude that IBM has not made a prima facie case that portions of its bid are trade secrets. IBM claims that three categories of information included within its bid are excepted from disclosure under the Open Records Act: (1) pricing information for future options not yet accepted by the comptroller; (2) information that indicates the system

³The 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.

design of the product supplied by IBM; and (3) intermediate bid proposals that were part of the negotiating process between IBM and the comptroller's office. First, the pricing information contained in documents in categories 1 and 3 does not fall within the trade secret exception to required public disclosure. *See* Open Records Decision Nos. 319 (1982), 306 (1982), 184 (1978). Secondly, as to all three categories of information, IBM does not discuss the extent to which the information is known outside of IBM, the extent of the measures taken by IBM to guard the secrecy of the information, the amount of effort or money expended by IBM in developing the information, and the ease or difficulty with which the information could be properly acquired or duplicated by others. Finally, this information is not "a process or device for continuous use in the operation of [IBM's] business." *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). Rather, it is "simply information as to a single or ephemeral event in the conduct of [IBM's] business." *See id.* The information submitted to this office for review concerns IBM's response to a particular statement of need from the comptroller's office, not anything "continuous." Therefore, section 552.110 of the Government Code does not except this information from required public disclosure.⁴

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# 32339

Enclosures: Submitted documents

⁴IBM also claims that its pricing information for future options that have not yet been accepted by the comptroller is protected under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." We are unaware of any statute or judicial decision that would make this information confidential. Therefore, section 552.101 does not except this information from disclosure.

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