



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 30, 1998

Ms. Anne M. Constantine  
Legal Counsel  
Dallas/Fort Worth International Airport  
P.O. Drawer 619428  
DFW Airport, Texas 75261-9428

OR98-0838

Dear Ms. Constantine:

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# 114062.

The Dallas/Fort Worth International Airport Board (the "board") received an open records request for the bid proposals of McDonald's Corporation ("McDonald's") and Anton Airfood, Inc. ("Anton") for food and beverage concession services at DFW Airport. You state that the board will make available to the requestor those portions of the requested proposal "which it believes to be clearly open record." You inform us, however, that McDonald's and Anton have objected to the release of certain information contained in the proposals under sections 552.101 and 552.110 of the Government Code.

Pursuant to section 552.305 of the Government Code, this office notified Anton and McDonald's of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure. Both companies responded by asserting that release of the requested information would provide an advantage to their competitors.

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 when applying the second prong of section 552.110. 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. *Id.* at 770.

"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) (emphasis added). 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. RESTATEMENT OF TORTS § 757 cmt. b (1939).<sup>1</sup> 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

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<sup>1</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 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 also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

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.

Upon review of the submitted information relating to Anton and the arguments submitted by Anton, we conclude Anton has not demonstrated how release of the requested information would result in substantial competitive harm. Nor has Anton established that the information is a trade secret. Therefore, we find that the Board must release to the requestor the requested information relating to Anton. Upon review of the submitted information relating to McDonald's and the arguments submitted by McDonald's, we conclude McDonald's has demonstrated how release of a portion of its requested information would result in substantial competitive harm. Therefore, pursuant to section 552.110, the Board must withhold the portion of information relating to McDonald's which we have marked as commercial or financial information. The remaining information relating to McDonald's must be released to the requestor.<sup>2</sup>

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,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref.: ID# 114062

Enclosures: Marked documents

cc: Ms. Sheila P. Jones  
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Atlanta, Georgia 30303  
(w/o enclosures)

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<sup>2</sup>We note that McDonald's also raises section 552.104 to protect its information from disclosure. Section 552.104 does not, however, protect the interests of private parties that submit information to a governmental body. Open Records Decision No. 592 (1991). Thus, that portion of McDonald's information not protected under section 552.110 is also not excepted from public disclosure under section 552.104.