



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 17, 1998

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

OR98-3175

Dear Mr. Peck:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 119666.

The Department of Criminal Justice ("TDCJ") received a request for, among other things, the winning proposals for "[t]he Request for Offer (RFO) for Phase I, Phase II(a), and Phase II(b)" and the winning proposal for "IV&V services." You indicate that TDCJ is concerned about "protecting the proprietary interests of vendors and proposers for projects of this type." You assert that the winning proposals contain information which may be confidential under section 552.110 of the Government Code.¹

As provided by section 552.305 of the Open Records Act, this office provided the companies which provided the winning proposals, IBM Government Systems Consulting Practice ("IBM"), Deloitte & Touche Consulting Group ("Deloitte"), and Logicon RDA ("Logicon") the opportunity to submit reasons as to why the information at issue should be withheld. However, IBM did not submit any argument as to why their proposal should be protected from disclosure. Thus, section 552.110 has not been shown to be applicable to the IBM proposal. *See* Open Records Decision No. 363 (1983) (third party has duty to establish how and why exception protects particular information). We will address the arguments submitted by Deloitte and Logicon that their information be excepted from disclosure under section 552.110 of the Government Code.

¹You originally asserted sections 552.101 and 552.108 as exceptions to disclosure, but later determined that these exceptions are not applicable.

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 information obtained from a person and made privileged or confidential by statute or judicial decision. Trade secrets are excepted from disclosure under the first prong of section 552.110. The Texas Supreme Court 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 at 2 (1990). 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). 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).² This office has held that if a governmental body takes no position with regard to the application of the trade secret exception to requested information, we must accept a claim for exception as valid under that branch if that claim 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).

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 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) , 306 (1982), 255 (1980).

Commercial or financial information is excepted from disclosure under the second prong of section 552.110. This office follows 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 ("FOIA"), 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.*

Logicon argues that their proposal is excepted from disclosure under section 552.110 because release would provide competitors an unfair advantage and cause substantial harm to their competitive position. However, Logicon does not provide any specific facts and evidence showing that the company faces competition and that release of their proposal would likely cause substantial competitive injury. Neither has Logicon shown that the proposal contains trade secrets that would be protected under section 552.110. Thus, Logicon has not shown the applicability of either prong of section 552.110 to its proposal, which must be released.

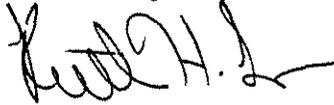
TDCJ submitted to this office for review three proposals from Deloitte, portions of which Deloitte argues are protected as financial or commercial information or as trade secrets: The company specifically asserts that the following types of information are protected from disclosure: (1) vendor's strategy/approach, methodology, and tools (section III); (2) resumes and project team descriptions; and (3) pricing information. We have reviewed the arguments provided by Deloitte and conclude that the company has not established a prima facie case that any of their proposals contain trade secret information. However, the company has shown that some portions of the proposals contain protected information. Deloitte provided an affidavit from a principal of the consulting company which explains that Deloitte is currently seeking other, similar consulting contracts with public entities such that release of some portions of the proposals at this time would likely cause substantial competitive injury in these bidding situations.

You must withhold from disclosure section III in each proposal, titled "Vendor's Proposed Strategy/ Approach, Methodology and Tools. Deloitte has also shown that the proposed organizational structures constitute confidential commercial information. These are identified in the re-engineering project management offer and in the offer for offender information management business process re-engineering services as sections V.1 and V.2. They are identified in the offer for offender information management architecture redesign as section IV.A, Project Organization.

However, Deloitte have not shown that the resumes and qualifications of company employees are protected commercial information. This information may not be withheld from disclosure. Neither may the pricing information be withheld. 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 and the time frame within which the contractor promises to perform its contractual obligations.

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,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref: ID# 119666

Enclosures: Submitted documents

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(w/o enclosures)