



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

March 4, 1998

Mr. Madison Jechow  
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816 Congress Avenue  
Austin, Texas 78701-2443

OR98-0586

Dear Mr. Jechow:

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# 112932 and ID# 113279.

The Capital Metropolitan Transportation Authority (the "authority") received two requests for information related to the authority's procurement of Fixed Route Van-Teleride Services. You state that you will release copies of the submitted proposals, except for those portions identified as proprietary. You also state that you will release all contract-related files, including the minutes, notes, scores, and rankings of the evaluation committee. You claim, however, that the remaining requested information is excepted from disclosure under sections 552.107 and 552.110 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information.<sup>2</sup>

Since the property and privacy rights of third parties are implicated by the release of the requested information here, Star Shuttle & Charter, Greater Austin Transportation Company, and Forsythe & Associates were notified of the requests. *See* Gov't Code

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<sup>1</sup>The authority has withdrawn its section 552.104 claim.

<sup>2</sup>One of the requestors states that she received redacted copies of legal fee bills. Since the fee bills were not submitted to this office, this ruling does not address these documents.

§ 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). The third parties did not respond to our notice. However, the three companies did send letters to the authority claiming that all or portions of their proposals are excepted from disclosure. Therefore, we will treat these letters as their responses.

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.

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.<sup>3</sup>

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<sup>3</sup>The 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;

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 for commercial and financial information. 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 future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). 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. *Id.*

In this instance, the companies have made only unsubstantiated, conclusory statements regarding the confidentiality of their proposals. 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). We, therefore, conclude that Star Shuttle & Charter, Greater Austin Transportation Company, and Forsythe & Associates have not met their burden under section 552.110 of demonstrating that the requested information is excepted from required public disclosure. Accordingly, the authority must release the requested proposals in their entirety.

You also claim that the documents in Exhibit E are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 (1990) at 5. Client communications to the attorney regarding the subject matter of the representation are privileged. *Id.* at 3. After reviewing the documents at issue, we agree that most of the documents you have marked may be withheld from disclosure under section 552.107(1). We have marked the information that is not protected by section 552.107(1), and must be released.

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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.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



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Open Records Division

JBH/ulg

Ref.: ID# 112932  
ID# 113279

Enclosures: Submitted documents

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