



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 13, 1995

Mr. Burton F. Raiford
Commissioner
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR95-1404

Dear Commissioner Raiford:

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# 31799.

The requested information consists of a request for proposal ("RFP") of the Texas Department of Human Services ("TDHS") and the proposals submitted in response to that RFP. The RFP number is 324-95-002, and TDHS received proposals from the following firms: Step L, Inc. ("Step L") and its subcontractor, Troy Systems, Inc. ("Troy"); Countermeasures, Inc. ("Countermeasures"); KPMG Peat Marwick LLP ("KPMG"); Deloitte & Touche LLP ("D&T"); and Science Applications International Corp. ("SAIC"). TDHS awarded the contract to Step L, with Troy as the subcontractor. We understand that no one contends that the RFP is excepted from required public disclosure and therefore do not further address that request.

TDHS asks this office to rule that all the proposals are excepted from required public disclosure by section 552.110 of the Government Code. Section 552.110 excepts from required public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." This section protects two classes of information: (1) trade secrets and (2) commercial or financial information.

Trade secret is defined in part in the *Restatement of Torts* as follows:

Definition of trade secret. 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. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . 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.

RESTATEMENT OF TORTS § 757 cmt. b at 5 (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958) (quoting *Restatement* definition in part); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

Some of the factors to be assessed in determining whether information qualifies as a trade secret are as follows:

- (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 to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing this 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 at 6; *see also* Open Records Decision No. 232 (1979).

This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is made, we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983) at 3.

Pursuant to section 552.305 of the Government Code, TDHS has chosen not to submit reasons why the requested information should be withheld from public disclosure. *See* Open Records Decision No. 542 (1990) at 2-3 (under former section 7(c) of V.T.C.S. article 6252-17a, governmental body may rely on third party to show why information is

excepted from disclosure). We have given notice to interested parties and have received briefs and comments from some of them.

Countermeasures, KPMG, and SAIC have not attempted to make a prima facie showing that any portions of their proposals are trade secrets under section 552.110, so we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). Therefore, you must release all portions of the proposals from these companies.

We now will consider the arguments submitted by the other companies.

The Step L-Troy Proposal

Troy contends that the following portions of the StepL-Troy proposal constitute trade secrets that are excepted from required public disclosure by Government Code section 552.110: Step L's "technical references" (pages 1-11 to 1-15), Troy's "technical references" (pages 1-20 to 1-26), Step L's and Troy's staff experience resumes (pages 2-3 to 2-21), the proposed work plan (pages 3-2 to 3-13), anticipated tools (pages 5-2 to 5-7), proposal summary (pages 6-2 to 6-28), and the total bid price (pages 8-2 to 8-3).

Troy contends specifically that the information in the technical references comprises a customer list. Although the technical references do mention various customers of Step L and Troy, they contain much information detailing past contracts with those clients. Only the information that identifies the customers must be withheld as customer list information. Neither Step L nor Troy has contended that the rest of the information in the technical references constitutes trade secrets for any other reason. You therefore must release the rest of the information.

Troy's contention that the resumes are trade secrets has no merit. "[R]esumes listing the education and experience of . . . employees . . . cannot . . . reasonably be said to fall within the 'trade secret' or any other exception to the Open Records Act." Open Records Decision No. 175 (1977) at 4, *quoted in* Open Records Decision No. 306 (1982) at 1-2. You therefore must release Step L's and Troy's staff experience resumes.

Neither Step L nor Troy has shown that the information in the proposed work plan, the anticipated tools section, or the proposal summary is information that gives one "an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT OF TORTS § 757 cmt. b at 5. They have failed to show that the information in the proposed work plan, the anticipated tools section, or the proposal summary constitutes "a process or device for continuous use in the operation of the business." *Id.* That is, they have not shown that the information in the proposed work plan, the anticipated tools section, or the proposal summary is anything other than "simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract." *Id.* Nor is there anything to indicate that the research techniques discussed in these sections are not generally known throughout the industry. Matters of general knowledge in an industry

cannot be appropriated as a trade secret. *Wissman v. Boucher*, 240 S.W.2d 278 (Tex. 1951). Consequently, the "trade secrets" aspect of section 552.110 does not apply here. You must release the proposed work plan, the anticipated tools section, and the proposal summary.

Finally, Troy contends that the total bid price section is excepted from required public disclosure as privileged or confidential commercial or financial information under section 552.110. Troy, correctly, does not claim that such information is a trade secret. Pricing proposals are not excepted from required public disclosure as trade secrets and may be withheld pursuant to section 552.104 ("information that, if released, would give advantage to a competitor or bidder") only during the bid submission process. See Open Records Decision No. 306 (1982) at 3. Commercial or financial information is excepted from disclosure only if it is deemed confidential by the common or statutory law of Texas. Open Records Decision No. 592 (1991) at 7. The information in the total bid price section is not confidential by statute or, as discussed above, under the common-law doctrine of trade secret. Section 552.110 therefore does not except this information from disclosure, and you must release the information.

We accordingly conclude that you must release all portions of the proposal from Step L and Troy save the information in the technical references section that identifies customers of these companies.

The D&T Proposal

D&T claims that references that it submitted in its proposal, on resumes of key personnel (located on pages 4, 10, 12-13, 15-16, 19, 21, 23, 35, and 28 of its proposal) and in a section touting D&T's experience in information security (located on page 49), are excepted from public disclosure as private information. We understand this argument to be an invocation of the common-law right of privacy as incorporated into section 552.101 of the Government Code.

Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and it is of no legitimate concern to the public. *Id.* at 683-85. "The right of privacy is designed primarily to protect the feelings and sensibilities of human beings, rather than to safeguard property, business or other pecuniary interests." Open Records Decision No. 192 (1978) at 4.

The information contained in the references is not highly intimate or embarrassing; therefore, its release would not constitute an invasion of privacy. D&T contends that the persons who authorized the use of their names as references did so only for the purpose of submitting D&T's proposal to TDHS. This fact does not make the information private,

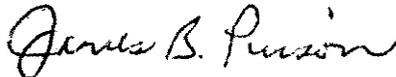
nor does it establish any other exception from public disclosure. You must release the references.

D&T's only other claim is that a table entitled "Condensed Summary of Financial Position May 28, 1994," including the two sentences following it (located on page 45 of D&T's proposal), is excepted from required public disclosure as financial information protected by section 552.110. As we said above, however, commercial or financial information is excepted from disclosure only if it is deemed confidential by the common or statutory law of Texas. *Open Records Decision No. 592 (1991) at 7*. The information in this portion of the proposal is not confidential by statute or under the common-law doctrine of trade secret. Section 552.110 therefore does not except this information from disclosure, and you must release the information.

We accordingly conclude that you must release all of the proposal from D&T.

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,



James B. Pinson
Assistant Attorney General
Open Records Division

JBP/RHS/ch

Ref.: ID# 31799

Enclosures: Submitted documents

cc: Mr. Robert F. Glickert
Partner
KPMG Peat Marwick, L.L.P.
111 Congress Avenue, Suite 1100
Austin, Texas 78701
(w/o enclosures)

Mr. B. D. Jenkins
Vice President
Countermeasures, Inc.
104 Judy Court
Hollywood, Maryland 20636
(w/o enclosures)

Mr. Lonnie Moore
Communications & Toll Fraud Specialists, Inc.
14327A Ranch Road 2769
Austin, Texas 78726
(w/o enclosures)

Mr. Thomas H. Pinkerton
Principal Consultant
Step L, Incorporated
6001 Montrose Road, Suite 802
Rockville, Maryland 20852
(w/o enclosures)

Mr. Haze E. Hanna
Director of Contracts
Troy Systems, Inc.
1199 North Fairfax Street, Suite 900
Alexandria, Virginia 22314
(w/o enclosures)

Ms. Stacie Siegal
Contacts Representative
Science Applications International Corporation
10770 Wateridge Circle
San Diego, California 72121
(w/o enclosures)

Ms. Maureen E. Vanacore
Deloitte & Touche, L.L.P.
2200 Ross Avenue, Suite 1600
Dallas, Texas 75201-6778
(w/o enclosures)