



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 23, 1996

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR96-1913

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 101361.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for "a copy of the responses to the RFP issued by the Texas Department of Mental Health and Mental Retardation entitled 'Texas Department of Mental Health and Mental Retardation (TDMHMR) Long-Range Strategic Planning Project for Information Resources' dated April 9, 1996." You have invoked sections 552.101, 552.104, and 552.110 of the Government Code and submitted the requested proposals to this office for review. You concede, however, that section 552.104 does not protect the proposals from disclosure because the department has already awarded the contract for the project. As for sections 552.101 and 552.110, you state that the department "declines to take a position on whether or not the information should be withheld or released."

Pursuant to section 552.305 of the Government Code, we notified the five companies that submitted proposals to the department of the pending request for copies of their proposals and of their opportunity to claim that their proposals are excepted from required public disclosure. Three companies responded by claiming that part or all of their proposals are excepted from disclosure: Andersen Consulting LLP ("Andersen Consulting"), David M. Griffith & Associates, Ltd. ("DMG"), and Johnson Consulting Services, Inc. ("JCS").¹

¹EDS Corporation and GartnerGroup Consulting Services did not respond to our notification. Because neither the department nor these companies provided us with written comments explaining how their proposals are excepted from disclosure, we have no basis upon which to pronounce the proposals protected. See Open Records Decision No. 363 (1983). Consequently, the proposals are not excepted from required public disclosure.

information contained in our proposals is confidential and copyrighted and the intellectual information they contain would place our firm at a significant disadvantage in future bidding processes." We assume that JCS intended to invoke section 552.110 to protect its proposal. However, JCS has not met its burden of showing how its proposal is excepted from disclosure under either the first or second prong of section 552.110.

We note that some of the requested information may be protected by copyright. Information that is not excepted from disclosure and not protected by copyright must be released to the requestor. As for information that is not excepted from disclosure but is protected by copyright, the department should be aware of the following. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must, however, allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 101361

Enclosures: Submitted documents

cc: Mr. Bradley G. Englert
Andersen Consulting LLP
701 Brazos Street, Suite 1000
Austin, Texas 78701
(w/o enclosures)

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). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).³ 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.

Having considered Andersen Consulting's trade secret arguments for the unmarked information on the pages listed above, we conclude that Andersen Consulting has not established that this information is a trade secret under section 552.110. Accordingly, the unmarked portions of the above-listed pages of Andersen Consulting's proposal, as well as all pages of Anderson Consulting's proposal for which it has not raised any arguments, are subject to required public disclosure.

JCS has not claimed specific exceptions to disclosure, but contends generally that "[t]he

³The 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.

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.

Notwithstanding the fact that the department has conceded that section 552.104 does not protect the requested proposals from disclosure, Andersen Consulting and DMG assert that their proposals are protected by section 552.104. 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). Section 552.104 does not, however, protect the interests of private parties who submit information to a governmental body. *Id.* at 8-9. Thus, the section 552.104 claims of Andersen Consulting and DMG are without merit. As DMG raises invokes no exceptions to disclosure other than section 552.104, we conclude that its proposal is subject to required public disclosure.

Andersen Consulting contends that portions of its proposal are excepted from disclosure under both the trade secret and commercial or financial information prongs 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 future² or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "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).

Andersen Consulting contends that the following pages of its proposal consist of commercial or financial information: 1-6, 12-13, 15-19, 20-24, 58-69, 70-73. Andersen Consulting has demonstrated that some of the information on these pages is commercial or financial information the release of which would cause Andersen Consulting to suffer substantial competitive harm. We have marked the information on these pages that is excepted from disclosure under the commercial or financial information prong of section 552.110.

As for the information on these pages that we have not marked as commercial or financial information, Andersen Consulting also contends that this information is a trade secret. The Texas

²Both Andersen Consulting and JCS contend that releasing their proposals to the requestor will impair the government's ability to obtain necessary information in the future by discouraging companies from bidding on future government projects. The department has not taken a position on this issue. We do not believe that the department's ability to obtain similar information in the future will be impaired by release of the information at issue, 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 department's ability to obtain future submissions will be impaired.

Mr. Mark S. Epstein
Regional Vice President
David M. Griffith & Associates, Ltd.
13601 Preston Road, Suite 400 W
Dallas, Texas 75240
(w/o enclosures)

Mr. Bruce W. Johnson
President
Johnson Consulting Services, Inc.
9674 Cincinnati-Columbus Rd.
Cincinnati, Ohio 45241-1071
(w/o enclosures)

Ms. Donna Migoni
EDS Corporation
11044 Research Boulevard, Building C
Austin, Texas 78759
(w/o enclosures)

Ms. Judi Nudelman
GartnerGroup Consulting Services
5819 Back Bay Lane
Austin, Texas 78739
(w/o enclosures)