



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 20, 1995

Ms. Y. Qiyamah Taylor
Assistant City Attorney
City of Houston
P. O. Box 1562
Houston, Texas 77251-1562

OR95-1497

Dear Ms. Taylor:

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# 33747.

The city of Houston (the "city") received a request for the winning proposal in response to RFP #TC-4-7030-010-008461. The city raises no exception to the release of the requested information. However, the company that submitted the winning proposal asserts that portions of the requested information are protected from required public disclosure based on sections 552.101 and 552.110 of the Government Code.

Section 552.101 excepts from required public disclosure information that is confidential by law, either constitutional, statutory, or by judicial decision. Section 552.110 excepts from required public disclosure two types of information: (1) a trade secret and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Because section 552.110 applies if information is made confidential by statute or judicial decision, it is redundant with section 552.101. *See* Open Records Decision No. 592 (1991). The company asserts that portions of the proposal are trade secrets.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763m 776 (Tex.),

cert. denied, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

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 single or ephemeral events in the conduct of the business, . . . [but] 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). The Restatement also lists the following 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;
- 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;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

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

This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must 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 argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

The company does not assert that sections 1 or 7 contain trade secrets. Thus, the city must release the information in those sections. The company contends that its financial statement and the information in sections 2, 3, 4, 5, and 6 of the proposal are trade secrets. The company also suggests that the proposal is confidential because its cover page contains a statement that the proposal is confidential and exempt from disclosure under two federal statutes.

Information is not confidential under the Open Records Act simply because the party submitting it anticipates or requests that it be kept confidential or marks it as confidential. *See* Open Records Decision Nos. 575 (1990), 479 (1987). Thus, the city may not withhold the proposal from required public disclosure because the company marked the proposal as confidential.

We believe the company has established that sections 3 and 6 of the proposal contain trade secrets. Accordingly, the city must withhold that information from required public disclosure based on section 552.110 of the Government Code.

We do not believe the company has established that its financial statement, or the information in sections 2, 4 or 5 contain trade secrets. The company states that the pricing information in section 2 is "individually tailored to specific requests for quotation." However, the Restatement trade secret definition requires that a trade secret be something for continuous use in the operation of the business. Moreover, the company has not established that the pricing information reveals a method of pricing. Additionally, we do not believe the financial statement is within the Restatement's definition of a trade secret, as we do not believe it is "used" in the company's business. *See* RESTATEMENT OF TORTS § 757 cmt. b (1939). With regard to the information in section 4, the list of subcontractors, we do not believe the company has established a prima facie case that the list is a trade secret. Section 5, titled Recommendations/Exceptions, contains the company's suggested modifications or clarifications of terms and conditions for the RFP. As with the company's financial statement, we do not believe the information in section 5 is within the Restatement's trade secret definition. Thus, the city may not withhold its financial statement or the information in sections 2, 4 and 5 from required public disclosure based on section 552.110.

We are resolving this matter with this 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 may 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,



Kay Guajardo
Assistant Attorney General
Open Records Division

KHG/ch

Ref.: ID# 33747

Enclosures: Submitted documents

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