



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 9, 1998

Ms. Judy Ponder
General Counsel
General Services Commission
P.O. Box 13047
Austin, Texas 78711-3047

OR98-3034

Dear Ms. Ponder:

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# 120652.

The General Services Commission (the "commission") received a request for three proposals and other documents, including negotiation documents and contracts, related to the commission's Request for Qualifications for TEX-AN 2000 Network Design Engineering/Consultant Services. You explain that portions of the proposals submitted by Lockheed Martin and International Network Services may be proprietary in nature and protected from disclosure by the Government Code or by copyright law. Gov't Code § 552.007; Gov't Code § 552.305. You raise no exception to disclosure on behalf of the commission, and in fact, you indicate that you do not believe that the information is protected from disclosure. Because you raise no exception to disclosure for the requested information other than the portions of the two proposals, we presume that any other responsive information has been released. Gov't Code § 552.301. You have submitted for our review the portions of the proposals at issue.

The commission, in this instance, has not sought an open records decision from this office within the statutory ten-day deadline. *See* Gov't Code § 552.301. The commission's delay in this matter results in the presumption that the requested information is public. *See id.* § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ). In order to overcome the presumption that the requested information is public, a governmental body must provide compelling reasons why the information should not be disclosed. *Hancock*, 797 S.W.2d at 381. The privacy and proprietary rights of third parties provides such a compelling reason. *See* Open Records Decision No. 470 (1987).

Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified Lockheed Martin and International Network

Services about the request for information. *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). International Network Services did not respond to our notification. Consequently, this company has not established that its requested proposal is excepted from required public 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 proposal submitted by International Network Services must be released.

You have noted that some of the materials at issue may, nonetheless, be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must, however, allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

Lockheed Martin responded to our notification and argues that portions of its proposal are protected from disclosure by sections 552.102 and 552.110 of the Government Code. Lockheed Martin's proposal includes the resumes of several of its employees, pages VI-11 through VI-84. Lockheed Martin contends that these resumes are excepted from disclosure pursuant to section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 excepts information in personnel files only if it meets the test articulated under section 552.101 of the Government Code for common-law invasion of privacy.¹ *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

For information to be protected from disclosure by the common-law right of privacy the information must be highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, and the information must not be of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The Texas Supreme Court found

¹Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

the following types of information to be highly intimate and embarrassing: information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. We do not find the professional qualifications of Lockheed Martin employees to be highly intimate and embarrassing information. *See* Open Records Decision No. 455 (1987) (qualifications of applicants for employment not protected by common-law right to privacy). *Cf.* 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), 175 (1977) (“resumes listing the education and experience of . . . employees . . . cannot . . . reasonably be said to fall within the ‘trade secret.’”). Thus, we conclude that sections 552.101 and 552.102 do not except from disclosure the employee resumes included in the proposal or the descriptions of the employees’ expertise. Pages VI-11 through VI-84 must be released.

Lockheed Martin next argues that pages V-4 through V-23 are protected from disclosure by section 552.110 of the Government Code. 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 rebuts the claim as a matter of law. Open Records Decision No. 552 at 5 (1990).²

In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption four 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 four 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.*

Lockheed Martin argues that its network protocols, interconnections, programing languages, operating systems, and client agency security information are revealed in the pages it seeks to withhold. After examining the submitted materials and Lockheed Martin's arguments, we conclude that Lockheed Martin has established that a portion of page V-6 and pages V-7 through V-23 are confidential commercial or financial information and must be withheld. The company has not shown how release of the remaining information is protected by section 552.110. *See* Open Records Decision Nos. 552 at 5 (1990), 494 (1988) (balancing public interest in disclosure of information with competitive injury to company); *see generally* Freedom of Information Act Guide & Privacy Act Overview (1995) 136-138, 145-147, n. 200 (competitive harm prong denied when prospect of injury too remote or when information is too general in nature). We have marked the information that must be withheld.

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

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 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).

determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JIM/nc

Ref.: ID # 120652

Enclosures: Marked documents

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