



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 30, 1998

Ms. Mary Keller
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR98-1099

Dear Ms. Keller:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114365.

The Texas Department of Insurance (the "department") received eight requests for information concerning the receiverships of American Eagle Insurance Company and the Supreme Home of the Progressive Order of Pilgrims. You claim that some of this information is excepted from disclosure under section 552.111 of the Government Code. You also invoke section 552.305 of the Government Code on behalf of the third parties who may have proprietary interests in the requested information. You have submitted representative samples of the information at issue to this office for review.¹

You claim that section 552.111 of the Government Code protects the department's internal memoranda regarding the selection process for special deputy receivers. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not except from disclosure purely factual information that is severable from

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the opinion portions of internal memoranda. *Id.* at 4-5. We have marked those portions of the submitted memoranda that are excepted from disclosure under section 552.111.

Pursuant to section 552.305 of the Government Code, we notified Jack Webb & Associates, Inc., Prime Tempus, Inc., and the Reyes Law Firm of the request for information and of their opportunity to claim that the bid proposals they submitted to the department are excepted from disclosure. Each business responded by claiming that its bid proposal is excepted from disclosure.

Jack Webb & Associates, Inc. ("Jack Webb") claims that portions of its bid proposal are excepted from disclosure under section 552.101 of the Government Code, in conjunction with article 21.28(f), section 11 of the Insurance Code. Jack Webb also invokes sections 552.104 and 552.110 of the Government Code and the right to privacy. Both Prime Tempus, Inc. ("Prime Tempus") and the Reyes Law Firm ("Reyes") contend that their bid proposals are excepted from disclosure under section 552.110.

Section 11 of article 21.28(f) of the Insurance Code provides that

Chapter 552, Government Code, shall not apply to any records of a receivership estate, or to the records of an insurance company prior to its receivership, held by the receiver or by a special deputy receiver under this article.

Jack Webb contends that this provision makes the bid proposals for special deputy receiver confidential. However, we have previously ruled that records generated during the selection of a special deputy receiver are subject to the Open Records Act. *See* Open Records Letter No. 97-2845 (1998). Thus, unless the bid proposals are protected by a particular exception to disclosure, they must be released to the public pursuant to the Open Records Act.

Jack Webb also contends that all of the bid proposals should be excepted from disclosure based on section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of this exception is to protect a governmental body's interests in competitive bidding situations, not to protect the interests of private parties. *See* Open Records Decision No. 592 (1991). The department has elected not to raise section 552.104. Therefore, we conclude that section 552.104 is not applicable in this situation.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the common-law right to privacy. Information is protected by the doctrine of common-law privacy if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Having reviewed the bid proposals, we find that none of the information contained in the proposals is protected by the common-law right to privacy.

Section 552.110 protects the property interests of third 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. 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. 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.*

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).² This office has held that if a governmental body takes no position with regard to the

²The 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)

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.

Jack Webb and Prime Tempus claim that their bid proposals contain trade secrets, but neither company has established a prima facie case for exception under the trade secret prong of section 552.110. Therefore, we conclude that the department must release the Jack Webb and Prime Tempus proposals.

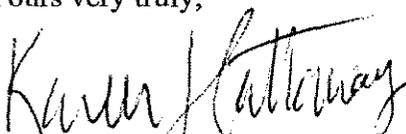
Reyes claims that portions of its bid proposals constitute both commercial or financial information and trade secrets. We find that Reyes has met its burden under the commercial or financial information prong of section 552.110 for the following sections of its proposals:

1. The Supreme Home of the Progressive Order of Pilgrims Bid Proposal-- Sections III, IV, and V, and Exhibits A, E, G, and H.
2. The American Eagle Insurance Company--Sections III, IV, and V, and Exhibits A, E, G, H, and I.

The department must withhold these sections of the Reyes proposals from disclosure under the commercial or financial information prong of section 552.110. In light of this conclusion, we need not consider whether these sections of the Reyes proposals are also protected by the trade secret prong of section 552.110. The remaining portions of the Reyes proposals must 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 any questions about this ruling, please contact our office.

Yours very truly,


Karen E. Hattaway
Assistant Attorney General
Open Records Division

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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.

Ref: ID# 114365

Enclosures: Marked documents

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(w/ highlighted documents submitted with brief)