



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 17, 1996

Mr. Larry W. Schenk
City Attorney
City of Longview
P.O. Box 1952
Longview, Texas 75606-1952

OR96-0736

Dear Mr. Schenk:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 29989.

The City of Longview (the "city") received a request for a copy of the winning bid for the city's long distance service. You submitted the requested information to this office for review, and you contend that the information is excepted from required public disclosure under sections 552.104 and 552.110 of the Government Code.

The city awarded the contract for long distance service to AT&T. Pursuant to section 552.305, we notified AT&T of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. AT&T responded by claiming that some of the requested information is "proprietary." We assume that AT&T is asserting that the "proprietary" information is excepted from disclosure under section 552.110. AT&T also states that some of the requested information is "personal information regarding employees of AT&T."

Section 552.101 excepts from disclosure information that is confidential under the common-law right of privacy. 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 the public has no legitimate interest in it. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The information that AT&T has labeled "personal information" is not the type of information that is protected by common-law privacy. Therefore, the information is not excepted from disclosure under section 552.101.

Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). However, section 552.104 does not protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 (1990) at 4. Furthermore, section 552.104 is generally inapplicable once bidding is complete and a governmental body has awarded the contract. *Id.* at 5. *See* Gov't Code § 552.022. Because the city has awarded the contract for long distance service, section 552.104 is not applicable here.

Section 552.110 protects the property interests of private persons by excepting 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 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 763 (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 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 of specialized customers, or a method of bookkeeping or other office management.*

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added).¹ Neither the city nor AT&T has demonstrated that any of the requested information constitutes trade secrets of

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

AT&T. Therefore, the requested information is not excepted from disclosure under the trade secret prong of section 552.110.

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.²

The city claims:

If such information is subject to disclosure, the very essence of the exemption, to protect the trade secrets, commercial information or financial information will hinder future proposals and will discourage businesses from dealing with governmental entities requiring their services, and hence will place additional burdens on all government entities.

We do not believe that the city's ability to obtain similar information in the future will be impaired by release of the information at issue here, because it is unlikely that companies will stop competing for government contracts if certain information involved in those competitions is disclosed. See *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4 (D.D.C. 1981). In other words, the benefits associated with submission of this particular type of information make it unlikely that the city's ability to obtain future submissions will be impaired. Therefore, we conclude that the city may not withhold the requested information under the second prong of section 552.110.³

(Footnote continued)

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

²"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted). AT&T did not specifically argue that any of the requested information is "commercial or financial information," or that releasing the requested information would likely cause AT&T substantial competitive harm. AT&T merely asserted that some of the requested information is "proprietary." AT&T therefore did not meet its burden under the second prong of section 552.110.

³We are issuing this ruling based on the information and arguments provided at the time you sought a request for a ruling from this office. This file may contain "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision" encompassed by

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,


Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref.: ID# 29989

Enclosures: Submitted documents

cc: Mr. Paul Everett
Network Long Distance
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Longview, Texas 75601
(w/o enclosures)

Ms. Valerie L. Hogan
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AT&T
613 West Ferguson
Tyler, Texas 75702
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(Footnote continued)

section 552.110. This office issued Open Records Decision No. 639 (1996) in February, 1996. In that decision this office overruled the test set out in Open Records Decision No. 592 (1991) for commercial or financial information and adopted the test federal courts have used when interpreting exemption 4 to the federal Freedom of Information Act. As section 552.110 is designed to protect third party interests, a claim under this exception may overcome the conclusion that this type of information should be released to the public. See Open Records Decision No. 552 (1990). However, a governmental body may not withhold this information without a ruling from this office.