



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 30, 1998

Mr. Leonard W. Peck, Jr.
Assistant General Counsel
Texas Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342-4004

OR98-2341

Dear Mr. Peck:

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# 118260.

The Texas Department of Criminal Justice (the "department") received a request for department staff evaluations, proposal documents and associated documents which were submitted in response to a Response For Proposal for the operation of several state jail facilities. You claim that the requested information is excepted from disclosure under sections 552.101, 552.104, 552.107, 552.110, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

As provided by section 552.305 of the Open Records Act, this office provided bidders: CiviGenics, Inc, Corrections Corporation of America ("CCA"), Management & Training Corporation ("M&TC") and Wackenhut Corrections Corporation the opportunity to submit reasons as to why the information at issue should be withheld. In correspondence to this office, Wackenhut Corrections Corporation and CiviGenics, Inc. indicate to this office that they do not object to the release of their project information to the public. However, M&TC contends that the information submitted to the department is excepted from disclosure under sections 552.104 and 552.110. Additionally, CCA contends that the

¹We assume that the "representative samples" 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.

information submitted to the department is excepted from disclosure pursuant to sections 552.104, 552.108 and 552.110.²

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a *governmental body's interests* in a particular commercial context by keeping some competitors or bidders from gaining unfair advantage over other competitors or bidders. Open Records Decision No. 541 (1990) at 4. However, section 552.104 may be waived by a governmental body as its purposes is to protect the interest of the governmental body and not the interests of the private parties. Open Records Decision No. 592 (1991). Additionally, we note that a governmental body may not raise additional exceptions after the ten day deadline absent a showing of compelling interest. Open Records Decision No. 515 (1988). The request was received by the department on June 23, 1998. The department did not assert section 552.104 as an exception until July 14, 1998. Therefore, because the department did not raise section 552.104 until after the passage of ten business days after the request and the department has not shown a compelling interest, section 552.104 is not applicable..

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by statute and information protected by common-law or constitutional privacy. A general claim that an exception applies to the entirety of documents submitted when the exception clearly does not apply to all, if any, information in the document does not conform to the Act. Open Records Decision No. 419 (1984). You claim that section 552.101 applies to the corporate financial information, however, we observe that section 552.101 does not protect a business's financial information. *See* Open Records Decision No. 192 at 4 (1978). However, the employees's salaries are confidential under common law privacy and must be withheld under section 552.101. The remaining information is not excepted under section 552.101.

Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Section 552.110 refers to two types of information: (1) trade secrets, and (2) commercial or financial information that is obtained from a person and made privileged or confidential by statute or judicial decision. Open Records Decision No. 592 (1991) at 2. Pursuant to section 552.305 of the Government Code, the department has declined to take a position on this issue.

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

²We observe that the governmental body has the burden to raise exceptions to the Open Records Act and that the exception applies to the records requested from it. Open Records Decision No. 542 (1990). Consequently, we do not address section 552.108 as raised by CCA nor section 552.104 as presented by MTC.

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. 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 for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

Commercial or financial information is excepted from disclosure under the second

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.

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 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.*

CCA asserts that its Dawson jail facility proposal contains information developed over many years at great expense to the company which is not available to the public. Specifically, CCA points to the requirements of the request for proposal which outlines the operating cost breakdown and narratives required to be submitted in response to the request for proposal. CCA asserts that this information is proprietary business information that if disclosed could give competitors detailed insight into the company's budgets and costs for operation. For the following reasons, we conclude that section 552.110 does not except these passages from disclosure as either trade secrets or commercial or financial information. First, we do not believe that the pricing information, the policy and procedure manual and employee salary information are within the Restatement definition of a trade secret, because they appear to relate exclusively to this contract, that is, a "single or ephemeral event in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." Therefore, the department may not withhold volumes I, II, III or IV from disclosure under section 552.110 as trade secrets. Open Records Decision Nos. 319 at 3 (1982), 306 at 3, (1982).⁴ Second, although we conclude that the department may withhold Appendix A under volume I under the commercial or financial information prong of section 552.110, it may not withhold the remaining information as CCA has not demonstrated that releasing the operating cost breakdown and narratives submitted in response to the request for proposal will cause it to suffer substantial competitive harm. Federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 at 6 (1988); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 319 (1982), 306 (1982). The public has an interest in knowing the prices that a government contractor charges. Consequently, we find volumes I, II, III and IV, with the exception of Appendix A under

⁴Additionally, we note that information is not confidential merely because one submitting it marks it as confidential. Open Records Decision No. 575 (1990).

volume I are not excepted from disclosure under section 552.110 as commercial or financial information.

Next, we have reviewed the Management & Training Corporation's ("M&TC") assertions that the sections dealing with the Business/cost proposals as well as the Technical/Proposal and Operational Plan and the Staffing as well as all BAFO should withheld under section 552.110. For the following reasons, we conclude that section 552.110 does not except these passages from disclosure as either trade secrets or commercial or financial information. First, we do not believe that the pricing information, the technical/proposal and operation plan and the staffing plan as well as all BAFO information are within the Restatement definition of a trade secret, because they appear to relate exclusively to this contract, that is, a "single or ephemeral event in the conduct of the business" rather than "a process or device for continuous use in the operation of the business." Therefore, the department may not withhold the business/cost proposals, the technical/proposal and operation plan and the staffing as well as all BAFO from disclosure under section 552.110 as trade secrets. Open Records Decision Nos. 319 at 3 (1982), 306 at 3 (1982). Second, we conclude that the department may not withhold the information under the commercial or financial information prong of section 552.110 as M&TC has not demonstrated that releasing the pricing information, the technical/proposal and operation plan and the staffing plan as well as all BAFO information submitted in response to the request for proposal will cause it to suffer substantial competitive harm. Federal cases applying the FOIA exemption 4 have required a balancing of the public interest in disclosure with the competitive injury to the company in question. *See* Open Records Decision No. 494 at 6 (1988); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 140-141, 151-152 (disclosure of prices is cost of doing business with government). *Cf.* Open Records Decision Nos. 319 (1982), 306 (1982). We conclude that M&TC has failed to demonstrate, beyond conclusory or generalized allegations that substantial competitive harm would result from release of the information at issue and the information may not be withheld under section 552.110.

Section 552.111 of the Government Code excepts from required public disclosure:

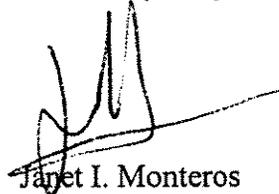
An interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.

This exception applies to a governmental body's internal communications consisting of advice, recommendations, or opinions reflecting the policymaking process of the governmental body at issue. *See* Open Records Decision No. 615 (1993). This exception does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *See id.* In Open Records Decision No. 559 (1990), the attorney general held that the predecessor statute to section 552.111 protects drafts of a document that has been or will be released in final form and any comments or other notations on the drafts because they necessarily represent the advice, opinion and recommendation of

the drafter as to the form and content of the final document. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). This section does not protect facts or written observations of facts. Open Records Decision No. 615 at 5. Most of the documents you submitted for review contain factual information and thus may not be withheld under this exception. We have marked samples of the documents to show the types of information that you may withhold from public disclosure under section 552.111.

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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/nc

Ref.: ID# 118260

Enclosures: Marked documents

cc: Mr. Les Gay
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(w/o enclosures)