



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 28, 1996

Ms. Donna M. Atwood
Legal Counsel
Dallas Fort Worth International Airport
P.O. Drawer 619428
DFW Airport, Texas 75261-9428

OR96-0806

Dear Ms. Atwood:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 39448.

The Dallas Fort Worth International Airport (the "airport") received a request for unspecified information relevant to a certain lawsuit. You inform us that the requestor clarified his request by telephone to mean information pertaining to a proposal submitted to the airport by Natural Energy Unlimited, Inc. ("Natural Energy") and any subsequent contractual agreements between Natural Energy and the airport board of directors. You advise us that you provided to the requestor a copy of the requested contractual agreement, but have withheld from required public disclosure copies of three proposals submitted by Natural Energy to the airport board. You raise no exception to the release of the information, but are withholding the information at this time because the property or privacy rights of a third party are implicated by the release of the information.

Since the property and privacy rights of a third party, Natural Energy, are implicated by the release of the requested information here, this office notified Natural Energy of this request. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). Natural Energy has responded to our notification by asserting that portions of its proposal are excepted from required public disclosure based on section 552.110 of the Government Code.

Section 552.110 excepts from 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.” Natural Energy asserts that its financial projections, rent calculations, and project cost analysis are trade secrets. Natural Energy appears to assert that information concerning its capital funding sources is not responsive to the request and, in the alternative, that the information is 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, 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.

Id.

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 thrust of Natural Energy's argument that its financial projections, rent calculations and project cost analysis are trade secrets seems to be that the release of this information will disclose its formula for use in making its financial projections. Thus, Natural Energy does not appear to assert that its financial projections, rent calculations or project cost analysis are themselves trade secrets. Rather, it argues that its financial projections formula is a trade secret.

We do not believe Natural Energy has adequately explained how the release of the proposal information reveals its financial projections formula. The information itself does not show how the release of the information would enable one to derive the formula from the information. Thus, even if we were to conclude that you have established that the formula is a trade secret- a conclusion we do not make- we do not believe you have established that the release of this particular information will uncover that formula.

Natural Energy suggests that the capital funding sources are not responsive to the request. Natural Energy states that the requestor's client "is not now, nor has she ever been a party to any business which Natural Energy Unlimited is, or has been involved in, within the state of Texas. . . . Further, the information . . . in the bid proposal . . . had nothing to do with any funding sources provided by Roger Wagner." We are unable to say whether the capital funding sources information is information the requestor does not seek. As the airport has asked us to rule on this information, we must do so.

Information is protected from public disclosure if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See Open Records Decision No. 639 (1996) (quoting *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974)). To show that the release of the information will cause substantial harm, the party seeking to prevent disclosure must demonstrate with specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from the disclosure. See *id.*

Natural Energy has provided no evidence that it actually faces competition or that the disclosure of the information would cause it substantial competitive injury. We therefore cannot conclude that the capital funding sources are excepted from required public disclosure based on section 552.110 of the Government Code. In conclusion, the airport may not withhold from required public disclosure the requested information.

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 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/rho

Ref.: ID# 39448

Enclosures: Submitted documents

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(w/o enclosures)