



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 17, 1997

Mr. Kevin McCalla
Division Director
Legal Division
Texas Natural Resource
Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR97-0543

Dear Mr. McCalla:

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# 104563.

The Texas Natural Resource Conservation Commission (the "commission") received a request for the "qualifications and experience portion of the bid submitted by Performance Strategies, [Inc.]" ("PSI") in response to the commission's Invitation for Bids for a Resource/Expert Witness Training Course. You request our decision whether the information pertaining to the proposal submitted by PSI is excepted from disclosure. You have submitted the relevant portions of the proposal to this office for review.

Pursuant to section 552.305 of the Government Code, we notified PSI of the request for information and of its opportunity to claim that the information at issue is excepted from disclosure. PSI responded by asserting that the information requested contains trade secrets and confidential commercial and financial information which should be excepted from disclosure under sections 552.104 and 552.110 of the Government Code.

Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *See, e.g.*, Open Records Decision Nos. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. Therefore, the requested information may not be withheld under section 552.104.

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. 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, 5 U.S.C. § 552, when applying the second prong of section 552.110. In *National Parks & Conservation Association 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. A business enterprise cannot succeed in a *National Parks* claim by a mere conclusory assertion of a possibility of commercial harm. Open Records Decision No. 639 (1996) at 4. "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).

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). 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. *Id.*¹ 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.

PSI informs us that the information responsive to the request is found in "Section III, Evaluation Criteria" and the "Firm Qualifications" section of the proposal. PSI argues that these sections reveal client information and product information and must therefore be withheld. As for its client information contained in the "Firm Qualifications" section, PSI states that it "does make available to the public a partial list of clients on its Internet site, and has offered to make this partial information available to the requester." We find that the client information that PSI has made public must be released. As for the remainder of the information contained in the "Firm Qualifications" section, we conclude that PSI has established that information found on pages 21-29 is protected as trade secrets. Any other information found in that section consists of resumes listing the education and experience of employees which we have held is not information excepted from disclosure under section 552.110. Open Records Decision No. 306 (1982). We also find that, as to "Section III, Evaluation Criteria" of its proposal, PSI has met its burden under the commercial and financial information prong of section 552.110 only for subsections (B) and (C)(1). The remainder of the information found in Section III is not excepted from disclosure under section 552.110 because it merely indicates the principals' previous experience and performance capabilities; the release of this information will not substantially harm PSI's competitive position. *See* Open Records Decision No. 309 (1982).

In summary, the commission must withhold only the information found in subsections (B) and (C)(1) of "Section III, Evaluation Criteria" and pages 21-29 of the "Firm Qualifications" section under section 552.110. The commission must release the remainder of the requested information.

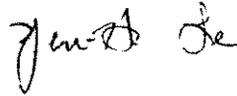
¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (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.

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

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref.: ID# 104563

Enclosures: Submitted documents

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