



Office of the Attorney General
State of Texas

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ATTORNEY GENERAL

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Ms. Lavergne Schwender
Assistant County Attorney
Harris County
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Houston, Texas 77002-1891

OR95-924

Dear Ms. Schwender:

The Harris County Purchasing Agent has received requests under the Texas Open Records Act, Gov't Code ch. 552, for contract proposals submitted to the Harris County/Greater Harris County 9-1-1 Emergency Network (the "Network"). The Network requested proposals for 911 ANI/ALI¹ equipment to be installed at twenty locations in Harris County. Six companies submitted proposals and the contract was awarded to Southwestern Bell Telecom by the Network's Board of Managers at a meeting on June 30, 1994. Subsequently, Nine One One, Inc.; Motorola Communications and Electronics, Inc., ("Motorola"); and Tel Control, Inc., ("TCI") made requests under the Open Records Act for various items of information submitted in response to the proposal. Nine One One, Inc., has requested copies of the following documents:

1. The dollar amounts of each proposal by each vendor in response to the request for proposal:

(a) Prior to Harris County's request for each vendor's "best and final offer"; and

(b) In response to Harris County's request for each vendor's "best and final offer".

¹These acronyms stand for "automatic number identification" and "automatic location identification," respectively.

2. A copy of the successful bidder's "best and final offer" (excluding product literature) which the County accepted.

3. To the extent not produced in response to the foregoing, all analyses of proposals, including comparisons of vendors, equipment proposed, prices or any other aspect of the bidding. (This includes the "matrix" Ms. Laverne Hogan referred to as being used to analyze the proposals on June 30, 1994 in a board meeting of Harris County 9-1-1.)

4. All correspondence or records of communications between the County and the successful bidder with respect to the subject request for proposal.

5. All correspondence or records of communications between the County and Plant Equipment Inc, with respect to the subject request for proposal.

In addition, Nine One One, Inc., later requested all correspondence or records of communication between the county and Southwestern Bell Telecom, Xtend Communications or Northern Telecom, Inc., regarding the request for proposal.

You state that the "matrix" mentioned under item 3 in the letter from Nine One One was used to evaluate another major contract awarded by the Network's Board of Managers on June 30, 1994, not the 9-1-1 ANI/ALI equipment contract. Thus, there was no such "matrix" relative to the ANI/ALI equipment contract. With respect to item 5, you state that Plant Equipment Company is the manufacturer of equipment mentioned in one of Southwestern Bell Telecom's proposals, and neither the county nor the Network negotiated directly with Plant Equipment Company. It appears from our inspection of the records that documents described as item 4, "correspondence or records of communications between the County and the successful bidder with respect to the subject request for proposal" are filed with the proposal documents.

Motorola requested copies of the pricing sheets that were submitted by the other bidders, specifically Revised Proposal Sheet 1 through 11 and the individual Revised Sheet Site Location Price Sheet(s). TCI requested the same information. The county purchasing agent notified the offerors of the open records requests, asking if they objected to the release of the requested information. The five responses² he received demonstrate the following: Southwestern Bell Telecom objects to the release of the requested information; CML Technologies, Inc., ("CML") objects to the release of its

²Nine One One, Inc., the requestor, did not respond.

proposal; Central Telephone Company of Texas does not object to releasing two pages of pricing information, copies of which are attached to its letter; and neither Motorola nor TCI objects. Both Motorola's and TCI's representative wrote that "I understand that the pricing information is not considered eligible as proprietary or confidential."

In cases where a third party's property interests may be implicated, section 552.305 relieves the governmental body of its duty under section 552.301(b) to state which exceptions apply to the information and why they apply if the governmental body requests a ruling from the attorney general, and the third party or another party has submitted reasons for withholding or releasing the information. Pursuant to section 552.305 of the Government Code, the purchasing agent has declined to release the requested information in order to request an open records ruling. You have submitted the initial proposal and best and final offer of the six companies, marked as Exhibits C through H, the correspondence between the county and the successful bidder as Exhibit I, and the analyses of proposals as Exhibit J. Exhibit J consists of one document on graph paper that appears to compare yearly costs under the proposers.

Some of the offerors have written letters to the purchasing agent claiming that the requested information consists of trade secrets protected from disclosure by section 552.110 of the Government Code. Southwestern Bell Telecom, as well as writing to the purchasing agent, has submitted a brief to this office, claiming that the information may be withheld under section 552.104 and section 552.110 of the Government Code. We will first address section 552.104, which permits a governmental body to withhold "information that, if released, would give advantage to a competitor or bidder."

Section 552.104 is designed to protect the competitive interests of a governmental body, Open Records Decision No. 463 (1987), and it is ordinarily not applicable when bidding on a contract has been completed. Open Records Decision No. 319 (1982). The brief from Southwestern Bell Telecom, however, points out the following language in Open Records Decision No. 541 (1990):

Section 3(a)(4) [now Gov't Code § 552.104] may protect information submitted by a successful bidder if public disclosure will allow competitors to accurately estimate and thereby undercut future bids. Open Records Decision No. 309 (1982) (quoting Gulf & W. Indus. v. United States, 615 F.2d 527, 530 (D.C. Cir. 1979)). An examination of Open Records Decision No. 309 (1982), however, suggests that this principle will apply when the governmental body solicits bids for the same or similar goods or services on a recurring basis. . . . There was no suggestion that section 3(a)(4) was designed to protect the competitive interests of the successful bidder in the broader marketplace.

Open Records Decision No. 541 (1990) at 5. Due to the duration of the contract at issue in Open Records Decision No. 541 (1990) and the unique services provided under it, it was "highly unlikely" that the city would seek to enter into a similar contract in the near future. *Id.* Thus, former section 3(a)(4) did not apply to the contract at issue in Open Records Decision No. 541 (1990). It is also highly unlikely that the Network will enter into such contracts on a recurring basis or seek a contract similar to the one at issue in the near future. Southwestern Bell Telecom has not shown that section 552.104 applies to the requested records.

We next address the arguments raised under section 552.110, which protects trade secrets from public disclosure. The Texas Supreme Court has adopted the definition of the term "trade secret" from the Restatement of Torts, section 757 (1939), 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.

See Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958) (quoting RESTATEMENT OF TORTS § 757 cmt. b (1939)); *see also* Penal Code § 31.05 (theft of trade secret).³ The Restatement lists 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;

³Section 31.05(a)(4) of the Penal Code defines "trade secret" as follows:

the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes.

(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 the information; [and]

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939).

Open Records Decision No. 552 (1990) noted that the attorney general is unable to resolve disputes of fact regarding the status of information as "trade secrets" and must rely upon the facts alleged or upon those facts that are discernible from the documents submitted for inspection. For this reason, the attorney general will accept a claim for exception as 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.

Southwestern Bell Telecom, Central Telephone Company of Texas, and CML objected to the release of their proposals. Central Telephone Company of Texas wrote to the Harris County Purchasing Agent stating that the information "should be considered proprietary and protected under Texas Open Records Act," while CML wrote that it believed that the information was very competitive and would be treated as confidential. These companies have not made a *prima facie* case that the information they submitted consists of trade secrets confidential under section 552.110. Since no basis has been expressed for withholding information submitted by Central Telephone Company of Texas or by CML, the information requested concerning these companies is available to the public.

Southwestern Bell Telecom objected to the release of the dollar amounts of each proposal, a copy of its "best and final offer," and any analyses of proposals,⁴ to the extent that any proprietary information submitted by Southwestern Bell Telecom was incorporated into such analysis. The brief argues that the requested records are trade secrets, made confidential by section 552.110.⁵ It points out that prices furnished to a governmental agency were treated as trade secrets in Open Records Decision No. 541 (1990).

⁴These are items 1(a), 1(b), 2, and 3 in the request letter from Nine One One, Inc.

⁵We have already addressed Southwestern Bell Telecom's argument that the requested information is protected by Government Code section 552.104.

Open Records Decision No. 541 (1990) concluded that provisions of a coal transportation contract on base rates and rate adjustments were trade secrets. However, Open Records Decision No. 541 (1990) addressed the trade secret question according to the practice of this office before the predecessor of section 552.305 came into effect. The decision stated as follows:

Because this office cannot ultimately resolve questions of fact such as this in the course of rendering an open records decision, it has been the practice of this office to rely upon the representations of a governmental body, or those of the business entity that are endorsed by the governmental body, concerning compliance with the six trade secret criteria.

Open Records Decision No. 541 (1990) at 7. The decision relied in part on affidavits submitted by the coal transportation company. It moreover related to a specific contract. Neither its method nor its conclusion control the question before us.

Open Records Decision No. 592 (1991) concluded that price lists for goods and services provided by a hospital were not trade secrets, because information from this list was disclosed in billings to patients at the hospital. It quoted the following part of the Restatement's definition of "trade secret:"

Secrecy. The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. *Matters which are completely disclosed by the goods which one markets cannot be his secret.* (Emphasis added.)

Open Records Decision No. 592 (1991) at 3. Southwestern Bell Telecom asserts that that protection of bid pricing information would help protect its competitive situation in the industry. This assertion alone does not show that the prices given in its proposals are trade secrets. See Open Records Decision No. 592 (1991) (competitive interest of hospitals in price list raised in connection with former V.T.C.S. art. 6252-17a, § 3(a)(4), now Gov't Code § 552.104). Its brief states that the prices charged to the county for each of the twenty locations were established on an *ad hoc* basis and that its pricing strategy has developed over time in hundreds of competitive bid situations. These statements fail to demonstrate that the prices charged Harris County are within the definition of "trade secret." Since the prices in the proposals apply only to the contract with the Harris County 9-1-1 District, we do not see how they are used in the business in a way that provides continuing value to the company. The prices, which are disclosed to the customer, are the product of a "pricing strategy" that is used in the business.⁶

⁶We do not determine whether the "pricing strategy" is a trade secret.

The brief from Southwestern Bell Telecom also states that

[A] list of the components and the mix of hardware and software used by SBT in its initial bid response and its final best and final offer should also be accorded trade secret status. Each vendor may configure its proposed solution to a customer's telecommunications needs differently and use different mixes and types of hardware and software.

Southwestern Bell Telecom also argues that a competitor could use the equipment list to identify weaknesses in a competitor's system design in future competitive situations and that this information might also reveal proprietary techniques employed by companies to reduce the costs of its systems. It points out that bid response sheets which contained the list of components were marked as being confidential when submitted to Harris County. Finally, it states that the designs chosen to establish the system configuration were developed on the basis of years of experience in selling, installing and maintaining similar systems.

The list of the components and the mix of hardware and software used in the bid proposals is fully disclosed to the persons who evaluated the bids for the purchasing agent and those who have access to it in carrying out the duties of the Network. Moreover, that particular configuration of items was developed expressly for the Harris County 9-1-1- District. Like the prices listed in the proposal, this information is not used in an ongoing way by Southwestern Bell Telecom, although this particular configuration may have been developed in reliance on information held by Southwestern Bell Telecom, such as specifications for designing telephone systems.⁷

Southwestern Bell Telecom has not made a prima facie case that the lists of components or the price lists in the proposals are trade secrets. Accordingly, the requested documents are not protected from disclosure as trade secrets within section 552.110 of the Government Code.

In your brief on behalf of the Harris County Purchasing Agent, you raise section 262.030 of the Local Government Code. The provision authorizes the use of the competitive proposal procedure to purchase high technology items. Section 262.030(b) provides in part:

⁷We do not determine whether such specifications exist, or whether they would be a trade secret if they exist.

(b) All proposals that have been submitted shall be available and open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such.

We have determined that Southwestern Bell Telecom has not shown its proposals to contain trade secret information or information otherwise confidential. Accordingly, the requested proposals, as well as the other items that have been requested, are available under the Open Records Act.

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.

Yours very truly,



Susan Garrison
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Open Government Section

SLG/LRD/rho

Ref.: ID#27651

Enclosures: Submitted documents

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