



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 21, 1995

Mr. William D. White, Jr.
Locke, Purnell, Rain & Harrell
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776

OR95-1269

Dear Mr. White:

You have asked this office to determine if 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# 34728.

The Texas Turnpike Authority (the "authority") received a request for the successful proposals submitted in response to the authority's request for proposal for underwriting services in connection with the SH-190 Toll Road Project. You state that although the authority "is not taking a position on these various issues," certain provisions of the Open Records Act may be applicable. You indicate that the proposals may be excepted from disclosure pursuant to sections 552.104, 552.110, and 552.112.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in a commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, generally neither the contract nor information submitted with the bid is excepted under section 552.104 once the bidding process is over and a contract awarded. *Id.* at 5. Since the underwriters for the project have been selected, the proposals at issue may not be withheld under section 552.104.

Section 552.112(a) of the Government Code states as follows:

[I]nformation is excepted from . . . [required public disclosure] if it is information contained in or relating to examination, operating, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both.

This exception protects from disclosure examination reports obtained by agencies that regulate financial institutions and information in reports on securities prepared by agencies regulating those securities. *See* Open Records Decision Nos. 262 (1980), 158 (1977) at 4. As the authority is not regulating financial institutions or securities, section 552.112 is inapplicable in this situation.

Section 552.110 excepts from 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. The commercial or financial information aspect of section 552.110 is redundant of section 552.101, which protects information "considered to be confidential by law, either constitutional, statutory or by judicial decision." Open Records Decision No. 203 (1978) at 1. However, we are aware of no statute which protects from disclosure the commercial or financial information in these proposals. The common law of Texas at present recognizes no doctrine, other than that of trade secret, that has been asserted as a basis for invoking section 552.110. *See* Open Records Decision No. 592 (1991). We note that there is no protected common-law privacy interest in commercial or financial information about a business. Open Records Decision No. 192 (1978) at 4 (right of privacy protects feelings of human beings, not property, business, or other monetary interests).

This office will accept a claim that information is excepted from disclosure under the trade secret aspect of section 552.110 if a *prima facie* case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (under former section 7(c) of article 6252-17a, V.T.C.S., now section 552.305 of the Government Code, governmental body may rely on third party to show why information is excepted from disclosure). This office sent letters to the companies you identified as having submitted winning proposals, informing these companies of their responsibility to identify exceptions that applied to their information and to explain why the exceptions applied. We received a response from only one of the companies submitting a successful proposal, Artemis Capital Group, Inc. ("Artemis"). Since the other companies did not submit arguments, their submitted proposals are public and must be released to the requestor. *See* Open Records Decision No. 363 (1983) (duty to establish how and why exception protects particular information).

Artemis contends that the portions of its proposal describing innovative products and debt structuring features developed for the authority, and financing structures and debt instruments developed for other debt issuers, are trade secrets. 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. 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 or specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939);¹ *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).

However, the information at issue does not appear to identify “any formula, pattern, device or compilation of information” used repeatedly in Artemis’ business. Nor has there been a showing that the information at issue is not generally known within the underwriting industry. Open Records Decision No. 592 (1991) at 3. As the information may not be withheld under section 552.110, it must be released to the requestor.

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,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

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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’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; (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; [and] (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.

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Enclosures: Submitted documents

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