



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 6, 1995

Mr. John Schwartz
Ruden, McClosky, Smith, Schuster & Russell, P.A.
701 Brickell Avenue
Suite 1900
Miami, Florida 33131

OR95-1361

Dear Mr. Schwartz:

You have asked 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# 36278.

The Amarillo Hospital District (the "district") received a request for a non-binding letter of intent concerning the purchase of Northwest Texas Hospital. You submitted to this office letters from Universal Health Services Inc. ("Universal") that are responsive to the request. You contend that the letters are excepted from disclosure under sections 552.101, 552.104, and 552.105 of the Open Records Act.

Section 552.101 provides that information is excepted from disclosure if it is "considered to be confidential by law." You assert that the letters are confidential under the reasoning employed in Open Records Decision No. 259 (1980), which determined that information about a pledge donation was confidential until the negotiations were completed. This office reasoned that if the city could hold a closed session under the Open Meetings Act, chapter 551 of the Government Code, to discuss the pledge, the city could also decline to reveal information about the pledge under the Open Records Act. However, that decision was specifically overruled in Open Records Decision No. 590 (1991). The Open Records Act and the Open Meetings Act are separate and distinct statutes. *Id.* Thus, the fact that the district has met or could meet in closed session to discuss the letters under section 551.072 of the Government Code does not thereby make the letters confidential under section 552.101.

You also asserted that release of the information at issue could violate the privacy or property rights of Universal. As provided by section 552.305 of the Open Records Act, this office provided Universal the opportunity to submit reasons as to why the information

should be withheld. In a letter to this office, Universal contends that the information is excepted from disclosure under sections 552.110 and 552.104.¹

This office must accept a claim that information is excepted from disclosure as a trade secret under section 552.110 if a prima facie case 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 body or company fails to make such a case, this office cannot say that section 552.110 applies. Open Records Decision No. 402 (1983).² Universal states that the district agreed to keep certain information private during the negotiation stage. However, Universal has not shown that section 552.110 is applicable.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is generally invoked to except from disclosure information submitted to a governmental body as part of a bid or proposal. Open Records Decision No. 463 (1987) at 2. Governmental bodies may withhold proposals while governmental officials are in the process of evaluating those proposals and seeking clarification of proposals. Open Records Decision No. 170 (1977). Section 552.104 does not, however, except proposals from disclosure once a contract has been signed. Open Records Decision Nos. 184 (1978) at 2, 75 (1975).

You state that the district and Universal are still in the negotiating stage and have not come to a final agreement or signed a contract. You contend that release of the letters, which outline Universal's proposal, could provide an advantage to the other companies that submitted proposals if negotiations break off between Universal and the district. Under these circumstances, the district may withhold the letters at this time

¹Universal also made a section 552.101 argument in reliance upon Open Records Decision No. 259 (1980). We have already addressed this argument.

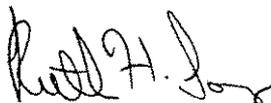
²In *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), cert. denied, 358 U.S. 898 (1958), the Texas Supreme Court adopted the definition of trade secret from section 757 of the Restatement of Torts. Section 757 provides that a trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] 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 A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, 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.

pursuant to section 552.104. Release of the letters during the time that competitors may clarify, modify, or withdraw their proposals could result in an advantage to the other competitors or damage the district's ability to obtain truly competitive proposals.³

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

RHS/ch

Ref.: ID# 36278

Enclosures: Submitted documents

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³Since section 552.105 provides no broader protection for the letters than section 552.104, we need not address your section 552.105 argument.