



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 22, 1998

Mr. E. Cary Grace
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR98-2265

Dear Mr. Grace:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118085.

The City of Houston (the city) received two requests for all bids submitted in response to the request for proposals for Workers' Compensation Third Party Administration. The requestors also seek the final contract and the completed evaluation forms for the submitted proposals. You indicate that you will release the final awarded contract and the completed evaluation forms. You explain, however, that you are withholding the proposals because they may contain confidential proprietary information. Pursuant to section 552.305 of the Government Code, and without submitting any reasons why the information should be withheld or released, you ask whether you must withhold the requested proposals.

Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified the following companies about the request for information: Argus Services Corp., Barron Risk Management Services, Inc., Brown, Scott, Fountain & Perkins Assoc., P.C., Crawford & Company (Crawford), Forte Managed Care, Hammerman & Gainer, Inc., Lindsey Morden Claims Management, Inc., Lone Star Claim Service, Inc., NYLCare Health Plans of the Gulf Coast, Inc. (NYLCare), Presidium, Inc., Regional Marketing Manager, Risk Enterprise Management, Ltd., Summit Risk Management, and Ward North America, Inc. (Ward). 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 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).

This office has received responses from Crawford, NYLCare, and Ward. Because the other companies did not respond to our notice, we have no basis to conclude that these companies' information is excepted from disclosure. *See Open Records Decision Nos. 639 at 4 (1996)* (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 at 5 (1990)* (party must establish prima facie case that information is trade secret), *542 at 3 (1990)*. The proposals submitted by Argus Services Corp., Barron Risk Management Services, Inc., Brown, Scott, Fountain & Perkins Assoc., P.C., Forte Managed Care, Hammerman & Gainer, Inc., Lindsey Morden Claims Management, Inc., Lone Star Claim Service, Inc., Presidium, Inc., Regional Marketing Manager, Risk Enterprise Management, Ltd., and Summit Risk Management must, therefore, be released to the requestor.

Each of the responding companies raises section 552.110 as an exception to disclosure of its proposal information. Section 552.110 protects the property interests of private 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.

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

rebutts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).¹

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 Association 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 at 4 (1996). 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.*

Both Crawford and Ward make general, unspecific contentions that their proposals are protected, proprietary information. After examining the arguments, we do not believe that either company has established that their proposals are protected under section 552.110. Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990). Crawford's and Ward's proposals must be released.

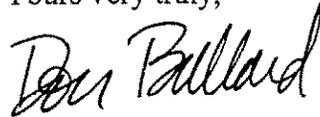
Finally, NYLCare primarily asserts that its proposal strategies, program design, internal company procedures, management structure and operations, unique database operations, claims administration, quality assurance techniques, claims hearings, and medical cost management information are protected by section 552.110 as either trade secret or confidential commercial or financial information. NYLCare argues that Tabs 1, 3, 4, 5, 7, 8, and 9 of its proposal, in their entirety, must be withheld. We have examined the submitted information and NYLCare's arguments. We find that portions of Tabs 1, 5, 7, 8, and Tab 9 in its entirety must be withheld under section 552.110 of the Government Code. We have

¹The 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; (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 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

marked the information that must be withheld. The remaining information in NYLCare's proposal, including Tabs 3 and 4, must be released to the requestors. *See* Open Records Decision No. 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); Open Records Decision Nos. 319 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted by section 552.110), 306 (1982) (resumes listing education and experience of employees of private company not excepted by section 552.110). *See generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138 (disclosure of prices is cost of doing business with government), 145-147, n. 200 (competitive harm prong denied when prospect of injury too remote or when information is too general in nature).

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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/nc

Ref: ID# 118085

Enclosures: Marked documents

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