



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 17, 1996

Mr. Howard D. Bye
Matthews & Branscomb
One Alamo Center
106 South St. Mary's Street
San Antonio, Texas 78205-3692

OR96-2418

Dear Mr. Bye:

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# 102649.

The City Public Service Board of San Antonio ("CPS") received two requests for proposals it received in response to Proposal No. 54181 as well as a copy of the executed contract documents.¹ CPS asserts no exception to the required public disclosure of the requested information. Since the privacy and property rights of the companies which submitted proposals to CPS are implicated by the release of the requested information, this office notified those companies of this request. In that notification, we invited the companies to raise an exception to the required public disclosure of the requested information and to explain the applicability of each exception so raised. *See* Gov't Code § 552.305. The notification also stipulated that if a company fails to raise and explain an exception within 14 days of receipt of the notification, this office will assume the company has no privacy or property interest in the information.

We have received no response to our notification from Central & Southwest Services, ABB CE Service, Westinghouse Electric Corporation, Rockwell Automation or WPS Power Development. Consequently, we assume these companies have no privacy or property interest in the information. We, therefore, have no basis to authorize CPS to withhold from public disclosure the information submitted by these companies.

¹The second requestor clarified that he seeks the joint proposal submitted by Westinghouse Electric Corporation and Central & Southwest Services.

Four companies responded to our notification: Siemens Power Corporation ("Siemens"), Elsag Bailey, Inc. ("Elsag Bailey"), Honeywell Automation and Control ("Honeywell"), and Max Control Systems, Inc. ("Max Control Systems"). All of these companies raise section 552.110 of the Government Code.

Section 552.110 excepts from disclosure two categories 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." 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).²

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.

In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom

²The 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.

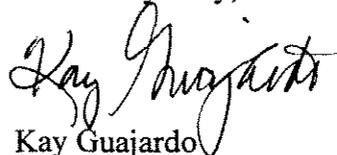
of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass'n* claim by mere conclusory assertion of a possibility of commercial harm. "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. Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert.denied, 471 U.S. 1137 (1985)).

We have reviewed the arguments the companies submitted to support their claim that section 552.110 exempts from disclosure the proposal information. With regard to Honeywell and Siemens, we conclude that CPS must withhold from public disclosure the information for which the companies raise section 552.110 in its entirety. As for Max Control Systems, we conclude that CPS must withhold from public disclosure all of the information for which Max Control Systems asserts section 552.110, with the exceptions of Tabs 5 and C. Furthermore, CPS may not withhold from public disclosure Tab D, the resumes of individuals to be involved in the CPS project. For the Tab D information, Max Control Systems raised Government Code section 552.102, an exception that protects certain information in the personnel files of government employees. Section 552.102 does not apply to the resumes of individuals who are not government employees.

Finally, we conclude that Elsag Bailey has established the applicability of section 552.110 to its information with the exception of Appendix B and Appendix C. We, therefore, conclude that CPS must withhold from public disclosure the information for which Elsag Bailey raises section 552.110, except for Appendix B and Appendix C.

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# 102649

Enclosures: Submitted documents

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