



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 12, 1998

Ms. Betty DeLargy  
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P.O. Box 2212  
Austin, Texas 78768-2212

OR98-1211

Dear Ms. DeLargy:

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# 114774.

The Texas Department of Insurance (the "department") received a request for "the successful bid submitted to obtain the management contract for the Texas Health Insurance Risk Pool (the "pool")." You advise this office that the department referred the request to you, as counsel for the pool. You claim that the requested information may be excepted from disclosure under sections 552.101, 552.102, 552.104, and 552.110 of the Government Code.

You have provided correspondence to this office showing that you contacted LaShelle, Coffman & Boles, LTD. ("LaShelle"), the successful bidder, regarding the request for information. Pursuant to section 552.305 of the Government Code, this office notified LaShelle of the request for information and of its opportunity to claim that its proposal is excepted from disclosure. LaShelle responded by claiming that portions of its bid proposal, which it submitted to this office for review, are excepted from disclosure under sections 552.101, 552.104, and 552.110 of the Government Code. Neither the department nor the pool offered arguments in support of their claimed exceptions. Therefore, we address only the claims raised by LaShelle.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give an 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). 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. Because the governmental body has not, in this instance, demonstrated any potential specific harm to its interests in a competitive bidding situation, the information at issue may not be withheld under section 552.104 of the Government Code.

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 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. *Id.*<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

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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.

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.

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, 5 U.S.C. § 552, 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." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

Having reviewed the information submitted, we find that LaShelle's arguments against disclosure are merely conclusory and do not demonstrate, by a *prima facie* case, that its proposal contains trade secrets. Nor has LaShelle demonstrated that its proposal is protected under the commercial or financial information prong of section 552.110. Thus, we conclude that the proposal is not excepted from disclosure by section 552.110 of the Government Code and therefore must be released to the requestor.

LaShelle also asserts that the information may be protected by section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." LaShelle presented no statutory or other legal authority which deems this information confidential by law. This section also encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate or embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. After reviewing the submitted material, we do not believe that any of the information is protected by common-law privacy. Accordingly, the requested information 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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch  
Assistant Attorney General  
Open Records Division

VDP/ulg

Ref.: ID# 114774

Enclosures: Submitted documents

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