



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 14, 1998

Mr. Erik T. Dahler
Legal Services Department
VIA Metropolitan Transit
P.O. Box 12489
San Antonio, Texas 78212

OR98-1667

Dear Mr. Dahler:

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# 116425.

Via Metropolitan Transit System of San Antonio, Texas ("VIA") received a request for copies of proposals submitted in response to a request for proposals for an Integrated Fleet-wide Automated Vehicle Location/Communications Control and Data Interchange System. You state that some of the requested information has been provided to the requestor, but you have asked this office to determine, pursuant to section 552.305 of the Government Code, whether the submitted proposals are protected from disclosure. This office notified the Harris Corporation, Raytheon, Orbital Sciences Corporation, Electrocom Communications Systems, Rockwell International Corporation and C&L Communications¹ that VIA had received a request for the proposals. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision Nos. 575 (1990), 542 (1990) (determining that statutory predecessor to section 552.305 of Government Code permits governmental body to rely on interested third party to raise and explain applicability of exception to required public disclosure in certain circumstances). The notification states that if the company does not respond within 14 days of receipt, this office will assume that the company has no privacy or property interest in the requested information. ElectroCom Communications and C & L Communications, Inc. did not respond to our notification. Thus, we have no basis to conclude the information about these two companies is excepted from required public disclosure and conclude it must be released.

¹We observe that you did not submit any proposals from C & L Communications, Inc. to this office with the other proposals.

Harris Corporation, Raytheon, Orbital Sciences Corporation, and Rockwell responded to our notification, each respectively asserting that portions of their proposals were excepted from disclosure by section 552.110 of the Government Code. Section 552.110 excepts from disclosure two categories of information: (1) “[a] trade secret” and (2) “commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.”

In applying the “commercial or financial information” branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass’n* claim by mere conclusory assertion of a possibility of commercial harm. “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. Open Records Decision No. 639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), cert.denied, 471 U.S. 1137 (1985).

After examining Harris Corporation’s arguments and the bid proposal, we find that it has established that the following information must be withheld: marked portions of Volume II of the Price/Commercial Proposal and the marked portions of Volume III, Technical Management Proposal

We do not believe, however, that VIA may withhold Volume I since Harris only offers conclusory or generalized allegations of competitive harm and so it must release Volume I as well as all other remaining portions of the proposal.

Orbital Sciences asserts that since the other companies participating in this procurement are the same ones which compete throughout the industry, the disclosure of sensitive financial information will severely impact its ability to compete. Orbital Sciences Corporation has not shown that it will suffer substantial competitive harm. It has not shown by specific factual or evidentiary material that it actually faces competition and that substantial competitive injury would likely result from disclosure and only asserts conclusory or generalized allegations. Consequently, Orbital Sciences may not withhold any of the documents under the second prong of section 552.110.²

²We also note that Orbital Sciences references an expectation of confidentiality. Information is not confidential under the Open Records Act simply because the party submitting it anticipates or requests that it

Rockwell asserts the commercial or financial prong of section 552.110 for submitted materials. In the "Best And Final Offer" (the "BAFO"), Enclosure 2, entitled "Supplemental Price Proposals Form," contains several pages of costs which Rockwell contends would enable its competitors to deduce its profit margin and enhance their ability to underbid it in future competitions. Within the BAFO, Enclosure 3, entitled "Response to Questions in VIA Letter Dated October 19, 1997," as well as the addendum, Enclosure 4, contain valuable technical information, the disclosure of which, Rockwell asserts, would unjustly enrich its competitors. The BAFO's Enclosure 7, a Summary Schedule and a Detail Schedule, as well as the documentation included under the document entitled "Technical Proposal" also contain information which Rockwell details will help its competitors by supplying answers regarding technical questions which will give competitors not only Rockwell's solution to technical challenges posed by VIA but also "an unfair insight into Rockwell's product performance and function." Rockwell asserts that sections 2, 3, and four, specifically columns three and four entitled "Compliance" and "Comments," and section 5 of the Technical Proposal should be withheld under the commercial and financial information provisions of section 552.110. Upon examination of the documents and review of Rockwell arguments, BAFO enclosures 2, 3, 4, and 7 should be withheld along with the submitted Technical Proposal sections 2, 4, 5 and pages R-5 through end of section 7. The remaining material must be disclosed.

Next, we examine Raytheon's arguments concerning commercial or financial information the release of which it asserts will give its competitors an advantage. Raytheon has not shown that it will suffer substantial competitive harm. It only asserts conclusory or generalized allegations. Consequently, Raytheon may not withhold any of the documents under the second prong of section 552.110.

Alternatively, Ratheon, as well as Orbital Sciences, argue that designated portions of the proposal are protected trade secrets under section 552.110 of the Government Code. Section 552.110 excepts from required public disclosure "[a] trade secret or 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

be kept confidential. Open Records Decision No. 479 (1987). Additionally, information is not excepted from disclosure merely because it is furnished with the expectation that access to it will be restricted. Open Records Division No. 180 (1977).

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).³ 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 a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case that the information is a trade secret and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6. We have reviewed Raytheon's argument, and conclude that Raytheon has not provided sufficient information to establish that the designated portions of the records at issue constitute a trade secret. Additionally, Orbital Sciences does not provide sufficient information to establish that the records at issue constitute a trade secret. Thus, we conclude that the designated portions within the Raytheon documents are not protected trade secrets under section 552.110, and must be disclosed. Similarly, Orbital Sciences documents are not protected trade secrets under section 552.110, and must also be disclosed.

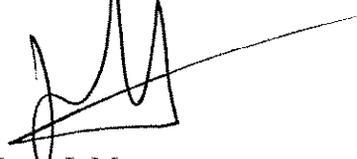
³The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (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.

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,

A handwritten signature in black ink, appearing to read 'Janet I. Monteros', written over a horizontal line.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/cbh

Ref.: ID# 116425

Enclosures: Submitted documents

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