



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 27, 1997

Mr. J. Greg Hudson
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel
1700 Frost Bank Plaza
816 Congress Avenue
Austin, Texas 78701-2443

OR97-2376

Dear Mr. Hudson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your requests were assigned ID#s 109568, 110142, and 110831.

Austin Community College (the "college"), which you represent, has received three requests for all information concerning the solicitation and acceptance of proposals in RFP # 97-7-772. You explain that you will release some of the requested information. You claim, however, that the college's internal proposal evaluations and portions of four submitted proposals are excepted from required public disclosure by sections 552.104 and 552.110 of the Government Code. We have considered the exceptions you claim and have reviewed the documents you have submitted.

You first assert that the college's internal proposal evaluations, labeled Exhibit C, are excepted from disclosure by section 552.104. Section 552.104 of the Government Code states:

Information is excepted from the requirements of Section 552.021 if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential specific harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 (1991) at 2, 463 (1987), 453 (1986) at 3. A general allegation or a remote possibility of an advantage being gained is not

enough to invoke the protection of section 552.104. Open Records Decision Nos. 541 (1990) at 4, 520 (1989) at 4. A general allegation of a remote possibility that some unknown "competitor" might gain some unspecified advantage by disclosure does not trigger section 552.104. Open Records Decision No. 463 (1987) at 2. As the exception was developed to protect a governmental body's interests, that body may waive section 552.104. *See* Open Records Decision No. 592 (1991) at 8.

In this instance, you explain that the college has rejected all proposals submitted in response to RFP # 97-7-772 because of alleged problems in the consideration of these proposals. You state that the college intends to issue a new request for proposals for the same services, management of the college's Riverside golf course. You argue that if the requested documents are released prior to the execution of a contract, the college will be unable to obtain additional concessions and more preferable terms. We have previously held that so long as negotiations are in progress regarding the interpretation of bid provisions, and so long as any bidder remains at liberty to furnish additional information relating to the proposed contract, bidding should be deemed competitive and therefore, information relevant thereto may be withheld under section 552.104 prior to the award of the contract. Attorney General Opinion MW-591 (1982); Open Records Decision No. 170 (1977); *see* Open Records Decision No. 541 (1990). You may withhold the college's internal proposal evaluations, marked as Exhibit C, under section 552.104.

You next contend that portions of four submitted proposals may be protected by section 552.110 of the Government Code. Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified Arnold Palmer Golf, Campo Golf, City of Austin Golf Division, and Evergreen Alliance Golf Limited ("Evergreen") about the 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). Only Evergreen responded to our notification by arguing that its company information should not be released.

The other three entities did not respond to our notice by raising any exception to disclosure. Further, we do not believe that you have established that these entities' information is protected under section 552.110. *See* Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party 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), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. The proposals submitted by Arnold Palmer Golf, Campo Golf, and the City of Austin Golf Division, must therefore, be released to the requestor.

Evergreen argues that its proposal must be withheld and raises sections 552.103, 552.104 and 552.110 as exceptions to disclosure. As noted above, however, section 552.104

protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the college does not raise section 552.104 for the submitted proposal, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by governmental body). Likewise, section 552.103 is inapplicable in this instance. The college does not seek to withhold the information at issue based on this section. Evergreen's proposal may not be withheld under section 552.103. Gov't Code § 552.007; *see* Open Records Decision No. 522 (1989) at 4 (governmental body may decide not to raise permissive exceptions).

Lastly, Evergreen argues that its proposal is protected as trade secret information. Section 552.110 protects the property interests of private parties 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 the Restatement of Torts, section 757, which holds a "trade secret" to be

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 a single or ephemeral event 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.

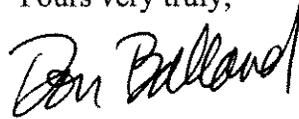
RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a prima facie case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.¹ After

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 other 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;

examining Evergreen's general and conclusory arguments, we do not believe that it has established that any portion of its proposal is a trade secret. Open Records Decision Nos. 552 (1990) at 5, 542 (1990) at 3. Evergreen's proposal must also be released.

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID#s 109568, 110142, 110831

Enclosures: Submitted documents

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(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.

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