



Office of the Attorney General  
State of Texas

January 6, 1998

DAN MORALES  
ATTORNEY GENERAL

Ms. Marianne Landers Banks  
City Attorney  
City of Georgetown  
P.O. Box 409  
Georgetown, Texas 78627-0409

OR98-0025

Dear Ms. Banks:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 111401.

The City of Georgetown (the "city") received a request for "copies of all invoices and payments for Tejas Avionics, Inc. since November 14, 1994." You submitted to this office for review documents responsive to the request. Pursuant to section 552.305 of the Government Code, you have declined to disclose the requested information for the purpose of asking this office to determine whether the requested information is protected from disclosure. You assert that the records are protected from disclosure under sections 552.101 and 552.104 of the Government Code. Also, as provided by section 552.305, this office notified Tejas Avionics, Inc. ("Tejas") of the request and provided Tejas the opportunity to submit reasons as to why the information at issue should be withheld. In correspondence to this office, Tejas contends that the information submitted to the city is excepted from disclosure pursuant to section 552.110. *See Gov't Code § 552.305.*

We will address the city's argument that section 552.104 protects the records at issue. Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The city objects to release of the requested information "because it contains proprietary information that, if released, may compromise Tejas Avionic's competitive position." We note that the purpose of section 552.104 is to protect a governmental body's interests in a particular bidding or commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, generally section 552.104 is inapplicable once the bidding process is over and a contract awarded. *Id.* at 5. The city does not indicate that there is a specific bidding or commercial situation involved or that the city's interests are at issue. Thus, the city has not shown the applicability of section 552.104 to the records at issue.

Both the city and Tejas assert that the records are protected from disclosure under section 552.110, which provides an exception for “[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.” Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2.

In regard to the trade secret aspect of section 552.110, this office will accept a claim that *information is excepted from disclosure under the trade secret aspect of section 552.110* if a prima facie case is made that the information is a trade secret and no argument is submitted that rebuts that claim as a matter of law. Open Records Decision No. 552 (1990) at 5; *see* Open Records Decision No. 542 (1990) (governmental body may rely on third party to show why information is excepted from disclosure). The Texas Supreme Court has adopted the definition of the term “trade secret” from the Restatement of Torts, section 757 (1939), 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 or 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).

The following criteria determines if information constitutes a trade secret:

(1) the extent to which the information is known outside [the owner’s business]; (2) the extent to which it is known by employees and others involved in [the owner’s] business; (3) the extent of measures taken [by the owner] to guard the secrecy of the information; (4) the value of the information to [the owner] and to [its] competitors; (5) the amount of effort or money expended by [the owner] in developing the information; (6) the ease or difficulty with which the information could be property acquired or duplicated by others.

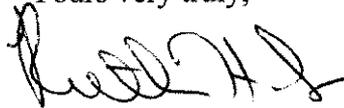
*Id.*; see also Open Records Decision No. 522 (1989).

However, this office cannot conclude that information is a trade secret unless the governmental body or company has provided evidence of the factors necessary to establish a trade secret claim. Open Records Decision No. 402 (1983). The city has asserted that section 552.110 is applicable, but has not provided any facts to show how section 552.110 is applicable. Tejas asserts that the records are private and confidential under section 552.110, but has not provided facts sufficient to show the applicability of the trade secret factors. See Open Records Decision No. 363 (1983) (third party duty to establish how and why exception protects particular information).

Nor has the city or Tejas shown that the submitted information comes within the commercial or financial aspect of section 552.110. A "mere conclusory assertion of a possibility of commercial harm" is insufficient to show that the applicability of section 552.110. Open Records Decision No. 639 (1996) at 4. "To prove substantial competitive harm," as Judge Rubin wrote in *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert. denied, 471 U.S. 1137 (1985) (footnotes omitted), "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." In this situation, section 552.110 has not been shown to be applicable to the information at issue.

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,



Ruth H. Soucy  
Assistant Attorney General  
Open Records Division

RHS/ch

Ref: ID# 111401

Enclosures: Submitted documents

cc: Mr. Rob Diver  
Tejas Avionics, Inc.  
205 Corsair Drive  
Georgetown, Texas 78628  
(w/o enclosures)

Ms. Beth Ann Jenkins  
Pilot's Choice Aviation, Inc.  
209 Corsair Drive  
Georgetown, Texas 78628  
(w/o enclosures)